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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1914

No. [illegible]54

L. E. WATERMAN COMPANY, APPELLANT,

vs.

MODERN PEN COMPANY.

FILED SEPTEMBER 7, 1912.

No. [illegible]72

MODERN PEN COMPANY, APPELLANT,

vs.

L. E. WATERMAN COMPANY.

FILED DECEMBER 10, 1912.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

(23,350 and 23,451)

MINNESOTA STATE LIBRARY

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Subpoena.

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO MODERN PEN COMPANY, GREETING:

You are hereby commanded that you personally appear before the Judges of the Circuit Court of the United States of America for the Southern District of New York in the Second Circuit in Equity, on the first Monday of May, A. D., 1910, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by L. E. Waterman Company, and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you of Two hundred and fifty dollars. 2

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the 11th day of April, in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States of America, the one hundred and thirty-fourth. 3

JOHN A. SHIELDS,
Clerk.

Watson & Raymond,
Solicitors for Complainant.

The defendant is required to enter appearance in the above cause, in the Clerk's office of this Court, on or before the first Monday of May, 1910, or the bill will be taken *pro confesso* against it.

J. A. S.,
Clerk.

4 *Complaint*

(Endorsed): I hereby certify that on the 11th day of April, 1910, at the City of New York in my District I served the within Subpoena in Equity upon the within-named defendant, Modern Pen Company by exhibiting to William .. Chapman, as Secretary of said Company at 17 Battery Place, New York, the within original, and at the same time leaving with him a copy thereof. William Henkel, United States Marshal, Southern District of New York. Dated, April 11, 1910. U. S. Circuit Court, Southern District of N. Y. Filed April 11, 1910. John A. Shields, Clerk.

5

Complaint (Original).

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK,

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,
against
6
MODERN PEN COMPANY,
Defendant.

To the Honorable, the Judges of the Circuit Court of the United States for the Southern District of New York:

The L. E. Waterman Company, a corporation duly incorporated, organized and now existing under the laws of the State of New York, and a citizen of said State, having its principal place of business at No. 173 Broadway, in the City of New York, County and State of New York, in the Southern District of New

York, brings this its bill of complaint against the Modern Pen Company, a corporation incorporated, organized and now existing under the laws of the State of West Virginia, and a citizen of the State of West Virginia, having its principal place of business in the City of New York, County and State of New York, in the Southern District of New York, and carrying on business at No. 22 Thames Street, in said City of New York.

And your orator thereupon complains and says:

I. That the L. E. Waterman Company, your orator, is a corporation incorporated, organized and now existing under the laws of the State of New York with its principal place of business at No. 173 Broadway, in the City, County and State of 8
New York, and is a citizen of the State of New York; that your orator is informed and believes and therefore alleges that the defendant, Modern Pen Company, is a corporation incorporated, organized and now existing under the laws of the State of West Virginia, and is a citizen of the State of West Virginia, with its principal place of business in the City of New York, County and State of New York, at No. 22 Thames Street, in the said City of New York.

II. That in the year 1883 one Lewis E. Waterman was engaged in the business of manufacturing and selling fountain pens in the said City of New York and in the year 1883 adopted as his trade-mark for fountain pens manufactured and sold by him the word "Waterman's" and the words "Waterman's Ideal 9
Fountain Pen, N. Y." and in connection with the manufacture and sale by him of fountain pens used and continued to use continuously until the year 1887 and until he was succeeded in said business by your orator, the said trade-marks in commerce among the several States of the United States and in commerce between the United States and foreign nations to denote and designate to the public the fountain pens so manufactured and sold by him.

III. That in the year 1887 your orator, the L. E. Waterman Company, was incorporated and organized as a corporation un-

der the laws of the State of New York and thereupon succeeded to the business and all rights of the said Lewis E. Waterman in and to said trade-marks "Waterman's" and "Waterman's Ideal Fountain Pen, N. Y." and all rights, interests and property of the said Lewis E. Waterman in the business of the manufacture and sale of fountain pens, as aforesaid; that your orator has continued the said business of manufacturing and selling fountain pens since the year 1887 continuously until the present time; that in connection with the said manufacture and sale of fountain pens and for the purpose of more clearly distinguishing the goods of their manufacture from those of other manufacturers,
11 your orator and its predecessor, the said Lewis E. Waterman, continuously from the year 1883 to the present time, stamped and labeled fountain pens made by them with said trade-marks "Waterman's" and "Waterman's Ideal Fountain Pen, N. Y."; and continued from the year 1883 to the present time the use of said trade-mark, stamped, labeled and affixed to the fountain pens of their manufacture for the purpose of more clearly distinguishing the goods of their manufacture from those of other manufacturers; that said trade-marks so stamped and affixed to fountain pens have been continuously used from the year 1883 to the present time by your orator and its said predecessor, the said Lewis E. Waterman, in trade and commerce among the several states of the United States and in commerce between the United States and foreign nations to denote and distinguish
12 the goods of their manufacture from those of other manufacturers.

IV. That on the 5th day of February in the year 1901, your orator duly registered in the United States Patent Office its said trade-mark "Waterman's Ideal Fountain Pen, N. Y." as a trade-mark for fountain pens under and in accordance with the United States Trade-mark Acts then in force, which certificate of registration or a duly certified copy of same is ready here in Court to be produced; that on the 6th day of February in the year 1906, your orator duly registered in the United States Patent Office its said trade-mark "Waterman's Ideal Fountain

Pens, N. Y." as a trade-mark for fountain pens under and in accordance with United States Trade-mark Acts then in force, which certificate of registration or a duly certified copy of same is ready here in Court to be produced; that on the 15th day of January in the year, 1907, your orator duly registered in the United States Patent Office its said trade-mark "Waterman's" as a trade-mark for fountain pens under and in accordance with United States Trade-mark Acts then in force, which certificate of registration or a duly certified copy of same is ready here in Court to be produced; that your orator is now the owner and entitled to the exclusive use as a trade-mark for fountain pens of said trade-marks "Waterman's" and "Waterman's Ideal Fountain Pen, N. Y."; that your orator and its predecessor in business have since the year 1883 continuously until the present time, applied and affixed to fountain pens of its manufacture and to the boxes in which said fountain pens were sold the said trade-marks "Waterman's" and "Waterman's Ideal Fountain Pen, N. Y." and has extensively used the said trade-marks in advertising and selling said pens; that your orator has invested and expended large sums of money in the manufacture and sale of its fountain pens bearing said trade-marks and improving and perfecting the same and that it has sought in many ways and by a large expenditure of money exceeding the sum of One million dollars ($1,000,000) to popularize said fountain pens and to advertise the same under said trade-marks, and your orator has expended during the last four or five years, in advertising fountain pens of its manufacture, stamped and marked with its said trade-marks and in making fountain pens of its manufacture known to the trade and public by means of said trade-marks, a sum exceeding One hundred thousand dollars ($100,000) per annum; that because of the superior quality, workmanship and material of said fountain pens of your orator's manufacture bearing said trade-marks, your orator's trade therein increased from year to year and assumed large proportions until thousands of said fountain pens bearing said trade-marks were annually sold by your orator, the same being a source of great profit to your orator and a bene-

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fit to the public; that your orator further shows unto your Honors, that the said trade-marks "Waterman's" and "Waterman's Ideal Fountain Pen, N. Y." applied and affixed to fountain pens of its manufacture, as aforesaid, came to be widely known and widely and generally recognized by dealers therein and by the public generally as indicating and distinguishing the goods of your orator's manufacture; that the said dealers and the public generally relied upon said trade-marks stamped and affixed upon said pens and upon the boxes in which they were contained as indicating that the goods so stamped and marked were of your orator's manufacture and they were thereby as-
17 sured that the goods so stamped and marked were reliable and superior in quality, material and workmanship and were in fact "Waterman's Pens" or "Waterman Fountain Pens" or "Waterman's Ideal Fountain Pens" of your orator's manufacture, and the public having become familiar with such goods, and the quality, material and workmanship thereof, called for and purchased the same by asking for the fountain pen of your orator's manufacture as "Waterman Pens," or "Waterman's Pens," or "Waterman Fountain Pens," or "Waterman's Fountain Pens," or "Waterman's Ideal Fountain Pens," or "Ideal Pens;" that the name "Waterman Company" and the name "Waterman and "Waterman's" have been for more than twenty years well known to the trade and public as indicating the plaintiff company and its fountain pens, and during all this period the name
18 "Waterman" and "Waterman's" affixed to, or used in connection with the sale of, fountain pens has denoted and indicated origin and has denoted and indicated that the plaintiff company is the maker of fountain pens bearing said name.

V. And your orator further shows unto your Honors that it is informed and believes and therefore alleges that the defendant, Modern Pen Company, was and for some time has been and still is engaged in the business of selling fountain pens at No. 22 Thames Street, New York City, in the Southern District of New York, and that said defendant has advertised, offered for sale and sold fountain pens not of plaintiff's manufacture

marked and stamped with the word "A. A. Waterman & Co.", and that the fountain pens so advertised, offered for sale and sold by the defendant, as aforesaid, bore the impression or stamp on the writing pen and on the holder of the words "A. A. Waterman & Co.," which stamp or impression was and is an imitation and simulation of your orator's name and of the stamp which your orator places on pens of its manufacture and upon the boxes in which the same are distributed and sold; that the said pens advertised, offered for sale and sold by the defendant, as aforesaid, were not made by the plaintiff and that thereby the defendant infringed plaintiff's said trade-marks and imitated and simulated plaintiff's corporate and trade name; that 20
dealers to whom defendant sells and has sold said pens have advertised, offered for sale and sold and are advertising, offering for sale and selling said pens as "Waterman Pens" and "Waterman Fountain Pens" and "Waterman's Pens" and "Waterman's Fountain Pens"; that the defendant thereby has fraudulently and is fraudulently securing to itself the profits rightfully belonging to the plaintiff, to the plaintiff's great detriment and damage; that the defendant is still continuing the business and practice of advertising, offering for sale and selling fountain pens bearing the said trade-marks and trade names of the plaintiff and simulations and colorable imitations thereof, which fountain pens are not of plaintiff's manufacture, and the defendant willfully threatens to continue said illegal and unlawful acts to the great injury and damage of plaintiff's reputation 21
and business and to the great injury and damage of plaintiff's good name and trade-marks; that the defendant in advertising, offering for sale and selling fountain pens not of plaintiff's manufacture, bearing said trade-marks and trade names of the plaintiff and simulations and colorable imitations thereof, is thereby deceiving the public and injuring the name and good will of plaintiff's business; that defendant is using said name *Waterman* for the purpose of deceiving the public and for the purpose of passing off on the public fountain pens which are not of plaintiff's manufacture as and for fountain pens of plaintiff's manufacture,

22 *Complaint*

all to the plaintiff's great injury, detriment and damage and to the great injury and damage of the good name and reputation of plaintiff's goods.

VI. And plaintiff is informed and believes and therefore alleges that there is no person by the name of *Waterman* connected with defendant's business and that such has been the fact since July 1, 1906; that the defendant advertises and represents and holds itself out as the sole selling agent of "A. A. Waterman & Co.," which is a fictitious business name used by Isaac E. Chapman and William L. Chapman, both of whom are directors and officers of the defendant company, and that
23 the defendant advertises and represents that the fountain pens advertised, offered for sale and sold by the defendant and which bear the mark or stamp "A. A. Waterman & Co." are manufactured by said "A. A. Waterman & Co."; that said fictitious business name "A. A. Waterman & Co." is used for the purpose of deceiving the public and with the intent and purpose of passing off on the public fountain pens which are not of plaintiff's manufacture as and for fountain pens of plaintiff's manufacture.

VII. That your orator further shows unto your Honors that the defendant, in advertising, offering for sale and selling fountain pens bearing the mark or stamp "A. A. Waterman & Co." has caused great confusion among the trade and public generally
24 as to the identity of origin of said fountain pens and has caused and is causing the trade and public generally to believe that the fountain pens advertised and sold by the defendant, bearing the mark or stamp "A. A. Waterman & Co.," are fountain pens of plaintiff's manufacture; that since the defendant has been advertising and selling the fountain pens stamped or marked "A. A. Waterman & Co." a large number of such fountain pens have been sent to the plaintiff for repairs or exchange by purchasers thereof in the belief that they were of plaintiff's manufacture and that numerous of such pens so sent to the plaintiff are broken or faulty in construction or will not work or are otherwise unsatisfactory; that said acts of the defendant damage the

plaintiff's business and lead the trade and purchasers of fountain pens to believe that the plaintiff is manufacturing a faulty and defective fountain pen to the great injury and damage of plaintiff's reputation and business.

VIII. That your orator further shows unto your Honors that the fountain pens which the defendant is advertising, offering for sale and selling, bearing the stamp or mark "A. A. Waterman & Co." and which are not of plaintiff's manufacture, are inferior to the "Waterman's Pens," "Waterman Fountain Pens" and "Waterman's Ideal Fountain Pens" of plaintiff's manufacture in utility, appearance, style, workmanship and material and their inferiority in these particulars taken in connection with their fraudulent substitution for the goods of plaintiff has damaged and continues to damage the reputation and business of plaintiff and the reputation and good name of plaintiff's fountain pens among the trade and public generally and plaintiff does not know the full extent of the damage thus suffered but states upon information and belief that the same exceeds, exclusive of interest and costs, the sum of Two hundred and fifty thousand dollars ($250,000).

IX. That plaintiff is informed and believes, and therefore alleges, that the defendant has notice and full knowledge of plaintiff's rights in the premises.

X. That the plaintiff further charges that the actions of the defenadnt, as aforesaid, are contrary to equity and good conscience and constitute an unlawful, fraudulent, unfair and inequitable competition in business and an invasion and infringement of the plaintiff's rights in the premises and of the plaintiff's registered trade-marks, all to plaintiff's great and irreparable loss and injury, by which plaintiff has been and still is being deprived of profits which it might and otherwise would have obtained but which have been received and enjoyed and still are being received and enjoyed by the defendant by reason of its unlawful acts, as aforesaid; and plaintiff further charges that the acts of the defendant, as aforesaid, have caused and still

28 are causing great and irreparable injury and damage to plaintiff's reputation, good name and business and great damage and injury to the reputation and good name of fountain pens of plaintiff's manufacture.

Forasmuch as your orator can have no adequate relief except in this Honorable Court and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief hereby prayed, and that defendant may be required to make full disclosure and discovery of all matters aforesaid and according to the best and utmost of his knowledge, remembrance, information and belief, and full, true and perfect answers make to the matters hereinbefore made, stated and charged
29 but not under oath, answer under oath being hereby expressly waived.

To the end, therefore, that your orator may obtain relief in the premises and forasmuch as your orator has no adequate remedy at law and can obtain no adequate relief except in this Honorable Court, it humbly prays:

That the said Modern Pen Company, its officers, servants, agents, attorneys and workmen and each and every one of them may be restrained and enjoined provisionally and perpetually by an order and injunction of this Honorable Court from:

1. Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any
30 fountain pens of other manufacture than that of the plaintiff under the name of Waterman or Waterman's or Waterman Pens, or Waterman's Pens, or Waterman Fountain Pens, or Waterman's Fountain Pens, or any mark or name in imitation thereof or near resemblance thereto as might be calculated to deceive or be likely to cause confusion or mistake in the mind of the public or deceive purchasers, or which would indicate that the fountain pens so sold, represented or advertised are fountain pens of plaintiff's manufacture.

2. Infringing the plaintiff's trade-mark "Waterman's," or infringing the plaintiff's trade-mark "Waterman's Ideal Fountain Pen, N. Y." and from manufacturing or selling fountain pens

(other than fountain pens of plaintiff's manufacture) having the said trade-marks, or either of them, or any simulation or colorable imitation thereof, on such fountain pens whether on the holder or on the gold pen, or on labels, boxes, signs, letter-heads, billheads, circulars, or advertisements accompanying or used in connection with the making or selling of such fountain pens, or in any manner whatsoever.

3. Using in connection with the manufacture and sale of fountain pens (other than fountain pens of plaintiff's manufacture) the name "A. A. Waterman" or "A. A. Waterman & Co." or "A. A. Waterman & Company" or "Arthur A. Waterman & Company," or any corporate, firm or individual name containing the word Waterman, Waterman's or Watermans or any mark or name containing the word Waterman in any form, whether the same be or be not coupled with other names or initials, or with the initials "A. A." or with the initial "A" or whether the same be or be not used in collocation with the word "Pen" or "Fountain Pen" or other descriptive words. 32

That the said defendant may be decreed to deliver up any and all fountain pens, labels, signs, prints, packages, wrappers or receptacles in the possession of the defendant bearing the trade-mark of your orator or any reproduction, counterfeit, copy or colorable imitation thereof and that this Honorable Court may order the same destroyed.

That the said defendant may be decreed to render a full, true and perfect account and to pay unto your orator all the profits obtained by it by reason of its aforesaid wrongful acts and the damages thereby suffered by your orator, including the damages sustained by your orator by its loss of trade and also the damages done to the good name and good will of your orator's said business and to the repuation of its said "Waterman's Pens," "Waterman's Fountain Pens," and "Waterman's Ideal Fountain Pen, N. Y." including three times the amount of the actual damages suffered by your orator on account of the use by the defendant in connection with the sale of fountain pens of any reproduction, counterfeit, copy or colorable imitation of your orator's said trade-marks, and also the costs of this suit. 33

34 *Complaint*

That your orator may have such other and further relief as to this Honorable Court may seem meet, equitable and just.

May it please your Honors to grant unto your orator a writ of injunction, as well provisional as perpetual, issuing out of and under the seal of this Honorable Court, commanding, enjoining and restraining the said defendant, Modern Pen Company, its officers, servants, agents, attorneys and workmen and each and every one of them, as is hereinbefore in that behalf prayed.

May it please your Honors to grant unto your orator the writ of subpoena issuing out of and under the seal of this Honorable Court directed to the said defendant, Modern Pen Company,
35 commanding it on a certain day and under a certain penalty to be and appear in this Honorable Court then and there to answer this bill and to stand to and abide such order and decree as may be made against it.

And your orator will ever pray, etc.

Dated, New York, April 5th, 1910.

L. E. WATERMAN COMPANY,
By Frank D. Waterman,
President.

Watson & Raymond,
Solicitors for Plaintiff,
No. 10 Wall Street,
New York City, New York.
Samuel S. Watson,
36 of Counsel.

State of New York,
City and County of New York, } ss.:
Southern District of New York,

Frank D. Waterman, being duly sworn, deposes and says: That he is the president of the plaintiff herein; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

37

That the said plaintiff is a corporation and the reason why this verification is not made by the plaintiff is because of that fact. That deponent's knowledge and the grounds for his information and belief are derived from his participation in the management of the business of said plaintiff as its president.

FRANK D. WATERMAN.

Sworn to before me this
5th day of April, 1910.
W. M. Bonhag,
Notary Public, No. 76,
N. Y. County.

38

U. S. Circuit Court, Southern District of New York. Filed Apr. 11, 1911, John A. Shields, Clerk.

39

40

Order Overruling Demurrer.

At a stated term of the United States Circuit Court, Southern District of New York, held at the Post Office Building, New York City, on the 28th day of June, 1910.

Present: Hon E. Henry Lacombe, Circuit Judge.

L. E. WATERMAN COMPANY,
Plaintiff,
against
MODERN PEN COMPANY,
Defendant.
} In Equity.

41

The demurrer of the Modern Pen Company, the above named defendant, to the bill of complaint having been heretofore argued and briefs submitted, and due consideration having been given the same, it is, after hearing Alexander S. Bacon, of counsel for defendant, in favor of the demurrer, and Samuel S. Watson, of counsel for the plaintiff, opposed,

Ordered and adjudged, that the said demurrer be and the same hereby is overruled, costs to abide the event, and the defendant have twenty days after the entry of this order within which to file and serve an answer to said bill of complaint.

42

E. HENRY LACOMBE,
United States Circuit Judge.

U. S. Circuit Court, Southern District of N. Y. Filed June 28, 1910. John A. Shields, Clerk.

Order Allowing Amended Complaint.

43

At a stated term of the United States Circuit Court, Southern District of New York, held at the Post Office Building, New York City, on the 16th day of July, 1910.

Present: Hon. Learned Hand, Judge.

L. E. Waterman Company,
Plaintiff,
against
Modern Pen Company,
Defendant.
} In Equity.

44

This cause coming on to be heard upon the petition of plaintiff to file an amended bill of complaint this day tendered herein, the Court now being fully advised,

Orders and adjudges, that said amended bill be and the same is now filed; and it is

Further ordered and adjudged, that the defendant have twenty (20) days after the entry of this order within which to file and serve an answer to said amended bill of complaint.

LEARNED HAND,
Judge.

45

U. S. Circuit Court, Southern District of N. Y. Filed July 16, 1910. John A. Shields, Clerk. Copy received July 16, 1910. A. S. Bacon, Deft's. Atty.

46 **Amended Complaint.**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Complainant,
against
MODERN PEN COMPANY,
47 Defendant.

Amended Complaint.

To the Honorable, the Judges of the Circuit Court of the United States, for the Southern District of New York:

The L. E. Waterman Company, a corporation duly incorporated, organized and now existing under the laws of the State of New York, and a citizen of said State, having its principal place of business at No. 173 Broadway, in the City of New York, County and State of New York, in the Southern District of New York, files this, its amended bill of complaint against the Modern Pen Company, a corporation incorporated, organized
48 and now existing under the laws of the State of West Virginia, and a citizen of the State of West Virginia, having its principal place of business in the City of New York, County and State of New York, in the Southern District of New York, and carrying on business at No. 22 Thames Street, in said city of New York.

And your orator thereupon complains and says:

I. That the L. E. Waterman Company, your orator, is a corporation incorporated, organized and now existing under the laws of the State of New York, with its principal place of business at No. 173 Broadway, in the City, County and State of

New York, and is a citizen of the State of New York; that your orator is informed and believes and therefore alleges, that the defendant, Modern Pen Company, is a corporation incorporated, organized and now existing under the laws of the State of West Virginia, and is a citizen of the State of West Virginia, with its principal place of business in the City of New York, County and State of New York, at No. 22 Thames Street, in the said City of New York. 49

II. That in the year 1883, one Lewis E. Waterman was engaged in the business of manufacturing and selling fountain pens in the said City of New York, and in the year 1883 adopted as his trade-mark for fountain pens manufactured and sold by him, the word "Waterman's" and the words Waterman's Ideal Fountain Pen, N. Y." and the word "Ideal," and in connection with the manufacture and sale by him of fountain pens used and continued to use continuously until the year 1887, and until he was succeeded in said business by your orator, the said trade-marks in commerce among the several States of the United States, and in commerce between the United States and foreign nations, to denote and designate to the public the fountain pen so manufactured and sold by him. 50

III. That in the year 1887, your orator, the L. E. Waterman Company, was incorporated and organized as a corporation under the laws of the State of New York, and thereupon succeeded to the business and all rights of the said Lewis E. Waterman in and to said trade-marks, "Waterman's," "Waterman's Ideal Fountain Pen, N. Y." and "Ideal," and all rights, interests and property of the said Lewis E. Waterman in the business of the manufacture and sale of fountain pens, as aforesaid; that your orator has continued the said business of manufacturing and selling fountain pens since the year 1887, continuously until the present time; that in connection with the said manufacture and sale of fountain pens and for the purpose of more clearly distinguishing the goods of their manufacture from those of other manufacturers, your orator and its predecessor, the said Lewis E. Waterman, continuously from 51

52 *Amended Complaint*

the year 1883 to the present time, stamped and labeled fountain pens made by them with said trade-marks "Waterman's," "Waterman's Ideal Fountain Pen, N. Y." and "Ideal," and continued from the year 1883 to the present time the use of said trade-marks stamped, labeled and affixed to the fountain pens of their manufacture for the purpose of more clearly distinguishing the goods of their manufacture from those of other manufacturers; that said trade-marks so stamped and affixed to fountain pens have been continuously used from the year 1883 to the present time by your orator and its said predecessor, the said Lewis E. Waterman, in trade and commerce
53 among the several states of the United States and in commerce between the United States and foreign nations, to denote and distinguish the goods of their manufacture from those of other manufacturers.

IV. That on the 5th day of February, in the year 1901, your orator duly registered in the United States Patent Office its said trade-mark "Waterman's Ideal Fountain Pen, N. Y." as a trade-mark for fountain pens under and in accordance with the United States Trade-Mark Acts then in force, which certificate of registration or a duly certified copy of same is ready here in Court to be produced; that on the 6th day of February, in the year 1906, your orator duly registered in the United States Patent Office its said trade-mark "Waterman's Ideal
54 Fountain Pen, N. Y." as a trade-mark for fountain pens under and in accordance with United States Trade-mark Acts then in force, which certificate of registration or a duly certified copy of same is ready here in Court to be produced; that on the 15th day of January, in the year 1907, your orator duly registered in the United States Patent Office its said trade-mark, "Waterman's," as a trade-mark for fountain pens under and in accordance with United States Trade-mark Acts then in force, which certificate of registration or a duly certified copy of same is ready here in Court to be produced; that on the 18th day of September, in the year 1900, your orator duly registered in the United States Patent Office its said trade-mark "Ideal" as a trade-mark for fountain pens under and in accordance with the

United States Trade-mark Acts then in force, which certificate of registration or a duly certified copy of same is ready here in Court to be produced; that on the 13th day of February, 1906, your orator duly registered in the United States Patent Office its said trade-mark "Ideal" as a trade-mark for fountain pens under and in accordance with the United States Trade-mark Acts then in force, which certificate of registration or a duly certified copy of same is ready here in Court to be produced; that your orator is now the owner and entitled to the exclusive use as a trade-mark for fountain pens of said trade-marks "Waterman's," Waterman's Ideal Fountain Pen, N. Y." and "Ideal;" that your orator and its predecessors in business have 56
since the year 1883, continuously until the present time, applied and affixed to fountain pens of its manufacture and to the boxes in which said fountain pens were sold the said trade-marks, "Waterman's," "Waterman's Ideal Fountain Pen, N. Y." and "Ideal" and have extensively used the same as their trade-marks in advertising and selling said pens; that your orator has invested and expended large sums of money in the manufacture and sale of its fountain pens bearing said trade-marks and improving and perfecting the same and that it has sought in many ways and by large expenditure of money, exceeding the sum of two and one-half millions of dollars ($2,500,000), to popularize said fountain pens and to advertise the same under said trade-marks, and your orator has expended during the last four
or five years, in advertising fountain pens of its manufacture, 57
stamped and marked with its said trade-marks and in making fountain pens of its manufacture known to the trade and public under and by means of said trade-marks, a sum exceeding two hundred thousand dollars ($200,000) per annum; that because of the superior quality, workmanship and material of said fountain pens of your orator's manufacture bearing said trade-marks, your orator's trade therein increased from year to year and assumed large proportions until thousands of said fountain pens bearing said trade-marks were annually sold by your orator, the same being a source of great profit to your orator and a benefit to the public; that your orator further shows unto your Honors,

58 that the said trade-marks "Waterman's," "Waterman's Ideal Fountain Pen, N. Y." and "Ideal" applied and affixed to fountain pens of its manufacture, as aforesaid, came to be widely known and widely and generally recognized by dealers therein and by the public generally as indicating and distinguishing the goods of your orator's manufacture; that the said dealers and the public generally relied upon said trade-marks stamped and affixed upon said pens and upon the boxes in which they were contained as indicating that the goods so stamped and marked were of your orator's manufacture and they were thereby assured that the goods so stamped and marked were reliable and superior in quality, material and workmanship and were in
59 fact "Waterman's Pens" or "Waterman Fountain Pens" or "Ideal Pens" or "Waterman's Ideal Fountain Pens," of your orator's manufacture, and the public having become familiar with such goods, and the quality, material and workmanship thereof, called for and purchased the same by asking for the fountain pens of your orator's manufacture as "Waterman Pens," or "Waterman's Pens," or "Waterman Fountain Pens," or "Waterman's Fountain Pens," or "Waterman's Ideal Fountain Pens," or "Ideal Pens;" that the name "Waterman Company" and the name "Waterman" and "Waterman's" have been for more than twenty years well known to the trade and public as indicating the plaintiff company and its fountain pens, and during all this period the name "Waterman" and "Waterman's"
60 affixed to, or used in connection with the sale of, fountain pens has denoted and indicated origin and has denoted and indicated that the plaintiff company is the maker of fountain pens bearing said name.

V. And your orator further shows unto your Honors that it is informed and believes and therefore alleges that the defendant, Modern Pen Company, was and for some time has been and still is engaged in the business of selling fountain pens at No. 22 Thames Street, New York City, in the Southern District of New York, and that said defendant has advertised, offered for sale and sold fountain pens not of plaintiff's manufacture marked and stamped with the words "Waterman" and

"A. A. Waterman & Co.," and that the fountain pens so advertised, offered for sale and sold by the defendant, as aforesaid, bore the impression or stamp on the writing pen and on the holder of the words "Waterman" and "A. A. Waterman & Co.," which stamp or impression was and is an imitation and simulation of your orator's name and of the stamp which your orator places on pens of its manufacture, and upon the boxes in which the same are distributed and sold; that the said pens advertised, offered for sale and sold by the defendant, as aforesaid, were not made by the plaintiff and that thereby the defendant infringed plaintiff's said trade-marks and imitated and simulated plaintiff's corporate name and the trade-name 62
of its goods; that dealers to whom defendant sells and has sold said pens have advertised, offered for sale and sold and are advertising, offering for sale and selling said pens as "Waterman Pens" and "Waterman Fountain Pens" and "Waterman's Pens" and "Waterman's Fountain Pens" and "Ideal Pens" and "Waterman's Ideal Fountain Pens," all of which is well known to and encouraged by the defendant; that the defendant thereby has fraudulently and is fraudulently securing to itself the profits rightfully belonging to the plaintiff, to the plaintiff's great detriment and damage; that the defendant is still continuing the business and practice of advertising, offering for sale and selling fountain pens bearing the said trade-marks and trade-names of the plaintiff and simulations and colorable imitations thereof, which fountain pens are not of plaintiff's manu- 63
facture, and the defendant willfully threatens to continue said illegal and unlawful acts to the great injury and damage of plaintiff's reputation and business and to the great injury and damage of plaintiff's good will, good name and trade-marks; that the defendant, in advertising, offering for sale and selling fountain pens not of plaintiff's manufacture, bearing said trade-marks and trade-names of the plaintiff, and simulations and colorable imitations thereof, is thereby deceiving the public and injuring the name and good will of plaintiff's business; that defendant is using said name, *Waterman* and *A. A. Waterman & Co.*, for the purpose of deceiving the public and for the

64 *Amended Complaint*

purpose of passing off on the public fountain pens which are not of plaintiff's manufacture as and for fountain pens of plaintiff's manufacture, all to the plaintiff's great injury, detriment and damage and to the great injury and damage of the good name and reputation of plaintiff's goods.

VI. And plaintiff is informed and believes and therefore alleges that there is no person by the name of *Waterman* connected with defendant's business and that such has been the fact since July 1, 1906; that the defendant advertises and represents and holds itself out as the sole selling agent of "A. A. Waterman & Co.," which is a fictitious business name used by
65 Isaac E. Chapman and William L. Chapman, both of whom are directors and officers of the defendant company, and that the defendant advertises and represents that the fountain pens advertised, offered for sale and sold by the defendant and which bear the mark or stamp "A. A. Waterman & Co," are manufactured by said "A. A. Waterman & Co.;" that said fictitious business name, "A. A. Waterman & Co.," is used for the purpose of deceiving the public with the intent and purpose of passing off on the public fountain pens which are not of plaintiff's manufacture as and for fountain pens of plaintiff's manufacture, and that fountain pens manufactured, as aforesaid, and sold by the defendant, are advertised, represented, sold and passed off as fountain pens of plaintiff's manufacture; that the
66 defendant and said Isaac E. Chapman and William L. Chapman have no right, as against this plaintiff, to use the name *Waterman* in any form in connection with the manufacture or sale of fountain pens not of plaintiff's manufacture.

VII. That your orator further shows unto your Honors that the defendant, in advertising, offering for sale and selling fountain pens bearing the mark or stamp "A. A. Waterman & Co." has caused great confusion among the trade and public generally as to the identity of origin of said fountain pens and has caused and is causing the trade and public generally to believe that the fountain pens advertised and sold by the defendant, bearing the mark or stamp "A. A. Waterman & Co.," are foun-

tain pens of plaintiff's manufacture; that since the defendant has been advertising and selling the fountain pens stamped or marked "A. A. Waterman & Co." a large number of such fountain pens have been sent to the plaintiff for repairs or exchange by purchasers thereof in the belief that they were of plaintiff's manufacture and that numerous of such pens so sent to the plaintiff are broken or faulty in construction or will not work, or are otherwise unsatisfactory; that said acts of the defendant damage the plaintiff's business and lead the trade and purchasers of fountain pens to believe that the plaintiff is manufacturing a faulty and defective fountain pen, to the great injury and damage of plaintiff's reputation and business. 68

VIII. That your orator further shows unto your Honors that the fountain pens which the defendant is advertising, offering for sale and selling, bearing the stamp or mark "A. A. Waterman & Co.," and which are not of plaintiff's manufacture, are inferior to the "Waterman's Pens," "Waterman Fountain Pens" and "Ideal Pens" and "Waterman's Ideal Fountain Pens," of plaintiff's manufacture in utility, appearance, style, workmanship and material and their inferiority in these particulars taken in connection with their fraudulent substitution for the goods of plaintiff has damaged and continues to damage the reputation and business of plaintiff and the reputation and good name of plaintiff's fountain pens, among the trade and public generally, and plaintiff does not know the full extent of the damage thus suffered, but states upon information and belief, that the same exceeds, exclusive of interest and costs, the sum of Two hundred and fifty thousand dollars ($250,000). 69

IX. That plaintiff is informed and believes, and therefore alleges, that the defendant has notice and full knowledge of plaintiff's rights in the premises.

X. That the plaintiff further charges that the actions of the defendant, as aforesaid, are contrary to equity and good conscience and constitute an unlawful, fraudulent, unfair and inequitable competition in business and an invasion and infringement of the plaintiff's rights in the premises and of the plain-

70 tiff's registered trade-marks, all to plaintiff's great and irreparable loss and injury, by which plaintiff has been and still is being deprived of profits which it might and otherwise would have obtained, but which have been received and enjoyed and still are being received and enjoyed by the defendant by reason of its unlawful acts, as aforesaid; and plaintiff further charges that the acts of the defendant, as aforesaid, have caused and still are causing great and irreparable injury and damage to plaintiff's reputation, good name and business and great damage and injury to the reputation and good name of fountain pens of plaintiff's manufacture.

71 Forasmuch as your orator can have no adequate relief except in this Honorable Court and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief thereby prayed, and that defendant may be required to make full disclosure and discovery of all matters aforesaid and according to the best and utmost of its knowledge, remembrance, information and belief, and full, true and perfect answers make to the matters hereinbefore made, stated and charged, but not under oath, answer under oath being hereby expressly waived;

To the end, therefore, that your orator may obtain relief in the premises and forasmuch as your orator has no adequate remedy at law and can obtain no adequate relief except in this Honorable Court, it humbly prays:

72 That the said Modern Pen Company, its officers, servants, agents, attorneys and workmen and each and every one of them may be restrained and enjoined provisionally and perpetually by an order and injunction of this Honorable Court from:

1. Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any fountain pens of other manufacture than that of the plaintiff under the name of Waterman or Waterman's or Waterman Pens, or Waterman's Pens, or Waterman Fountain Pens, or Waterman's Fountain Pens, or Ideal Pens, or any mark or name in imitation thereof or near resemblance thereto as might be calculated to deceive or be likely to cause confusion or mistake

in the mind of the public or deceive purchasers, or which would indicate that the fountain pens so sold, represented or advertised are fountain pens of plaintiff's manufacture.

2. Infringing the plaintiff's trade-mark "Waterman's," or infringing the plaintiff's trade-mark "Waterman's Ideal Fountain Pen, N. Y.," or infringing the plaintiff's trade-mark "Ideal," and from manufacturing or selling fountain pens (other than fountain pens of plaintiff's manufacture) having the said trade-marks, or either of them, or any simulation or colorable imitation thereof, on such fountain pens whether on the holder or on the gold pen, or on labels, boxes, signs, letter heads, bill heads, circulars or advertisements accompanying or used in connection 74 with the making or selling of such fountain pens, or in any manner whatsoever.

3. Using in connection with the manufacture and sale of fountain pens (other than fountain pens of plaintiff's manufacture), the name "A. A Waterman" or "A. A. Waterman & Co." or "A. A. Waterman & Company" or "Arthur A. Waterman & Company," or any corporate, firm or individual name containing the word *Waterman, Waterman's* or *Watermans* or any mark or name containing the word *Waterman* in any form, whether the same be or be not coupled with other names or initials, or with the initials "A. A.," or with the initial "A," or whether the same be or be not used in collocation with the word "Pen" or "Fountain Pen," or other descriptive words. 75

That the said defendant may be decreed to deliver up any and all fountain pens, labels, signs, prints, packages, wrappers or receptacles in the possession of the defendant, bearing the trade-mark of your orator or any reproduction, counterfeit, copy or colorable imitation thereof, and that this Honorable Court may order the same destroyed.

That the said defendant may be decreed to render a full, true and perfect account and to pay unto your orator all the profits obtained by it by reason of its aforesaid wrongful acts and the damages thereby suffered by your orator, including the damages sustained by your orator by its loss of trade and also the dam-

76 ages to the good name and good will of your orator's said business, and to the reputation of its said Waterman's Pens," "Waterman's Fountain Pens" and "Waterman's Ideal Fountain Pen, N. Y." and "Ideal Pen," including three times the amount of the actual damages suffered by your orator on account of the use by the defendant in connection with the sale of fountain pens of any reproduction, counterfeit, copy or colorable imitation of your orator's said trade-marks, or any or either of them, and also the costs of this suit.

That your orator may have such other and further relief as to this Honorable Court may seem meet, equitable and just.

77 May it please your Honors to grant unto your orator the writ of injunction as well provisional as perpetual, issuing out of and under the seal of this Honorable Court, commanding, enjoining and restraining the said defendant, Modern Pen Company, its officers, servants, agents, attorneys and workmen and each and every one of them, as is hereinbefore in that behalf prayed.

May it please your Honors to grant unto your orator the writ of subpoena issuing out of and under the seal of this Honorable Court, directed to the said defendant, Modern Pen Company, commanding it on a certain day and under a certain penalty to be and appear in this Honorable Court, then and there to answer this bill and to stand to and abide such order and decree as may be made against it.

78 And your orator will ever pray, etc.

Dated, New York, July 6th, 1910.

L. E. WATERMAN COMPANY,
By Frank D. Waterman,
President.

WATSON & RAYMOND,
Solicitors for Plaintiff,
No. 10 Wall Street,
New York, N.Y.

Samuel S. Watson,
Walter B. Raymond,
Of Counsel.

State of New York,
City and County of New York, } ss.:
Southern District of New York,

Frank D. Waterman, being duly sworn, deposes and says: That he is the president of the plaintiff herein; that he has read the foregoing amended bill of complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the said plaintiff is a corporation and the reason why this verification is not made by the plaintiff is because of that 80
fact. That deponent's knowledge and the grounds for his information and belief are derived from his participation in the management of the business of said plaintiff, as its president.

FRANK D. WATERMAN.

Sworn to before me this
6th day of July, 1910.
Agnes M. Vikberg,
Notary Public,
Kings County, No. 27.
Certificate filed in New York County.
(Notarial Seal.)

Order granted. 81

L. H.,
U. S. J.

Copy received July 7, 1910.

A. S. BACON,
Attorney for Defendant.

U. S. Circuit Court, Southern District of N. Y. Filed July 16, 1910. John A. Shields, Clerk.

82

Replication.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

against

MODERN PEN COMPANY,
Defendant.

83

The replication of the above named plaintiff to the answer of the above named defendant.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, for replication thereunto sayeth, that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly as in and by its said bill it has already prayed.

84

WATSON & RAYMOND,
Solicitors for Plaintiff,
Office & Post Office Address,
No. 10 Wall Street,
New York, N. Y.

Samuel S. Watson,
Of Counsel.

Copy received, Sept. 3, 1910.

ALEX. S. BACON,
Deft.'s Atty.

U. S. Circuit Court, Southern District of N. Y. Filed Sept. 3, 1910. John A. Shields, Clerk.

Order Fixing Time to Take Proofs.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

86

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

against

MODERN PEN COMPANY,
Defendant.

On reading and filing the affidavit of plaintiff's attorney and notice of motion, with proof of due service thereof, on the attorney for the defendant, and after hearing Samuel S. Watson, Esq., for the plaintiff, and Alexander S. Bacon, Esq., for the defendant; 87

It is, on motion of Samuel S. Watson, Esq., attorney for the plaintiff,

Ordered, that the plaintiff shall have until the 10th day of April, 1911, within which to take its *prima facie* proofs, or evidence in chief, and the defendant shall have two weeks thereafter in which to put in its testimony, and the complainant shall have 10 days thereafter in which to put in its rebuttal testimony.

ALFRED C. COXE,
Judge of the United States Circuit Court
for the Southern District of New York.

88 *Stipulation*

Filed Feb. 24, 1911.

JOHN A. SHIELDS,
Clerk.

Copy received Feb. 25, 1911.

A. S. BACON,
Atty. for Deft.

Stipulation.

89 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

against

MODERN PEN COMPANY,
Defendant.

90 It is hereby stipulated by and between the parties hereto, by their respective solicitors, that due notices of the taking of the depositions contained in this printed record were given to opposing counsel; that the officers before whom said depositions were taken were duly qualified to act as such, and that the witnesses appeared before and were duly sworn and cautioned by said officers, respectively, in accordance with the statutes in such cases made and provided and that said officers, respectively, returned said depositions to the Clerk of this Court, with their certificates in due and proper form, in accordance with the statutes in such cases made and provided, which certificates are on file annexed to said depositions, respectively, in the Clerk's

office of this Court; that said notices to take said depositions 91
and the certificates of the officers annexed thereto in returning said depositions as aforesaid, are omitted from this printed record by agreement of counsel, and by this stipulation.

Dated, New York, May 3, 1911.

WATSON & RAYMOND,
Solicitors for Plaintiff.
ALEXANDER S. BACON,
Solicitor for Defendant.

UNITED STATES CIRCUIT COURT,

92

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY, Plaintiff, vs. MODERN PEN COMPANY, Defendant.	In Equity.

Proofs for final hearing on the part of the plaintiff under the Equity Rules, and Act of Congress as amended, and in accordance with the Statutes of the United States, and in pursuance of the rules and practice of this Court, taken before Frederick M. 93
Adams, an Examiner of this Court, at the office of Watson & Raymond, at No. 10 Wall Street, Borough of Manhattan, New York City, on the 12th day of December, 1910, at 10:30 o'clock in the forenoon, pursuant to notice hereunto annexed.

Appearances:

Samuel S. Watson, for Plaintiff.
Alexander S. Bacon, for Defendant.

94 *William I. Ferris*

Mr. Bacon: I note my objection to the taking of testimony, on the ground that more than ninety days have elapsed since the service of the replication, on September 3, 1910.

And I also make the following offer, which I spread on the record.

Hereto attached and marked Defendant's Exhibit A of this date.

WILLIAM I. FERRIS, a witness called on behalf of the plaintiff, being duly sworn, deposes as follows:

95 *Direct-examination by Mr. Watson*:

Q1. Please state your name, age, residence and occupation? A. William I. Ferris; 43 years old; I reside in Westfield, New Jersey; I am secretary of the L. E. Waterman Company, and my principal duties are in charge of the Manufacturing Department of the business.

Q2. How long have you been connected with the plaintiff company? A. Since its organization, in 1887.

Q3. What have been your duties generally during that period? A. I have been a director and officer in the company and as such I have had certain executive duties to perform, but my principal duties have been in charge of the Manufacturing Department of the business, the making of the fountain pens.

96 Q4. Were you in the fountain pen business prior to your connection with the plaintiff company? A. Yes.

Q5. With whom were you connected? A. With the Ideal Pen Company which was the name under which L. E. Waterman Company operated the business of making and selling fountain pens and accessories.

Q6. Do you mean L. E. Waterman Company or L. E. Waterman? A. L. E. Waterman.

Q7. The L. E. Waterman referred to is Mr. Lewis E. Waterman? A. Lewis E. Waterman.

Q8. How long were you connected with the Ideal Pen Company, or L. E. Waterman, prior to the incorporation of the plain-

tiff company? A. I was first employed by the Ideal Pen Company, by Mr. Lewis E. Waterman, in August, 1885.

Q9. Were you employed continuously from that time until the plaintiff was incorporated? A. I was.

Q10. What were your duties with the Ideal Pen Company? A. In charge of the Manufacturing Department.

Q11. Were you one of the incorporators and organizers of the plaintiff company? A. I was.

Q12. Do you know what business or property the plaintiff company acquired in regard to the fountain pen business? A. It took over the business of the Ideal Pen Company.

Q13. What did that consist of, do you know? A. It consisted 98
of all the business in connection with the making and selling of pens under the name under which L. E. Waterman operated the business.

Q14. Did it take over any patent rights or trade-marks of any kind? A. It took over all the patent rights and trade-marks that the Ideal Pen Company owned or controlled.

Q15. What has been the business of the L. E. Waterman Company since it was organized? A. The manufacturing and selling of fountain pens, parts and accessories.

Q16. Do you know, and if so state, what trade-marks were acquired by the L. E. Waterman Company from the Ideal Pen Company or Lewis E. Waterman? A. The trade-marks "Waterman's," "Waterman's Ideal Fountain Pen, N. Y." and "Ideal." 99

Q17. How long to your knowledge had these trade-marks been used by L. E. Waterman or the Ideal Pen Company? A. They were used at the time of my connection with the business and continuously ever since.

Q18. Have they been used continuously since the plaintiff company was organized? A. They have.

Q19. How were these trade-marks used in connection with the goods? A. In imprinting the fountain pens.

Q20. Marking them on the goods? A. Marking them on the goods; also on the supplies and stationery.

Q21. Were these trade-marks, or any of them, marked on the boxes in which the goods were sold and distributed? A. Yes.

100 *William I. Ferris*

Q22. How long has that been the practice of the plaintiff company? A. Ever since my connection with the business.

Q23. And was this practice carried on by the Ideal Pen Company? A. Yes.

Counsel for the respective parties agree to waive the certification of Patent Office copies of trade-marks and patents and that the usual Patent Office copies of trade-marks and patents may be used with the same force and effect as certified copies.

Plaintiff introduces in evidence Patent Office copy of plaintiff's trade-mark "Ideal," registered in the United
101 States Patent Office, September 18, 1900, and asks the Examiner to mark it Plaintiff's Exhibit No. 1.

Marked Plaintiff's Exhibit No. 1, December 12, 1910. F. M. A., Exr.

Also registration of plaintiff's trade-mark "Ideal" in the United States Patent Office, registered February 13, 1906.

Marked Plaintiff's Exhibit 2, December 12, 1910. F. M. A., Exr.

Also Patent Office copy of plaintiff's trade-mark "Waterman's Ideal Fountain Pen, N. Y.," registered February 5, 1901.

Marked Plaintiff's Exhibit 3, December 12, 1910. F.
102 M. A., Exr.

Also registration of plaintiff's trade-mark "Waterman's Ideal Fountain Pen, N. Y.," registered February 6, 1906.

Marked Plaintiff's Exhibit 4, December 12, 1910. F. M. A., Exr.

Also plaintiff's trade-mark "Waterman's," registered in the United States Patent Office, January 15, 1907.

Marked Plaintiff's Exhibit 5, December 12, 1910. F. M. A., Exr.

Q24. Where were the goods bearing these trade-marks sold, if you know, by the plaintiff company? A. They were sold all over

the United States and very early in the business were sold in foreign countries.

Q25. In what foreign countries? A. Most all foreign countries on the globe.

Q26. Have they been sold during this period that you have been connected with the business, in different States of the United States? A. They have.

Q27. And is it a fact that these trade-marks "Ideal," "Waterman's Ideal Fountain Pen, N. Y.," and "Waterman's" have been used continuously on goods which have been sold in the different States of the United States and in foreign countries ever since you have been connected with the business? A. It is. 104

Q28. Is it a fact that the fountain pens made and sold by the plaintiff have been generally known, called for by the trade and the public generally, under these trade-marks? A. It is.

Q29. And these names which have been called were what? A. The names which the plaintiff's goods have been known by.

Q30. What were those names? A. "Waterman's," "Waterman's Ideal Fountain Pen, N. Y.," "Waterman's Fountain Pen" and "Ideal Pen."

Q31. Is it not a fact that they have largely been known as Waterman's pens also? A. "Waterman's Pens," "Ideal Pens," "Waterman's Fountain Pens."

Q32. By what name is the plaintiff company usually known by the trade and the public A. "L. E. Waterman Company," "Waterman Company," "Waterman Fountain Pen Company," 105 "Waterman's Ideal Fountain Pen Company."

Q33. Do you know whether the plaintiff is now the owner of the trade-marks which have been introduced in evidence, Plaintiff's Exhibits 1 to 5 inclusive? A. Yes, they are.

Q34. I show you some envelopes and ask you if you know where they came from (handing witness a package of envelopes)? A. They are envelopes that were received through the mail from persons writing us about pens.

Q35. Are these envelopes received in the usual course of business? A. They are.

106 *William I. Ferris*

Mr. Watson: Plaintiff offers a bunch of envelopes in evidence and asks that they be marked Plaintiff's Exhibit No. 6.

Mr. Bacon: Objected to as incompetent, irrelevant and immaterial.

Marked Plaintiff's Exhibit 6, December 12, 1910. F. M. A., Exr.

Q36. Is it a fact that the plaintiff and its predecessor in business have advertised extensively its goods under the trade-marks and trade names that I have mentioned? A. It is.

Q37. How long has that been the practice? A. Ever since
107 I have been connected with the business in 1885; that is, of the plaintiff's predecessor; and also the time when I have been connected with the plaintiff company.

Q38. Of late years this advertising has been very extensive, has it not? A. Yes, increasing largely from year to year.

Q39. Will you please produce one of the fountain pens of the plaintiff's manufacture which bears the trade name you mentioned? (Witness produces a fountain pen.)

Mr. Watson: The fountain pen produced by the witness is offered in evidence and the Examiner is asked to mark it Plaintiff's Exhibit No. 7.

Marked Plaintiff's Exhibit No. 7, December 12, 1910. F. M. A., Exr.

108 Mr. Watson: The pen offered in evidence, Exhibit No. 7, bears the imprint, "Waterman's Ideal Fountain Pen, N. Y." Around the word "Ideal" is a representation of the globe. Underneath the above is the following: "Pat'd May 23, 1899 & Aug. 4, 1903, U. S. A."

Q40. Will you produce one of the fountain pens bearing the trade-marks you have mentioned which plaintiff put on the market prior to the time the company stamped goods as shown in Exhibit 8? (Witness produces a fountain pen.)

Mr. Watson: The fountain pen produced by the witness is offered in evidence and the Examiner is asked to mark it Exhibit No. 8.

Marked Plaintiff's Exhibit 8, December 12, 1910. F. M. A., Exr.

Mr. Watson: This pen bears the imprint "Waterman's Ideal Fountain Pen, N. Y." "Pat'd Feb. 12 & Nov. 4, 1884."

Q41. Are the pens you have produced, Plaintiff's Exhibits 7 and 8, fair samples of the pens put on the market by the plaintiff and bearing said trade-marks? A. They are.

Q42. How long has the plaintiff been manufacturing pens of the grade and style of Plaintiff's Exhibits 7 and 8? A. We have been manufacturing that style since 1896, or 1897, but of the grade since 1887—grade and quality. 110

Q43. When you refer to the grade and quality to what do you refer? A. To the quality of the material and the workmanship.

Q44. Has anything come to your notice which shows confusion in the trade or in the minds of the public between the fountain pens of plaintiff's manufacture bearing the trade-marks and trade names you have mentioned and those put on the market by the defendant which bear the name "A. A. Waterman & Co."? A. Yes.

Q45. Please state what? A. We receive from persons sending in letters—

Mr. Bacon: Objected to as incompetent, irrelevant and immaterial, and I move to strike it out. 111

A. (Continued) Stating that one of our pens, either asking to have it exchanged or repaired and on looking it up we find that it is one of the defendant's pens and not our make.

Q46. How do you know it is defendant's make? A. Because it is stamped "A. A. Waterman & Co." and not with our trade-mark, "Waterman's Ideal Fountain Pen, N. Y."

Q47. How long has this state of facts been going on? A. It has been going on for sometime; more noticeably in the last few years.

112 *William I. Ferris*

Q48. Do you know who are the officers of the Modern Pen Company during the last couple of years, or thereabouts? A. I believe William L. Chapman, Isaac E. Chapman and Hobart W. Geyer.

It is admitted that Isaac E. Chapman is president of the Modern Pen Company, William L. Chapman is secretary and Hobart W. Geyer is the treasurer; that Mr. Geyer has been treasurer only for the last two months; prior to that time Mr. William L. Chapman was treasurer.

113 Q49. Have you ever had any conversations with any of the officers of the Modern Pen Company regarding their discontinuance of the name "A. A. Waterman & Co." from their goods? A. Yes, with William L. Chapman.

Q50. Where did that conversation take place? A. In our office on Broadway. It came up in connection with making some pens for the Aikin-Lambert Company at which time he stated that they were going to discontinue marking the goods "A. A. Waterman & Co."

Q51. Who was present at that conversation besides you and Mr. Chapman? A. I am not sure that any one was at that particular time, though Mr. F. D. Waterman was in and out during the visit.

114 Q52. You speak of pens for Aikin-Lambert Company. Were those fountain pens? A. Gold pens.

Q53. They were not fountain pens? A. No, they were gold pens.

It is admitted that the notice which is now offered in evidence as Plaintiff's Exhibit No. 9 was sent out to the trade by the defendant on or about its date, attached to a catalogue of defendant, which shows styles and designs and advertising matter of the Modern Pen Company and of fountain pens marked "A. A. Waterman & Co."

Marked Plaintiff's Exhibit 9, December 12, 1910. F. M. A., Exr.

Q54. Did this notice, Plaintiff's Exhibit 9, come to your notice about the time you had this conversation with Mr. William L. Chapman to which you have just referred? A. Shortly after that time.

CROSS-EXAMINATION by Mr. Bacon:

XQ55. Was the Ideal Pen Company a corporation or a firm? A. A firm or a name which the business was conducted under.

XQ56. Who conducted it? A. Lewis E. Waterman, who was the manager.

XQ57. Was he the only person interested? A. Yes, to my 116
knowledge.

XQ59. Did you ever put out any pens that did not have the words "Ideal" upon them? A. I don't think so.

XQ58. Were any trade-marks ever registered earlier than the dates indicated by Exhibits 1 to 5? A. Not that I know of.

XQ60. Did all of the pens ever manufactured or sold by L. E. Waterman & Co. bear the mark "Waterman's Ideal Fountain Pen, N. Y."? A. All of them with the exception of possibly some metal covered ones which also had "Waterman's" on.

XQ61. Those that were entirely covered with metal were how marked? A. Always "Waterman's;" sometimes "Waterman's Ideal" and "Waterman's Ideal Fountain Pen." Those marks were changed during the various years owing to different places 117
where we marked the metal on the holders.

XQ62. When did you last mark any pens simply "Waterman's"? A. We make some now.

XQ63. Are there any so marked except such as are wholly metal holders? A. Wholly or part metal holders.

XQ64. How many have been so marked within the last year? A. I should say several thousand.

XQ65. And they are marked simply "Waterman's"? A. "Waterman's."

XQ66. How are your gold pens marked? A. "Waterman's Ideal."

118 *William I. Ferris*

XQ67. That is always the case, is it? A. Yes, "Waterman's Ideal, New York."

XQ68. When did you first begin to put on the patent marks "May 23, 1899" and "August 4, 1903"? A. At the time that we started to use the patents which they covered; I think in the early part of 1902 or 1903, or about the time we commenced to use the features covered by the patents. I think the patents were issued a little time before we started to use the improvements.

XQ69. To what does this patent of May 23, 1899, refer; does it refer to a whole pen or to some part of a pen? A. Part of a pen.

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XQ70. What is that? A. That is the spoon feed, which has the overflow pocket for the ink outside of the feed duct.

XQ71. That is all that that patent refers to? A. Yes.

XQ72. What does the patent of August 4, 1903 refer to? A. That refers to the feed with the wide back—wide or flat back.

XQ73. Then both the patent of 1899 and the patent of 1903 refer to feed exclusively; is that right? A. Yes.

XQ74. And your basic patents of 1884 have expired? A. Yes.

XQ75. Where do you manufacture your pens? A. We manufacture the gold pens in Canada; we manufacture the complete pen holder. Now we manufacture gold pens in New York and the rubber holders are manufactured in Seymour, Connecticut.

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XQ76. By whom? A. A concern operating under the name of H. P. & E. Day Co. While years ago they made holders for various people, they make holders exclusively for us, with the exception of one party.

XQ77. And under whose supervision? A. The factory at Seymour is marked as the Waterman factory. It is known as the Waterman factory by people who see it, who go by in the trains, because that is the only name that appears on it. Those holders which they manufacture are shipped to New York. We do the chasing and other work on them and assemble them and

make the clip caps and mountings and put them on here in New York.

XQ78. The H. P. & E. Day Co. are a wholly different concern from the L. E. Waterman Co., are they not? A. Yes.

XQ79. What other concerns do they manufacture holders for? A. Only one party to my knowledge; that is a man named Brown; that is fountain pens. They may make a few small dip holders as they did years ago for some dealer, but nothing in the fountain pen line.

XQ80. They have a right to manufacture for anybody they please? A. Yes.

XQ81. How long since they have been manufacturing mostly for your people? A. Say the last twelve or fifteen years. 122

XQ82. But during that time they have also manufactured for a great many other concerns, have they not? A. More in the earlier years, but it has gradually been reduced until now there is only one to my knowledge.

XQ83. What other parts of a completed pen do you buy from other people? A. We, of course, buy raw material, that is the metal for the mountings, &c.

XQ84. You have not always manufactured gold pens in the United States, have you? A. Not in the early years. We had them made under contract.

XQ85. How long since you have been having them made under contract? A. From very early, from the time of my connection with the business up to the time the plaintiff started its own factory. At that time we had a few made, but the amount gradually grew less. 123

XQ86. When did your factory start? A. About eight or nine years ago.

XQ87. Have you not bought gold pens from other people in the last eight or nine years? A. Yes.

XQ88. From whom have you bought? A. Bought them from various pen makers.

XQ89. Kindly name them? A. Some from the Fairchild Company.

124 *William I. Ferris*

XQ90. Le Roy W. Fairchild? A. Yes, the old name; I think they call it the Fairchild Company now; and some from Armeny & Marion and some from Mabie, Todd & Co.

XQ91. Mabie, Todd & Bard? A. Yes, and some from the Aikin-Lambert Company.

XQ92. Some from M. T. Horn Company? A. Yes.

XQ93. Then during the last nine or ten years you have bought the various parts of pens from various parties and assembled them in New York; is that the way it was done? A. We have made in the last nine or ten years the greater part of our pens. We bought a few and assembled them here, of the
125 holders which we received from Seymour on which we do the chasing and other work needed to finish the holder.

XQ94. You do not manufacture your holders at all? A. We do certain work on them to make them finished holders. We do all the chasing on them, which is part of the labor necessary to make up a complete holder.

XQ95. A good many are put out plain, not chased at all? A. Some are.

Mr. Watson: Plaintiff's counsel objects to all this line of testimony on the ground that it is entirely immaterial and irrelevant.

XQ96. Can you think of any others from whom you have bought parts of pens and assembled them?

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Mr. Watson: The same objection.

A. I do not.

XQ97. Who are the officers of the plaintiff? A. Frank D. Waterman is president and treasurer; Lewis E. Waterman, vice president; William I. Ferris, secretary.

XQ98. The original Lewis E. Waterman died when? A. In 1901.

XQ99. And the present Lewis E. Waterman, vice president, was his son? A. Yes.

XQ100. What relation is Frank D. Waterman to the original Waterman? A. Nephew.

XQ101. Do you manufacture and sell any pens that are not marked with the name "Waterman"? A. We make a pen which we call "Pen and Ink." It is stamped "Pen and Ink."

XQ102. That is a fountain pen? A. Yes.

XQ103. Remex? A. Yes.

XQ104. Is that the same thing? A. It is a similar pen.

XQ105. Then you make several cheaper grades of pens, do you that are not marked "Waterman" at all? A. Well, these two.

XQ106. That is all? A. Yes.

XQ107. Do you make anywhere a completed fountain pen without assembling the parts—some of the parts obtained from other people? A. We make in Canada all the pens complete, both the rubber holder and the pen. 128

XQ108. And that is the only country? A. Here they are made as I explained to you, the holders coming from Seymour.

XQ109. And in the Canada factory you make them for local consumption in Canada? A. In Canada and to ship to foreign countries.

XQ110. They are shipped to foreign countries from New York? A. Yes.

XQ111. You ship these assembled pens to various countries from this port? A. The completed pens.

XQ112. Do you know anything of the purchase of gold pens for use in fountain pens by the plaintiff of the defendant? A. Not by the plaintiff; some were purchased by the Aikin-Lambert Company. 129

XQ113. The purchase was made through your president, Mr. Frank D. Waterman, was it not? A. I think I placed the order myself with Mr. Chapman.

XQ114. Did you place the order as for Aikin-Lambert Company or for L. E. Waterman? A. Aikin-Lambert Company.

XQ115. Do Aikin-Lambert Company manufacture gold pens for everybody or just for you? A. More for their own use and our use.

130 *William I. Ferris*

XQ116. Were these pens that were manufactured by the Modern Pen Company, or bought from them, used in the manufacture of L. E. Waterman? A. No, Aikin-Lambert.

XQ117. What was the name of the pen they were used for? A. They put them in a holder which they called Capital. These pens I remember were simply stamped 14 karat. That is the way they marked all pens that they used in that matter.

XQ118. Who were the officers of the Aikin-Lambert Company? A. William E. Smith, president; Frank D. Waterman, treasurer; William I. Ferris, secretary.

XQ119. Is W. E. Smith connected in any way with the L. E.
131 Waterman Company? A. As salesman.

Mr. Watson: Plaintiff objects to this line of testimony as entirely immaterial and irrelevant, and gives notice that he will move at final hearing to have the same stricken out.

XQ120. How long have you known A. A. Waterman? A. That runs back a good many years. He was connected with us back in the 90's.

XQ121. How long was he employed by the L. E. Waterman Company? A. I should say three or four years.

XQ122. When did he leave? A. It was in 1896, or thereabouts; 1896 or 1897.

132 Mr. Watson: Plaintiff objects to all this line of testimony as entirely immaterial and irrelevant to any issues in this case and gives notice that he will move at final hearing to have the same stricken out.

XQ123. When he left were you an officer of the plaintiff? A. Yes.

XQ124. What office did you hold in 1897? A. I think I was vice president at that time.

XQ125. Was Mr. Waterman related in any way to Mr. Lewis E. Waterman? A. I never understood that he was.

XQ126. Did you know of the fact of his having started in business with a man named Gibson in the year 1897, under the firm name of "A. A. Waterman & Co."?

Mr. Watson: Plaintiff objects to this question and all this line of testimony as entirely irrelevant and entirely immaterial to any issues in this case, and gives notice that he will move at the final hearing to have the same stricken out.

A. After it became publicly known.

XQ127. It was so publicly known early in the year 1897, was it not? A. I believe that is the date.

XQ128. And you began an action against Mr. A. A. Waterman and Mr. Gibson in the Supreme Court of New York County in that year, did you not? A. I believe so.

XQ129. And which finally terminated in a decree? A. Yes. 134

XQ130. You knew all about that litigation? A. In a general way.

XQ131. And you saw at that time a copy of the decree of September 3, 1898? A. Yes.

Mr. Bacon: The copy decree I offer in evidence.

The decree is marked Defendant's Exhibit B, December 12, 1910. F. M. A., Exr., and the same is to be annexed to this deposition.

XQ132. You knew, did you not, that immediately after this decree was entered, in September, 1898, Mr. A. A. Waterman continued to manufacture and sell fountain pens and mark them "A. A. Waterman & Co."? A. I believe he did. 135

XQ133. And you knew that at that time? A. Yes.

XQ134. And you knew that Mr. Gibson died about 1899, did you not? A. Yes.

XQ135. And you know that Mr. A. A. Waterman continued to manufacture fountain pens and mark them "A. A. Waterman" after the death of Mr. Gibson? A. Yes.

XQ136. And you knew that Mr. Waterman entered into a new partnership about the year 1901, calling the firm "A. A. Waterman & Co.," and that it was composed of Mr. Waterman, Mr. Hobart W. Geyer and William G. Frazer? A. Yes, after it transpired.

XQ137. And you knew that for many years that firm of A. A. Waterman & Co. continued to manufacture and sell fountain pens and advertise them as A. A. Waterman & Co.'s pens? A. Yes.

XQ138. This fact was well known to all people in the trade in New York, was it; they were a well known firm? A. They were well known to the trade, but a great many of them confused them with the plaintiff company.

XQ139. Were their pens also called "Waterman Pens"? A. They were by people that had them and did not know any Waterman but the "Waterman Ideal."

137 XQ140. Were they so-called by people who knew only A. A. Waterman pens? A. In a great many instances they had a pen, a Waterman, and it was "Waterman" irrespective of the marking "A. A. Waterman" on it.

XQ141. That was true of people generally, was it not? A. If a person had bought an A. A. Waterman pen he called it a "Waterman," and if he bought an L. E. Waterman pen he called it a "Waterman"? A. Any pen bearing "Waterman" was referred to as a "Waterman Pen."

XQ142. The old firm of A. A. Waterman & Co. composed of Waterman, Frazer and Geyer advertised largely their A. A. Waterman pen? A. Yes, I saw their advertisement.

XQ143. And they were openly in the market manufacturing and selling pens bearing the trade-name of A. A. Waterman &

138 Co., were they not? A. Yes.

XQ144. Made no concealment of it? A. Yes.

XQ145. And you knew all about it? A. Yes.

XQ146. And all the officers of your company knew? A. I presume so.

XQ147. They knew that A. A. Waterman & Co. were using that name as a trade name throughout the United States and in foreign countries from 1901 up to 1905? A. Yes.

XQ148. And also knew of the organization of the new firm of A. A. Waterman & Co. on or about the month of June, 1905; the new firm consisting of A. A. Waterman, Isaac E. Chapman and William L. Chapman? A. After it transpired.

XQ149. You knew it almost immediately, didn't you? A. I don't know as to that. We knew that there was a change and probably saw it in the trade papers, the notice of it.

XQ150. They advertised the change at once, didn't they? A. I don't remember as to that.

XQ151. Then this new firm of A. A. Waterman & Co. from June, 1905, until July 1, 1906, manufactured and sold pens under the trade name of A. A. Waterman & Co., just as the old firm had done? A. Yes.

XQ152. And advertised it freely? A. Yes.

XQ153. Then to your own personal knowledge fountain pens have been manufactured and sold openly in the market under 140
the name of A. A. Waterman & Co., or A. A. Waterman, continuously since September, 1898, up to the present time? A. Yes.

XQ154. And the plaintiff, L. E. Waterman Company has not had the exclusive use of the name "Waterman" in the trade during those years; is not that so? A. I don't know that I am just clear as to what you mean, Colonel.

XQ155. Well, I hope the question is clear. L. E. Waterman Company has not been the only company or firm that has been using the name "Waterman" in connection with the manufacture and sale of fountain pens during the period from 1898 to 1910? A. No, there are other companies that have been in the field.

XQ156. Have you ever known the firm of A. A. Waterman 141
& Co., or any one of these firms of A. A. Waterman & Co. to advertise their fountain pens other than as A. A. Waterman & Co. pens? A. No, I don't know that the firm has, but dealers through the country have.

Mr. Bacon: I move to strike that out as not responsive.

XQ157. You have never known of any one of these firms of A. A. Waterman & Co. having authorized any third person to sell or advertise pens other than as A. A. Waterman & Co. pens? A. No.

XQ158. Did you know during the year 1906, 1907 and 1908 of the L. E. Waterman Company, or anybody connected with

142 *William I. Ferris*

them negotiating for the purchase of the assets of the Modern Pen Company, A. A. Waterman & Co. and their trade names and patents?

Mr. Watson: Objected to as entirely immaterial and irrelevant to any issue in this case; that even though it should appear that the purchase had been contemplated, the fact that a concern should attempt to buy its peace to save litigation is no waiver of their rights.

A. No.

XQ159. Did you participate in any negotiations by any party
143 relative to the purchase of said assets, business and names?

Mr. Watson: Objected to as entirely immaterial to any issue in this case, and notice is given that at final hearing a motion will be made to strike out all this line of testimony as entirely immaterial.

A. Yes.

XQ160. In what manner? A. In going over the machinery and plant to see to what extent it could be used in developing the Aikin-Lambert Company.

XQ161. Whom did you talk with? A. William L. Chapman, Hobart W. Geyer.

XQ162. Did you tell them for whom you were acting in making this examination? A. Mr. William L. Chapman under-
144 stood it.

XQ163. Did you tell him, I said? A. He was told several times that the Waterman Company was not interested directly.

XQ164. Was it indirectly? A. No, sir, there was nothing in it that they could use in the way of material or machinery, because their own plants were well equipped.

XQ165. Is it not a fact that the Aikin-Lambert Company and the L. E. Waterman Company are substantially the same? A. No, it is an incorporation of its own; its officers and stockholders are independent of the L. E. Waterman Company.

XQ166. It is the L. E. Waterman Company that has an office in Canada, is it not? A. No, it is L. E. Waterman Company, Limited.

XQ167. Is that different from L. E. Waterman Company? A. It is a separate corporation.

XQ168. The stockholders the same? A. Some of the stockholders.

XQ169. Substantially all of the stockholders the same? A. Yes.

XQ170. Substantially all of the stockholders of the L. E. Waterman Company and the Aikin-Lambert Company the same? A. No, there are people in the Aikin-Lambert Company that are not interested in the Waterman Company.

XQ171. What proportion of the stock of the Aikin-Lambert Company is held by people who are stockholders in the L. E. Waterman Company? 146

Mr. Watson: Objected to as entirely immaterial to any issue in this case and the attention of the Court is called to the fact that counsel for the defendant is unduly extending the record and a motion will be made at final hearing to strike out this line of testimony and that the cost of taking the same shall be taxed against the defendant.

A. They hold less than a majority of the stock.

XQ172. That is the L. E. Waterman Company? A. The people not interested, I understood the question, in the L. E. Waterman Company.

XQ173. They own less than a majority? A. Yes. 147

XQ174. That is, the L. E. Waterman Company stockholders own a majority of the stock of the Aikin-Lambert Company? A. Yes.

XQ175. That is they own a control? A. Yes.

XQ176. How large a control do they own? A. They own the greater part of it.

XQ177. Is it not substantially all? A. Yes.

XQ178. Are the different stockholders more than barely enough to qualify the Board of Directors?

Mr. Watson: Objected to as entirely immaterial.

148 *William I. Ferris*

A. They about cover the Board of Directors.

XQ179. That is all? A. Yes.

XQ180. Then it is a fact that the Canada company, L. E. Waterman and Aikin-Lambert Company are substantially the same as far as officers and stockholders are concerned?

Mr. Watson: The same objection.

A. Yes.

XQ181. State what conversation you had with Mr. William L. Chapman in relation to this purposed purchase? A. Several times he called at our office, and talked the matter over; principally what I had to do with it was as to how far we could
149 make use of the machinery, tools, &c., in connection with the plant of the Aikin-Lambert Company.

XQ182. Did you mention the Canadian plant? A. Possibly.

XQ183. Do you know Mr. Frazer, formerly of A. A. Waterman & Co.? A. No.

XQ184. You have had no conversation with him, then? A. I never met him.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ185. Is it a fact that the fountain pens made in the Canadian factory are also marked with the trade-marks "Waterman Ideal Fountain Pen," "Ideal," and "Waterman's" substantially
150 in the same manner as those made in the United States? A. Yes.

RDQ186. And that has always been the fact while they have been making pens in Canada? A. It has.

RDQ187. Is it a fact that all the time that the plaintiff has been making metal holders, that is, holders partly of rubber and partly of metal, silver, gold, &c., that the plaintiff has marked a considerable number of these pens with the name "Waterman's" alone, with the patent dates? A. Yes.

RDQ188. How long has that practice continued of marking the goods which are known as mounted goods, that is, rubber holders, embellished by gold and silver mountings—marked by

the plaintiff with the name "Waterman's" alone? A. Ever since we have been mounting them that way.

RDQ189. How long has that been? A. Running back a great many years. In the early years there were fewer all-mounted pens used.

RDQ190. Did you begin that practice ten years ago, fifteen years ago, twenty years ago, or when? A. Fifteen or twenty years ago.

RDQ191. You have continued that practice ever since? A. We have

RDQ192. And those pens did not have the mark or stamp "Ideal" on them? A. Not all of them. 152

RDQ193. What do you mean by metal goods? A. Goods that have the rubber mostly covered with metal so that the rubber is not exposed; either covered with gold or silver.

RDQ194. Do you mean all covered, or partly covered? A. All covered except possibly where the caps fit—where the ends fit.

RDQ195. Then all these pens are made with a foundation of rubber, with a gold or silver or other metal mounting on the outside; is that right? A. Yes.

RDQ196. When you refer in your testimony to pens bearing the name "A. A. Waterman" and "Waterman's Ideal Fountain Pen," all known as "Waterman," what do you mean by that? A. I mean that the public know the pens that have "Waterman" on as pens of the original Waterman, "Waterman's Ideal Fountain Pen." 153

RDQ197. When they call a pen "Waterman" they mean a pen of plaintiff's make? A. Of plaintiff's make.

RDQ198. Has it come to your knowledge that dealers selling fountain pens marked "A. A. Waterman & Co." put out by the defendant, have advertised them as Waterman pens?

Mr. Bacon: Objected to as incompetent, irrelevant and immaterial and not the best evidence.

A. They have, yes.

RDQ199. Has this been very general, to your knowledge?

154 *William I. Ferris*

Mr. Bacon: The same objection, and notice is given that all these exceptions and objections will be utilized at the final hearing.

A. Yes.

RDQ200. Has it come to your knowledge that persons purchasing these pens marked "A. A. Waterman & Co." are deceived or led to believe that they were pens of plaintiff's manufacture?

Mr. Bacon: The same objection.

A. It has.

155 RDQ201. To what extent has this been known to you? A. It occurs very frequently. It would principally come through our repair or mail department where people write in stating they have one of our pens and wish to exchange it or repair it, or some other attention, and when the pen is received we find it is marked "A. A. Waterman & Co."

Mr. Bacon: I move to strike out the answer on the ground that it is not the best evidence; the letters themselves are the best evidence.

RDQ202. The basic patents referred to, those of February 12, 1884, and November 4, 1884, referred to what part of the pen in particular? A. The feeding device.

156 RDQ203. What utility or function does the feeding device perform in connection with the manufacture and sale and use of fountain pens? A. It controls and regulates the flow of the ink from the reservoir to the point of the pen, and it is the principal piece in the construction of the holder which makes it successful.

RDQ204. And without a satisfactory feeding device? A. The pen would be of little use and a very unsatisfactory writing instrument.

RDQ205. Were all the pens which you purchased from the defendant used by the Aikin-Lambert Company and not by the plaintiff? A. They were, as far as I know.

RDQ206. Were any of these pens so far as you know, used by the plaintiff? A. No, sir; they were not.

RDQ207. Were they sold by the plaintiff? A. They were not.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ208. And what you know about this confusion comes from what other people have told you or written you, does it not? A. Yes.

RXQ209. And if a man had purchased an A. A. Waterman & Co. pen he would be just as apt to call that a Waterman pen as though he had purchased an "Ideal" pen, wouldn't he? A. If he should purchase an A. A. Waterman pen? 158

RXQ210. Yes. A. He would, unless he was fully posted about the manufacture.

RXQ211. He might not know of the existence of L. E. Waterman or of the "Ideal" pen? A. That is so.

RXQ212. When was the Canada company organized?

Mr. Watson: Objected to as not proper re-cross examination.

A. I think about five years ago.

RXQ213. And when did this community of interest with the Aikin-Lambert Company occur? A. Five or six years ago.

RXQ214. About the same time the Canada company was organized? A. I think so. Possibly the Canada company was a little earlier. 159

RXQ216. Then at substantially the same time these three companies became practically the same; is that right? A. Well the interests became identified.

RXQ217. And the difference in stock holdings was very small? A. Yes.

RXQ218. And for purposes of organization only?

Mr. Watson: Same objection as entirely immaterial.

A. Yes.

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RXQ219. The reason the word "Waterman" alone was put on the metal covered holders was because there was not room for the whole name; is not that the reason? A. In a great many of those cases "Waterman" was put on the metal alone, and sometimes on the rubber there was some imprinting; but that was the principal reason for not marking the whole barrel down the middle, the same as you do on the rubber holders. A man identified the pen as a Waterman pen, the mark and the name.

RXQ220. The metal cover is in filagree work and difficult to mark, is it not? A. Not necessarily. Some of it is plain gold, and silver.

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RXQ221. When they were plain gold would they mark them with the word "Ideal"? A. Sometimes.

RXQ222. You mark all your gold pens "Ideal," don't you? A. Yes, or "Waterman's Ideal."

RXQ223. So that no matter what may be on the holder, the pen always contains your trade-mark "Ideal"? A. Yes.

RXQ224. The Waterman pen is not, generally speaking, a self-filling pen? A. Well, we make both styles. For a great many years it has not been a self-filling pen, that is, that the bulk of our business has been done in.

RXQ225. In the non-self-filling? A. It has been in the non-self-filling.

RXQ226. How long since you began to manufacture a self-

163 filling pen?

Mr. Watson: Objected to as not proper re-cross examination.

A. We made them about ten or eleven years ago.

RXQ227. You made very few of them, didn't you? A. Not extensively.

RXQ228. And that is true today also, is it not? A. We make considerably more today, quite a larger per cent of self-filling pens.

RXQ229. Your self-filling pens are what are called "pump" pens? A. We have what we call a "pump" pen and a "rubber sack" pen.

POOR COPY

RXQ230. Your self-filling pen has some arrangement on the side, has it not, for filling? A. The "rubber sack" pens, you mean. It has a sleeve to make an opening.

RXQ231. On the side? A. On the side of the reservoir.

RXQ232. It is not like the defendant's self-filler? A. Not the operating part of it. They both have similar rubber sacks.

RXQ233. Are one per cent of your pens as manufactured today self-filling? A. I should say more.

RXQ234. How much more? A. I should say more than ten per cent.

RXQ235. Very much more than ten per cent?

Mr. Watson: Objected to as entirely immaterial. 164

A. It is hard to determine that without looking it up.

RXQ236. I just ask for your best recollection. Your best recollection is about ten per cent? A. I should say at least ten per cent.

RXQ237. And your principal pen has a joint about under the finger, has it not? A. Yes, the pen that we have been selling mostly in past years.

RXQ238. Do you have any pens with joints up in the middle of the pen? A. No.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ239. Does the plaintiff manufacture pens without any joints? A. Yes. 165

RDQ240. Are those self-filling pens? A. Self-filling and safety pens.

RDQ241. Both kinds? A. Yes.

RDQ242. Have you seen the pens put out on the market by the defendant? A. Yes.

RDQ243. Do any of those have a joint under the finger? A. They have.

Mr. Watson (to defendant's counsel): Do you concede that the pen I show you is among the styles of pen put out by the defendant?

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Mr. Bacon: Yes.

Mr. Watson: Plaintiff offers the pen in evidence and asks that it be marked Exhibit 10.

Marked Plaintiff's Exhibit No. 10, December 12, 1910. F. M. A., Exr.

RDQ244. Exhibit 10 is a pen that has a joint under the finger, has it not? A. It has.

RDQ245. Do you know what the capital stock of the Aikin-Lambert Company is? A. Yes.

RDQ246. How much? A. I believe it is $250,000.

RDQ247. A corporation under the laws of the State of New

167 York? A. Yes.

RDQ248. Where is the place of business of the Aikin-Lambert Company? A. 19 Maiden Lane, New York City.

RDQ249. What business do they carry on, what kind of business? A. The business of fountain pens, dip pens and holders; making pencils, charms, novelties and similar articles in the gold and silver line.

RDQ250. What kind of pencils do they make and sell? A. Gold and silver cases for pencils; take the wooden pencils with lead in; magic pencils, of various styles and designs.

RDQ251. Most of their pencils are silver and gold? A. Silver and gold.

RDQ252. What is the principal bulk of their business? A.

168 The principal bulk is the pencil department.

RDQ253. Will you look at Exhibits 7 and 10 and compare them so far as the material, finish, &c. are concerned. You might take them to the window? A. Exhibit 10 does not seem to be as carefully made or finished as Exhibit 7, or as highly finished. It also has the appearance of a different grade of stock or rubber in the holder. It has the appearance of rubber which has some foreign mixture in it; while Exhibit 7 is made of the pure rubber and sulphur, free from any foreign mixture. This mixture makes the rubber which is more elastic and more durable, less liable to breakage. Exhibit 7 also has a feature in the feeding device to prevent blotting the pen from the overflow of the

ink, which is not in Exhibit 10. Referring to the workmanship of Exhibit 10, it is very apparent as to the finish of the threads and the joint of the holder.

RDQ254. You find, as I understand, the joint of Exhibit 10 inferior to the joint in Exhibit 7? A. Yes, the finishing is rough. The joint binds and does not fit freely.

RDQ255. Which joint is more likely to leak? A. The one that is roughly finished.

RDQ256. Which one is that? A. Exhibit 10.

RE-CROSS EXAMINATION by Mr. Bacon:

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RXQ257. Outside of what you term "finish" there is no substantial difference in the pens, is there? A. There is a difference in the quality of the rubber.

RXQ258. The gold pen itself is just as good? A. That is possible; the character of the gold and the point.

RXQ259. How much does Exhibit 7 retail for? A. $2.50.

RXQ260. Are you aware that Exhibit 10 retails for $1? A. I am not familiar with that.

RXQ261. It is one of the cheapest grades that are made by the defendant?

Mr. Watson: Counsel for plaintiff objects to the question as not the fact, there is no evidence to show it, and counsel will introduce evidence to show that they retail in this instance for more than that. 171

Mr. Bacon: Counsel for defendant will show that that is the regular price, $1.

RXQ262. Does the Aikin-Lambert Company make all these pencils and novelties which are their specialty, or do they buy them for re-sale? A. They make the greater part of them. They make practically all of them.

RXQ263. These safety pens, how long have you been making them? A. We have been making them for—that is going into it more extensively—the last two or three years.

RXQ264. Before that you did not make hardly any, did you? A. A very small percentage of the business.

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RXQ265. Is it not true that generally speaking your specialties in high grade goods are not self-filling, but are manufactured with a joint under the finger? A. In the past, but not late years. We are going into the other style of pen more, the safety and the self-filling.

RXQ266. Within the last year or two? A. The last three or four years.

RXQ267. But even now about 90 per cent of your pens are not self-filling and have the joint under the finger? A. No, not 90 per cent. The safety pens have no joint under the finger and we have sold a good many of those in the last few years.

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RXQ268. In the last two or three? A. In the last two or three years.

RXQ269. What proportion of the pens that you sell and mark "Ideal" are non-self-filling and have the joint under the finger?

> Mr. Watson: Plaintiff again calls the Court's attention to the irrelevant line of testimony that is being sought here, having no connection with the issues in this case and gives notice that he will move to strike it out at the final hearing.

A. Less than half of our output.

RXQ270. How long has that proportion prevailed? A. We are going into the other pens more all the time, that is, the pen without the joint or the self-filling pen.

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RXQ271. Then up to about three or four years ago substantially all of your pens marked "Ideal" were non-self-filling and had a joint under the finger; is that right? A. Yes, the greater part of them.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ272. Will you compare Exhibit 8 with Exhibit 7 as to the quality of material and finish? A. They are of similar material and finish.

RDQ273. Do you find any difference in them? A. No difference except in the stamping.

RDQ274. As far as the material and finish is concerned? A. In the material and finish they are the same.

RDQ275. Can you tell what grade of rubber those pens are made from? A. Made of the pure rubber and sulphur.

RDQ276. What kind of rubber? A. The finest grade of Para rubber.

RDQ277. Does that make the best material for fountain pens that you know of? A. It does.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ278. Did you ever have anything to do with the manufacture of holders? A. Yes, the supervision of the manufacture. 176

RXQ279. In what way? A. In all changes in the holders, different designs, construction.

RXQ280. You have never had supervision of the actual manufacture of the holders in Connecticut? A. You mean the mixing of the rubber?

RXQ281. Anything to do with the manufacture. They come to you as a completed holder? A. I have charge, I have general supervision of it, in going up and going through the factory and having changes made or whatever we find necessary in connection with the holders.

RXQ282. You have nothing to do with the actual manufacture in the Connecticut factory? A. Not as far as the work of a foreman goes, but the general planning, or what we want and how we want it made, and all that, I do. 177

RXQ283. How often do you visit the Day factory in Connecticut? A. At times I visit it frequently and the superintendent of the factory comes to the city most every week.

RXQ284. How often do you go up there in a year? A. Sometimes several times a year. It is possibly two months since I have been up there. In times past I have been in the habit of going nearly once a month.

RXQ285. Generally speaking your factory in New York receives the completed holder from Connecticut and that holder

178 *William I. Ferris*

has only to be polished and decorated, is that right? A. Yes, chasing and mounting and other fancy coverings which we put on it.

RXQ286. You have nothing to do with the mixture of the rubber? A. Not personally.

RXQ287. Do you know from whom Day buys the rubber? A. They buy it, I understand, from the New York Commercial Company.

RXQ288. This Exhibit No. 8, how much does that retail for? A. $3.50.

179 *RE-DIRECT EXAMINATION by Mr. Watson:*

RDQ289. Is there any difference in the grade of the rubber between the pen that retails for $2.50 and those that retail for a higher price? A. Their grade of rubber is the same.

RDQ290. Do you have charge of the factory of the Aikin-Lambert Company? A. Yes.

RDQ291. Making fountain pens? A. I do.

RDQ292. Do they make the holder complete there? A. They do.

RDQ293. Do you buy the materials for those fountain pens? A. I know it is bought through the American Hard Rubber Company. I know that it is ordered. I do not place the orders personally.

180 RDQ294. Do you know the grade of rubber that is required for the "Waterman's Ideal Fountain Pen"? A. Yes, they require for that the pure vulcanized rubber, the pure Para rubber and sulphur and no mixture in it.

WILLIAM I. FERRIS.

It is stipulated that the exhibits introduced in evidence by the respective parties shall remain in the hands of the counsel presenting the same, to be produced on notice to the other side.

Adjourned to Wednesday, December 14, 1910, at 11 A. M.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

181

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.
} In Equity.

New York, March 6, 1911.

Adjourned to 2 P. M. on account of the engagement of defendant's counsel.

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2 P. M.

Adjourned on account of the engagement of defendant's counsel, to Tuesday, March 7, 1911, at 11 A. M.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

183

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.
} In Equity.

New York, March 7, 1911.

Met pursuant to notice and by agreement.

Appearances:

Samuel S. Watson, for Plaintiff.
Alexander S. Bacon, for Defendant.

184 Mr. Watson (to defendant's counsel): Will you produce the letters and telegrams which were sent to and received by the defendant from John Saadi of Washington, D. C.

Mr. Bacon: I have them here, the originals and some copies that I have had made, with the exception of one or two short letters which I could not find yesterday, but I will find them. They were dunning letters; that is all they were.

Mr. Watson: Letters produced by defendant's counsel to and from John Saadi, Washington, D. C., regarding Royal Ideal Pens, are introduced in evidence by the complainant and the examiner is asked to mark them Complainant's Exhibit No. 20.

185 The letters are marked Complainant's Exhibit No. 20, March 7, 1911. F. M. A., Exr.

Mr. Watson: These letters are dated and signed as follows:

Dec. 7, 1909, from John Saadi to Mr. Geyer.

Dec. 8, 1909, Modern Pen Company to John Saadi.

Dec. 12, 1909, John Saadi to the Modern Pen Company.

Dec. 30, 1909, John Saadi to the Modern Pen Company.

Dec. 31, 1909, Modern Pen Company to John Saadi.

May 13, 1910, John Saadi to the Modern Pen Company.

186 May 20, 1910, Modern Pen Company to John Saadi.

The letters above referred to marked Exhibit No. 20, are as follows:

Exhibit No. 20. 187

"Dec. 7th, 1909
"602 9th St. N. W.
"Washington, D. C.

"Dear Mr. Geyer:

"The L. E. Waterman & Co. have brought action against me. They want to serve injunction against my selling the Royal Ideal Pen. They served me with lots of paper & they brought out among other things, that I or any of my employees should be restrained from selling Waterman or any name of Waterman with or *without any other* initials.

"My lawyers wants to know the decision of the courts in favor of A. A. Waterman & Co., where was it recorded, if recorded, or if you can send me immediately copy of decision with any other information. We are preparing an answer, why an injunction should *not* be served. This must be answered by Friday at 10 o'clock this week the 10th inst. they worked everything so quick and in a hurry but we are ready for them and we shall win. 188

"Please give me an *early reply to above question* & greatly oblige.

"Yours very truly,

"JOHN SAADI.

"P. S. Just came to my notice a fountain pen with imprint A. A. Waterman & Co., Chicago, is that right?" 189

"Dec. 8, 1909

"Mr. John Saadi,
"602 9th St., N. W.,
"Washington, D. C.

"Dear Sir:

"Your letter of the 7th inst. received, and we note that the L. E. Waterman Co. have brought a suit against you.

190 *Exhibit 20*

"In 1898 before A. A. Waterman had a connection with this Company he allowed the L. E. Waterman Co. to get a judgment against him by default, but the judgment distinctly stated that he had a perfect right to use his name, A. A. Waterman, or Arthur A. Waterman, or A. A. Waterman & Co. or Arthur A. Waterman & Co., which is, as we understand it, common law. In 1905 Mr. Waterman formed a copartnership with Messrs Isaac E. and William L. Chapman, President and Treasurer of the Modern Pen Co., under the firm name of A. A. Waterman & Co., with a provision therein that he could withdraw from the firm at the end of the year, he giving the firm the right to use
191 the name A. A. Waterman & Co. or A. A. Waterman which right still holds good.

"Mr. A. A. Waterman was employed by the L. E. Waterman Co., for a number of years until along about 1895 when he went into business in Boston, Mass., using the name of A. A. Waterman Pen Co. After retiring from the firm of A. A. Waterman & Co. in New York, Mr. Waterman went to Chicago and formed a corporation organized under the laws of Arizona, known as A. A. Waterman & Co., Inc. Within the last year Mr. Waterman has withdrawn from the Chicago Company and is now with the Held Pen Co. of Salt Lake City, Utah.

"We enclose a copy of the decision with the L. E. Waterman Co. got against Mr. A. A. Waterman.

"We trust this covers all the information you require but
192 if there is any more we can give you, let us know and we will be only too glad to do so.

"Yours truly,
"THE MODERN PEN CO.,
"Hobart W. Geyer,
"Ass't Treas."

Exhibit 20

193

"Dec. 12th, 1909
"602 9th St., N. W.,
"Washington, D. C.

"The Modern Pen Co.,
"New York

"Dear Mr. Geyer:

"I thank you for sending me the decision of the court also for your good wishes.

"The case did not come up last Friday. Mr. Watson of N. Y. was on hand also a lawyer, Mr. May of Washington. Simply we were not ready & the Justice postponed the hearing until next 194
Friday, Dec. 17th.

"I have engaged two talented attorneys, a Mr. Hollander & Mr. White, who is Assistant district attorney of Washington. I don't believe the justice will grant injunction & they will or may have to fight the case on its merits.

"Thanking you again for all favors, I beg to remain.

"Yours respectfully,
"JOHN SAADI.

"Frank Waterman is the plaintiff in the case of his Co. & is also in Washington."

195

"Dec. 30th, 1909
"602 9th St., N. W.
"Washington, D. C.

"The Modern Pen Co.,
"New York City

"Gentlemen:

"You may have known by this time that I can no longer have the word Ideal on any fountain pen. The opinion of the Justice was such and my lawyers thought it best to destroy the word &

196 *Exhibit 20*

use any other word in the future. Messrs Hollander & White wrote you on another subject which I believe of greater importance to you. As we are trying to settle with them without further expense & before court decision. They demand that I would not sell fountain pens made by A. A. Waterman & Co. & if they should succeed with me, they will in the future use same tactics with every dealer of Fountain Pens who deals with you. They have the money & a dealers as myself cannot afford to spend few hundreds to fight them.

"Of course I am in the Fountain Pen business to stay, and my adv. of any Fountain Pens makes sale of same; and while
197 they have more money and ready lawyers for that purpose and they can win & dictate I can sell any Fountain Pen by advertising same that they cannot stop me & all their money cannot stop me. I would not sell their Pen if it was given me free to sell. It was only fear of expenses & maybe total loss that made me give in. Also I know if I had the money to fight all of their demand in the courts, they cannot win, but what can I do. I hope you answered my Lawyers letter direct to you, which I have not seen, but was told of its substance.

"Will you please pardon me for taking the liberty in using your name as reference. I will soon add a full line of razors to my stock in Washington and the Law of the District that every dealer in razors should take name, age, color & residence of every person who buys a razor & to report same every month
198 & in order to enforce their law they require a thousand dollar bond from every dealer in razors. I applied to the Fidelity Co. for the bond and had to fill their form. Please pardon me for taking such liberty in using your name, the above explains it.

"I expect to be in New York the latter part of next week & will call & see you.

"Wishing you a very happy New Year,

"Yours respectfully,

"JOHN SAADI."

Exhibit 20 199

"Dec. 31, 1909

"Mr. John Saadi,
"602 9th St., N. W.
"Washington, D. C.

"Dear Sir:

"Your letter of the 30th inst. received, and we also heard from your attorney and are writing him to-day for further particulars. We will undoubtedly authorize him to protect our interests all that he can in the matter but the President of the Company wants more information in regard to it before he will authorize our engaging Mr. Hollander. 200

"We note that you have decided to drop the use of the 'Royal Ideal' as the name of your pen and we presume that you have quite some stock of this imprint left yet. If you wish and will send what stock you have on to us, we will be pleased to remove the imprint and put any new imprint on that you wish, the only expense to you being the cost of the wheel for the new imprint.

"In regard to your referring to us, we will be pleased to recommend you to the bonding company as a good risk. With kindest regards and wishing you the compliments of the season, we remain.

"Yours truly,
"THE MODERN PEN CO.,
"Hobart W. Geyer,
"Ass't Treas." 201

202 *Exhibit 20*

"May 13-10

"Modern Pen Co.,
"New York,

"Please give me credit for
10/12 #20 Self filling
1 8/12 #103 fountain pens.
"Yours respectfully,
"JOHN SAADI.

"I have more A. A. W. gold points & fountain pens which I
203 will return to you. I will soon be in N. Y. & will call on you.
"J. S."

"May 20, 1910

"Mr. John Saadi,
"Washington, D. C.

"Dear Sir:

"Your letter of the 13th instant and pens received, and we have sent you a credit memorandum for same.

"Your bill has been running quite a long time, and we request
204 that you send us a check for either $100.00 or $150.00 on account by return mail.

"As we informed you sometime ago, we started a suit against the L. E. Waterman Co. to restrain them from making use of the injunction which they got by consent restraining the Standard Drug Co. and yourself from selling our goods. This case has not yet been decided but in the mean time the L. E. Waterman Co. started a suit in the United States Circuit Court here against the Modern Pen Company to restrain it from selling goods imprinted A. A. Waterman & Co. On Wednesday of this week, Judge Cox handed down his decision declining their request, and in his opinion he intimated strongly that we were the aggrieved

Exhibit 20 205

parties rather than the L. E. Waterman Co. We hope before long to have the matter closed up satisfactory to ourselves.

"Yours truly,

"THE MODERN PEN COMPANY,

"Hobart W. Geyer,

"Ass't Treasurer."

Mr. Watson: Counsel for complainant has requested counsel for defendant to admit that the advertisement appearing in the Jersey City Journal of December 11, 1909, of Wolfson Bros., of Jersey City, advertising fountain pens was, in part or in whole, paid for by the defendant. 206

Mr. Bacon: We refuse to make any admission but state that the exact fact will be brought out when Mr. Geyer is on the stand, and that he will be produced as a witness and he is the only one who knows all about it.

Mr. Watson: Counsel for complainant asks counsel for defendant if he will admit on the record that Isaac E. Chapman and William L. Chapman, who are now the sole members of the firm of A. A. Waterman & Co., and their friends, are the stockholders of the Modern Pen Company and that the defendant and A. A. Waterman & Co. are substantially the same; that the parties are very nearly the same and that the Modern Pen Company stands in this litigation in the place of the firm of A. A. Waterman & Co. 207

Mr. Bacon: That is substantially true. The firm of A. A. Waterman & Co. is now composed of Messrs. I. E. and William L. Chapman, and the Messrs. Chapman and their friends own a majority of the stock of the Modern Pen Company, which is the sole selling agent of A. A. Waterman & Co.; and Mr. Isaac E. Chapman is President and Mr. William L. Chapman is Secretary of the

208 Modern Pen Company, Mr. Hobart W. Geyer is now Treasurer of the Modern Pen Company and has been for the last four or five months; before which time Mr. William L. Chapman was Treasurer.

Mr. Watson: Is it a fact that Isaac E. Chapman has been President of the Modern Pen Company ever since it was organized?

Mr. Bacon: Yes, that is true.

Mr. Watson: And that William L. Chapman has been its Secretary since it was organized, and Treasurer up to a few months ago?

Mr. Bacon: It is admitted.

Mr. Watson: Counsel for complainant asks counsel
209 for defendant if he will admit that the defendant's so-called "self-filling fountain pen," is made under United States Letters Patent No. 744,642, granted to Harry W. Stone, and dated November 17, 1903, and that these pens are marked with this patent date.

Mr. Bacon: It is admitted that this patent is marked on the pen, but whether or not this is the only patent utilized in the manufacture of the pen counsel does not know.

Mr. Watson: Counsel for plaintiff introduces in evidence United States Patent No. 744,642, granted to Harry W. Stone, November 17, 1903.

Mr. Bacon: Objected to as immaterial.

210 Marked Complainant's Exhibit 22, March 7, 1911, F. M. A., Exr.

Mr. Watson: Counsel for complainant states on the record that Mr. Hobart W. Geyer is present at this hearing conferring with defendant's counsel and that he has made affidavit that he is the manager of the business of the defendant company. This is contained in an affidavit of Mr. Geyer, verified August 10, 1910.

Also in an affidavit verified by Mr. Hobart W. Geyer on April 27, 1910. In the last affidavit referred to Mr. Geyer states that he is the Assistant Treasurer and Man-

ager of the Modern Pen Company, and has been such since about 1908; before which period Mr. C. E. Martling was manager. All matters of business detail are in the hands of the manager, and matters of finance are looked after by Messrs. I. E. & W. L. Chapman, who are the president and treasurer respectively of this defendant. 211

And in an affidavit verified by Mr. Geyer on August 10, 1910, he states that he is now and for about three weeks has been treasurer of the Modern Pen Company; before that time he was assistant treasurer and manager. * * * "Deponent is the manager of A. A. Waterman & Co., and the partners give that business no personal attention."

Counsel for complainant stated before Judge Coxe in open court a few days since that the defendant made no claim to the name Waterman or Waterman's alone in connection with the fountain pen business, or substantially to this effect. In order to save expense and facilitate the closing of the depositions in this case, counsel for complainant now asks counsel for defendant to admit the same on the record. 212

Mr. Bacon: Counsel for complainant denies that he ever made any such statement in fact or in substance and refuses so to admit. Defendant's counsel alleges that the Modern Pen Company nor A. A. Waterman & Co. have ever in any instance used or permitted or recognized the use of the word "Waterman" alone or "Waterman's," but whether or not they are entitled to that use jointly with other persons equally so entitled, is a matter for the Court and not for them to admit. Said company and firm have at all times very carefully instructed all of their agents and representatives of every name and nature whatsoever, to be careful and use the full name of A. A. Waterman & Co. in connection with all their goods, so that their superior goods might not be confused with the inferior goods of the Complainant, and they know of no single instance whatever where these instructions have been violated. 213

214 *William I. Ferris*

WILLIAM I. FERRIS, recalled as a witness for the complainant, being duly sworn, testifies as follows:

Direct-examination by Mr. Watson:

Q285. Has the L. E. Waterman Company received any medals or diplomas for superiority or excellence or merit for fountain pens of its manufacture?

Mr. Bacon: Objected to as immaterial.

A. They have.

Q286. Have you prepared a list of these medals and diplomas
215 which have been awarded to the complainant and its predecessor in business, to which you refer? A. I have. It is as follows:

1883 The Mechanics' Institute, New York; medal of excellence.

1884 The Mechanics' Institute, New York; medal of superiority.

1885 The Mechanics' Institute, New York; special medal.

1886 The Mechanics' Institute, New York; medal of superiority.

1887 The Mechanics' Institute, New York; Medal of superiority.

1888 The Mechanics' Institute, New York; medal of superiority.

1889 The Mechanics' Institute, New York; medal of excel-
216 lence.

1889 Exposition Universelle, Paris; medal and diploma.

1893 World's Columbian Exposition, Chicago; medal and diploma upon the finding of a Board of International Judges, "Award for specific points of excellence which are as follows: 1st, Positive excellence of materials used throughout; 2, Excellent workmanship; 3d, Superior excellence of action of feed; 4th, Writes the moment pen touches paper; 5th, Does not overflow or skip; 6th, Simple in construction; 7th, Very cleanly."

1894 California Mid-Winter International Exposition, San Francisco; medal.

217

1895 Cotton States & International Exposition, Atlanta; medal and diploma.

1897 Tennessee Centennial Exposition, Nashville; medal and diploma.

1898 Trans-Mississippi & International Exposition, Omaha; medal and diploma.

1900 World's International Exposition, Paris; medal and diploma.

1901 Glasgow International Exposition, Glasgow, Scotland; diploma.

1901 Panama-American Exposition, Buffalo, New York; medal and diploma.

1901-2 Inter-State Exposition, Charleston, S. C.; medal and diploma. 218

1903 World's Exposition, Osaka, Japan; diploma.

1904 Louisiana Purchase Exposition, St. Louis; medal and diploma.

1905 Lewis & Clark Exposition, Portland, Oregon; medal and diploma.

1906 International Exposition, Milan, Italy, medal and diploma.

1906 Dominion Exposition, Halifax, Canada; medal.

1907 Jamestown Tercentennial Exposition, Jamestown, Virginia; medal and diploma.

1907 World's Exposition, Paris; diploma.

1910 Cotton States' Exposition, Cincinnati, Ohio; Highest award for fountain pens to Waterman's Ideal Fountain pens. 219

1910 International Exposition, Brussels, Belgium. Plaintiff has been advised that highest award has been made to Waterman's Ideal Fountain pens, official notice not yet received, the exposition is still in progress.

Wherever exhibited Waterman's Ideal Fountain Pens have always received the highest award for fountain pens.

Q287. Is this list correct in this book? A. Yes.

Q288. Except the 1910 Cotton States' Exposition held at Cincinnati, have all these medals which you have listed here been

220 *William I. Ferris*

received by the plaintiff company? A. Yes, except the medal awarded at the International Exposition at Milan in 1906, a diploma has been received; and except the medal awarded at the Dominion Exposition at Halifax in 1906; and the medal awarded at the exposition recently held in Cincinnati in the year 1910; and also except the medal awarded at the International Exposition in Brussels in 1910.

Q289. I understand the company has been advised of the award of the last two awards; is that a fact? A. Yes.

Q290. Will you produce these medals and diplomas that you have listed? A. (The witness produces a box of medals and
221 diplomas.

Mr. Watson: Counsel for complainant presents for the information of the Court some representations of the backs and fronts of a great many of these medals, and asks that these representations be placed in evidence and marked Complainant's Exhibit 21.

Mr. Bacon: Objected to as immaterial and irrelevant; no objection to the fact that they are copies of the originals.

The representations referred to are marked Complainant's Exhibit 21, March 7, 1911. F. M. A., Exr.

Q291. Does the name Waterman Pen or Waterman's Ideal Fountain Pen, indicate or designate any special construction or
222 structure? A. No; it indicates origin; it indicates pens of the plaintiff's manufacture and has no reference to the style or design or construction of the holder of the fountain pens.

Q292. Has this always been the fact since you have been connected with the business? A. It has.

Q293. Is it a fact that the plaintiff has manufactured many different designs and styles of fountain pens? A. It is.

Q294. When I refer to designs and styles I refer to structure, appearance; is your answer the same? A. Yes.

Q295. Has the name of Waterman's Ideal Fountain Pen, or Waterman's Pen at any time indicated any special patented structure? A. No.

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Q296. Since you have been connected with the business what was the date of the earliest patent which the plaintiff or its predecessors ever used, to your knowledge? A. February 12, 1884.

Q297. And one of the medals which you have produced of Waterman's Ideal Fountain Pen was awarded and bears date in 1883; is that a fact? A. Yes.

Q298. During your connection with the plaintiff's business, has the plaintiff or its predecessors, or both, placed these names and trade-marks in suit on various styles and designs of fountain pen holders? A. They have.

Q299. And also on fountain pens covered by various patents? A. They have. A great many of these names have been on holders that were covered by one patent, and at the same time they are used on other holders made or covered under another patent, sometimes both, but in no case do these trade-marks refer to designs of holders of any patent that covers them.

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Q300. Has the plaintiff company advertised its goods under the names and trade-marks in suit? A. It has.

Q301. Can you state generally to what extent and in what way? A. From the first it has advertised these trade names, and the advertising has gradually increased from time to time; it is now very extensive. This advertising is done in magazines, papers and in various literature sent out to the dealers; and the dealers themselves advertise the pens. This advertising has become more extensive the last four or five years, and runs in the neighborhood of $200,000 a year. The pens are also advertised in foreign countries.

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Q302. Can you approximate in a general way how much has been expended annually in the last four or five years in advertising and bringing to the attention of the trade and public the plaintiff's goods under the trade names and trade-marks in suit? A. There has been expended for this advertising in this country alone in the neighborhood of $200,000 a year.

Q303. In that advertising which you have referred to as made by dealers are the trade-marks or trade names in suit

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included in those advertisements which you refer to? A. Yes.

Q304. And does all the advertising you refer to and the publicity that you refer to concern the advertising and popularizing of the complainant's goods under the name of Waterman's and Waterman's Ideal Fountain Pen? A. It does.

Q305. And the trade names and trade-marks in suit? A. It does.

CROSS-EXAMINATION by Mr. Bacon:

XQ306. Before five years ago about how much did they spend
227 per annum in advertising? A. In the neighborhood of $200,000 a year.

XQ307. Just the same as during the last period of five years? A. There may have been some increase. That is an approximate figure. There are a great many other things that are in advertising that have not been included in that, in the way of supplies and all such materials.

XQ307. Have you materially increased your advertising in the last ten years? A. Yes.

XQ308. Have you materially increased your advertising in the last five years? A. Not in the proportion of the first five years of ten years.

XQ309. Before the last ten years you did not advertise so much? A. We advertised from the very first.

228 XQ310. My question was "so much"? A. Not as much as in the last five years.

XQ311. Before ten years ago how much did you spend a year? A. I am not familiar with the amount but the advertising graduated or increased with the business, in the early years.

XQ312. Did you spend $100,000 a year before ten years ago? A. I could not say as to the exact amount without looking it up.

XQ313. While you have increased this advertising so largely during the last ten years you know all of this time that the vari-

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ous firms of A. A. Waterman & Co. were also advertising their goods under their firm name, did you not? A. We saw some advertisements of theirs.

XQ314. And you knew that all this time they claimed the right to use the words "A. A. Waterman & Co."? A. I don't know as to that; I have no knowledge of that.

XQ315. You knew that they were using it openly and above board? A. Yes, to much confusion and trouble on our part.

XQ316. And you never made any complaint about it until 1909? A. Whatever the date is when the first action was taken; 1898 or 1897, the first action was taken.

XQ317. After the decree of September 3, 1908, and up to the year 1909, you never made any complaint against any firm of A. A. Waterman & Co., advertising and selling their goods under that trade name? A. I don't know as to that. There was no legal action ever taken that I was familiar with.

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XQ318. And you never heard of any other action? A. I don't recall any.

XQ319. And all this time you knew that the word "Waterman" being a family name could not legally be made a trade-mark, did you not?

Mr. Watson: Objected to.

A. I don't know as to that.

XQ320. And your counsel never told you that? A. That it could not be used as a trade-mark?

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XQ321. Yes. A. I don't remember of any such information.

XQ322. Are you familiar with the recent litigation in Italy? A. I know there has been litigation, but I am not familiar with the details of it.

XQ323. Do you know that the L. E. Waterman Company as complainant, over there in an action brought in Milan, Italy, have alleged that there is no such firm as A. A. Waterman & Co.? A. No, I have no such knowledge.

XQ324. Has Mr. Frank Waterman ever told you so? A. No, not to my knowledge.

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XQ325. The L. E. Waterman Company manufacture all styles and designs of pens, do they not? A. A great many.

XQ326. But you do not claim that any of those styles or designs are exclusive, that they are not manufactured also by many other fountain pen manufacturers? A. We do not claim all of them are exclusive. A great many of them were at one time, but other people have copied them.

XQ327. They had a perfect right to copy them? A. There is no protection; there is no reason why they could not.

XQ328. You do not claim that anybody in looking at any of the L. E. Waterman pens could tell that it was an L. E. Water-
233 man pen unless he found the name on it; that is, that it could not be distinguished by its appearance? A. It might if they were familiar with the pen, familiar with the manufacturing, the workmanship or the quality of the rubber, &c.

XQ329. Nobody but an expert then could do it? A. Not so apt to.

XQ330. You do not claim that the trade name or trade-mark "Waterman" or "Waterman's" or "Ideal," refer to any particular design or structure? A. No, sir.

XQ331. That it is applied to pens that have the same design and the same structure as many other manufacturers? A. They may.

XQ332. Your trade-mark does not refer to any particular patent, nor any particular design, nor any particular structure;
234 is that right? A. Yes.

XQ333. It can be applied to anything that is manufactured or sold by the L. E. Waterman Company? A. Yes.

XQ334. No matter what, provided it is in connection with fountain pens? A. Yes, as I understand it.

XQ335. In other words, there is no particular difference in appearance between the pens manufactured and sold by your company and those of many other companies? A. Not to an inexperienced person.

XQ336. A man would have to be a manufacturer and an expert to detect the difference? A. Unless he might distinguish

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it from using the pen, from experience and being familiar with it.

XQ337. But the general public would not know the difference except for the name? A. They would not be apt to.

XQ338. Is it not a fact that your Canadian company makes pens, fountain pens, imprinted with the names of other people who want to represent them as their own make? A. Not Waterman's pens.

XQ339. Then they will make any pen and put any name on which the vendor desires, will they not? A. No, sir.

XQ340. They make pens and put other names on them than Waterman's pens? A. But no pens that use the patent. Pens of the higher grade are imprinted with the Waterman trade- 236
mark. All the pens that are imprinted with other names are a cheaper class of pens.

XQ341. If a jobber wanted a certain number of pens manufactured by your Canadian company you would put on them any name that he might desire, would you not? A. No pen that we imprint with the Waterman name.

XQ342. If he sends you his private design you would manufacture it and put any name on it that he wants? A. Only on the cheaper pens, not of the Waterman, or that had the Waterman imprint.

XQ343. Could he not sell them at any price he pleased? A. You refer to these cheaper pens?

XQ344. I refer to the pens manufactured by the Waterman 237
Company that are sold to other people, bearing the names that other people want put on them? A. They are at liberty to sell them for what they please.

XQ345. And you make such pens upon request? A. In a great many cases.

XQ346. Is it not a fact that you will sell certain grades of pens with another imprint, which grades are the same as those that bear the Waterman imprint? A. No.

XQ347. Do you not have cheaper grades of goods bearing the Waterman imprint? A. Yes.

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XQ348. What is the cheapest retail price of any pen bearing the Waterman imprint? A. $2.50.

XQ349. Do you mean to say you never make pens with any other imprint that are sold at retail for $2.50? A. Not to my knowledge.

XQ350. It may be so? A. I think not.

XQ351. Referring to the list of medals received by the L. E. Waterman Company, offered in evidence today, were you with the plaintiff company in 1883? A. No, sir, 1885; that is the plaintiff's predecessor, in 1885.

XQ352. It was the same company, was it not? A. No, the company was not organized until 1887.

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XQ353. Do you know what character of pen was exhibited in New York in 1885, which received the American Institute medal? A. The pens of the same grade and material which are now made. The rubber work was made in the same factory that the pens now come from.

XQ354. Then the L. E. Waterman Company did not manufacture the penholders that received the Mechanics Institute medal in 1885? A. Well, as explained in my earlier testimony, the holders are made at Seymour, Connecticut. We do work on them here, assembling them, putting them together and chasing, and other work which we consider manufacturing.

XQ355. Did, in 1885, the L. E. Waterman Company manufacture the holders that received the medal at the Mechanics'

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Institute Fair? A. Yes, as we understand it.

XQ356. Are all those penholders chased? A. No, not all.

XQ357. Then some of them are just as they come from the Connecticut factory, are they not? A. Yes.

XQ358. And in 1885 the Connecticut factory manufactured for anybody that wanted penholders? A. They manufactured for various people.

XQ359. A good many firms? A. I don't know how many.

XQ360. Are you willing to swear that in 1885 the L. E. Waterman firm manufactured the pen points that got this medal? A. No, but we adjusted and assembled them to the holders.

XQ361. Then other people manufactured pen points and other people manufactured holders and you simply put them together or adjusted them, as you have called it? A. Yes. All those holders and pens had the trade names on them.

XQ362. But some of those pen points may have been manufactured by one party and some by another? A. That is possible.

XQ363. Is what you have said true about the medals—the pens that received medals in 1886 at the Mechanics' Institute Fair? A. The same conditions prevailed for several years until such time as we did all the manufacturing.

XQ364. When was that? A. The manufacturing of the 242
gold pens, about ten or eleven years ago.

XQ365. Then from 1883 up to say 1900 all of the pens that received these various medals had the holders manufactured in Connecticut and the pen points manufactured by various manufacturers from whom you bought? A. Yes.

XQ366. And you simply assembled the parts? A. We did the other work in connection with the assembling and adjusting the pens, &c.

XQ367. And the assembling consisted in putting in the pen points into the holder? A. Adjusting the nib, the set, refinishing the point, or touching it up, as we call it, in a great many cases, all of which involves quite an amount of labor.

XQ368. How often would you readjust the point of a pen— 243
once in a hundred times? A. Every pen receives more or less adjustment.

XQ369. Do you mean by adjustment, change? A. Adjusting the set of the nib and fitting, and shaping the feed to the pen after it is inserted in the holder.

XQ370. You do not mean to say when you bought pen points you had to change the points, as a rule? A. Yes, in almost every case, say 999 out of 1,000; practically every one.

XQ371. How did you change the pen points? A. By altering the set of the nib.

XQ372. What metal is on the extreme point of the nib? A. Iridium.

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XQ373. Do you mean to say you took the iridium off and put it on again? A. No.

XQ374. What did you do? A. Adjust the tension of the nib, the pressure of the two nibs coming together.

XQ375. How long would it take a man to do that? A. It would depend on the condition of the set. In some instances several seconds, or it might take half a minute or a minute. Sometimes after it is inserted into the holder it is necessary to take it out several times.

XQ376. From 1900 down to this date are you willing to swear that any particular pen exhibited at any particular ex-
245 hibition was manufactured by the L. E. Waterman Company? A. As I have previously explained to you.

XQ377. In each instance the penholder was manufactured by somebody else; and are you able to swear that in any particular instance a pen point was manufactured by you? A. Yes.

XQ378. Which one? A. In the French Exhibition.

XQ379. Of what year—1907 and 1900? A. 1907.

XQ380. Were those pens exhibited in Paris in 1907 manufactured by the Canadian factory? A. No, sir.

XQ381. Manufactured in New York? A. Yes.

XQ382. Do you know of your own knowledge that the pen points there exhibited were manufactured by your own firm? A. It is my knowledge that they were made up specially for that exhibit, certain pens.

246 XQ383. Where was the factory in which you made them? A. At Rose and Duane Streets.

XQ384. Does the L. E. Waterman Company own that factory? A. Yes.

XQ385. It is run in their name? A. Yes.

XQ386. And yet, notwithstanding the fact that you have a factory there you buy pen points from other people? A. We have in the past.

XQ387. And up to within a very short time? A. Gradually less in the last years.

XQ388. But you still buy from some other parties? A. Very few, the cheaper pens.

XQ389. But they bear the name of L. E. Waterman? A. Some of them.

XQ390. And "Ideal"? A. Some of them.

XQ391. What do you call cheaper pens? A. A pen that is without any name on; it is merely stamped 14 karat.

XQ392. And it is put in a holder marked "Ideal"? A. No.

XQ393. Or L. E. Waterman? A. No.

XQ394. Do you mean to say you do not buy any pen points that are put in Ideal pens? A. We buy a few, or have of later years, very few.

XQ395. But you have done that even up to the present time? A. Up to the last year or two.

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XQ396. Have you not got pens on hand today, pen points, by other people that are sold for Ideal pens? A. That is possible. There may be some running back several years that have not worked out of the stock.

XQ397. Then it is not true that substantially all of the pens that were put on exhibtion between 1883 and 1910, and for which medals were received by the L. E. Waterman Company were manufactured in whole or in part by other people than the plaintiff? A. A great many of the gold nibs may have been made by others, but I could not swear to it, because the greater part of the pens were made by us, and it is fair to presume that they were in those pens that were exhibited.

XQ398. When you made these pens for exhibit you made special pens different from the ordinary stock in trade? A. No, only that French pen, and it was necessary to have an 18 karat pen go into France. That is why I recollect that particular pen. The other pens that go into exhibits are pens that go through the ordinary stock.

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XQ399. And the pen points may be manufactured by anybody besides yourself? A. It is possible.

XQ400. You do not advertise to the world that you buy any part of the pens that are sold under the name of "Ideal"? A. That is not necessary. Lots of manufacturers do not advertise to the world where they get some of their parts.

XQ401. Then you make no claim that the word "Waterman" or "Waterman's," or "Ideal," or any combination of those words refer to anything except a fountain pen or the parts thereof that are sold by the L. E. Waterman Company? A. Yes, that is the claim we make, that they are pens of the plaintiff's manufacture.

XQ402. You use those words on pens that are not manufactured by the plaintiff, do you not? A. These trade names?

XQ403. Yes, and have done so since 1883? A. No, sir.

XQ404. You do not claim that since 1883 or 1887 when the new corporation was formed, that all the pens bearing the words
251 "Waterman" or "Ideal" were manufactured by the L. E. Waterman Company? A. I claim that they were as I have explained, the same way as automobile manufacturers buy or get a great part of their supplies one way or another which make up the complete article.

XQ405. You do not claim that these so-called trade-marks were placed upon goods all of the parts of which, both the holders and the pen points were manufactured by the plaintiff company? A. No.

XQ406. But you claim that the manufacture of a fountain pen consists in the assembling of the parts? A. And proper supervision of the pen to make a good working instrument.

XQ407. When you buy pen points from any other party you do not claim that you supervise the manufacture of those pen
252 points? A. Only to have them meet our requirements.

XQ408. That is you examine them after you get them? A. Yes, and instruct them how to make them.

XQ409. By instructing them you mean giving them a description of the style of pen that you want? A. A sample and what is necessary for our requirement and then follow them up and see that we get it, which, in a great many cases necessitates going to their plant or factory and going over the matter with them to get it straightened out and get them as they should be.

XQ410. Then when they get one pen right they make them all like that pen? A. As far as possible, but it requires constant following up.

XQ411. You do not claim that the self-filling pens manufactured by the A. A. Waterman Company are like the pens manufactured by the L. E. Waterman Company; no person would mistake one for the other? A. They have the rubber sack, as I remember the pen; the same method of filling. It may be a different construction in detail or mode of operating.

XQ412. They are manufactured under an entirely different patent from your patents? A. I believe so.

XQ413. Nobody ever would mistake the one for the other; 254
the mechanical construction is wholly different? A. You mean irrespective of the name stamped on it?

XQ414. Certainly? A. As I remember that pen it operates from the end. Ours operates from the side, in the filling.

XQ415. And your joint pens have the joint under the finger, do they not? A. At the end where the pen is.

XQ416. They have a middle joint pen, where the joint is away up in the middle of the pen, do they not? A. I believe they do have a similar pen.

XQ417. And they have such a one now as their specialty? A. I don't know that they do.

XQ418. Don't you know that their specialty is a self-filling pen and a middle joint pen, so-called? A. I am not familiar with that. 255

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ419. As I understand your testimony all of the fountain pens made by the plaintiff for other people which are imprinted with their name or trade-mark, or what-not, do not bear the name of "Waterman" or "Ideal"? A. They do not.

RDQ420. And that has always been the fact; you never have made or sold pens to other people bearing their name which also bore the trade-marks which are now in suit? A. Except in

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cases where there were complimentary pens for dinners, or some such distribution—banquets.

RDQ421. Since you have been connected with the plaintiff's business, is it not a fact that the manufacture of the holders and parts has been directly supervised by the plaintiff's representatives? A. That is the case.

RDQ422. That applies to the rubber parts and the gold pen points? A. Yes.

RDQ423. And is it not a fact that the rubber parts have been made in all cases under the instruction and supervision of some representative of the plaintiff company or its predecessor? A. They have.

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RDQ424. Is it not a fact that at all times since you have been connected with the business, when pen points have been made for the plaintiff, or its predecessors by outside people, that the manufacture of these pen points is supervised and explicit instructions given as to the manner of manufacture and design and quality of the materials from the beginning of its manufacture? A. They have.

RDQ425. And that is the case today where any of the parts are made outside of the factories directly controlled by the plaintiff company? A. It is.

RE-CROSS EXAMINATION by Mr. Bacon:

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RXQ426. You are the one that has done the supervising of the manufacture of the rubber holders, are you not? A. Yes.

RXQ427. And you go up to the Connecticut factory about once a month? A. I do at times, and oftener than that in years gone by when it required attention oftener.

RDQ428. And you never have been an expert manufacturer of rubber? A. I am familiar with all the operations and the working it up from the raw gum.

RXQ429. You have never manufactured rubber at all? A. I am familiar with it.

RXQ430. You have never been engaged in the manufacture of rubber, have you? A. Not personally.

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RXQ431. You simply go to the factory and look around and tell them the styles that you want and make changes and suggestions in the styles? A. Yes, and in the method of making them, in the operation, suggesting new machinery and new methods of making the holders.

RXQ432. You do not assume that you know more about the actual manufacture of rubber than those who are engaged in it, do you? A. No.

RXQ433. And you would not call yourself an expert rubber manufacturer? A. I think I would.

RXQ434. And yet you never manufactured a pound? A. Not practically.

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RXQ435. And you never manufactured a machine that manufactured rubber? A. No.

RXQ436. Never have designed one? A. No, but I have made suggestion that machines were developed from, in the method of handling rubber, working it up.

RXQ437. What are the constituent elements of the rubber found in the rubber holders of such pens? A. Para rubber, pure rubber worked up from the gum, two-thirds rubber and one-third sulphur.

RXQ438. That is all there is to the manufacture? A. That is all the ingredients in the rubber.

RXQ438a. How is it mixed? A. The first operation, the rubber is torn, the biscuits are torn to pieces, going over a cylinder wheel with teeth on it; at the same time a stream of running 261
water washing it. After it is torn into sheets and all pulled to pieces it is hung up to dry. After it is dried it is put in an artificial dryer or dried in the open for a week or two weeks until it is in a certain condition. Then it is put through the rolls again, flat rolls that are heated and rolled down to a certain thinness and then sulphur is mixed with it. It is put through the rolls many times. After it is sheeted down and mixed with the sulphur it is laid out on a hot table where it is cut into small pieces and wrapped around a metal arbor from which stage it goes into a vulcanizer, packed in large metal cases and covered with soapstone, one layer on top of another. These are then

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put into heaters and the heat is gradually turned on for twelve hours running up to 300 degrees and back again; gradually cooled off. Then the holder taken out of the oven and the metal arbors are drawn out on a draw bench. They are removed on the draw bench. Then the holders are ready for the lathe work. They are roughed down first, the barrels and caps. Then the necks are made and inserted into the barrels and they are shaped on the outside. The necks are reamed to take the feeds. The caps are turned down similar to the barrels and finished. Then they go through a polisher, one or two polishing operations, according to the finish. After that they are wiped and
263 cleaned and stamped with the name and inspected. That is the general routine.

RXQ439. And that is all done in Connecticut? A. Yes.

RXQ440. Then when the holders are brought down to New York and you put in the gold pen points you have a pen that may be ready for the market? A. Yes, after the assembling and labeling and some attention to the vent holes, opening or closing them as the case may be.

RXQ441. Have you ever personally manufactured the pen points? A. Yes.

RXQ442. Where? A. At my own home.

RXQ443. When? A. In 1897.

RXQ444. How many did you make there? A. Only a few.

RXQ445. How many? A. In the neighborhood of half a
264 dozen.

RXQ446. Did you have machinery in your own home? A. Yes.

RXQ447. And took machines there for the purpose of manufacturing these half dozen? A. I had them made, the machines, experimental machines.

RXQ448. When you bought pen points from Mabie Todd did you go to their factory and tell them how to make them? A. Yes.

RXQ449. Is that true of all the other people from whom you get pens? A. Yes.

RXQ450. Was that true of A. A. Waterman & Co. from whom you bought pens? A. I never bought any of them.

RXQ451. Didn't you give an order personally? A. I did to Mr. Chapman, but not for L. E. Waterman Co.

RXQ452. You bought them for the Aikin & Lambert Company? A. Yes.

RXQ453. And you did not go to the defendant, the A. A. Waterman & Company to tell them how to make those pens, did you? A. No, sir.

RXQ454. You simply gave them an order for so many pens at such a price? A. That was one small lot. I will say that those particular pens had soft points on them.

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RXQ455. The same as the sample? A. The sample was hard.

RXQ456. Are you sure? A. I examined it.

RXQ457. What do you mean by a hard point? A. A point sufficiently hard that it will not rub readily on the oil stone.

RXQ458. Did they have iridium on the point? A. A certain grade of iridium.

RXQ459. And iridium is very hard? A. Certain grades of it.

RXQ460. These were cheap pens, were they, that you ordered in this lot? A. The pens, as I recollect, were simply stamped 14 karat, small size.

RXQ461. How much did you pay for them apiece? A. I don't remember.

RXQ462. About how much?

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Mr. Watson: Complainant's counsel objects to all this detail matter that has no connection with the issue in the case, and especially to the matter inquired about which is within the knowledge of the defendant.

RXQ463. I suppose you know as well as the defendant?

Mr. Watson: The same objection.

A. I don't recollect; there were a great many of those transactions all the time; and this was two or three years back.

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RXQ463a. And you accepted them all right? A. I did, under the circumstances.

RXQ464. And paid for them? A. Yes.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ465. Were any of these pens which were obtained from A. A. Waterman & Co. or the Modern Pen Company used by the plaintiff? A. No.

RDQ466. Were any of these pens put in holders bearing the name of Waterman? A. No.

269 RDQ467. Or Ideal? A. No.

RE-CROSS-EXAMINATION by Mr. Bacon:

RXQ468. Do you know whose check paid for these? A. My check.

RXQ469. Your personal check? A. Yes.

RXQ470. Are you in the habit of buying Aikin, Lambert's goods with your personal check? A. No.

RXQ471. That was an isolated instance? A. Yes.

RXQ472. Did you ever do it before? A. I don't recollect of doing it before.

RXQ473. Do you pay for L. E. Waterman's goods with your personal check? A. No, sir, not as a rule.

270 RXQ474. Do you ever? A. I don't recollect that I ever have.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ475. How long have you been supervising the manufacture of the goods put out by the plaintiff company, or its predecessor? A. I took charge of that two or three years after my connection with the business.

RDQ476. And continued it ever since? A. Ever since.

RDQ477. During all of this period you have personally supervised the manufacture of these parts and these finished goods

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put out by the plaintiff which bore their trade-marks and trade names in suit? A. I have.

RE-CROSS-EXAMINATION by Mr. Bacon:

RXQ478. You do not wish the Court to understand that you have even seen with your own eyes one out of one thousand of all the pens that have been sold by L. E. Waterman in the last ten years? A. I do.

RXQ479. Do you mean to say you have handled them all? A. I have handled them every day.

RXQ480. Do you mean to say you have handled the entire product? A. Not every one, not individual pens, but I know what is going on.

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RXQ481. You don't look at each pen? A. No, but I see the pens from every lot that goes through, or where there is any change.

RXQ482. How many in a lot that go through? A. There are lots going through all the time, but any changes, any special lots going along, I am always in touch with them.

RXQ483. Then you do not mean to say you give each pen your individual attention? A. Not every individual pen, but the pens in general I am familiar with.

RXQ484. That is true of lots of clerks in your place, is it not, that they are familiar, generally speaking, with all the pens? A. Not to the extent I am. They are not interested particularly in the manufacture or the condition of the pens. They handle them more to attend to the shipping.

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RXQ485. How many did you buy from A. A. Waterman & Co., how many pen points?

Mr. Watson: The same objection.

A. I am not sure as to the amount. I think it was less than a thousand.

RXQ486. How many of those thousand did you actually handle yourself?

274 Mr. Watson: That is objected to as it is shown by the testimony of this witness that those were not handled or bought for the plaintiff.

RXQ487. How many of them did you personally handle? A. I looked at enough to familiarize myself with the condition of it.

RXQ488. A half a dozen? A. I should say several dozen.

RXQ489. Out of a thousand? A. Taking them out of the different parts of the lot to get a fair sample.

WILLIAM I. FERRIS.

Adjourned to Wednesday, March 8, 1911, at 2 P. M.

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UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY, Plaintiff,
against
MODERN PEN COMPANY, Defendant.
} In Equity.

276 Testimony taken, *de bene esse,* pursuant to notice hereto annexed, before Robert M. Hopkins, Clerk of the United States District Court for the Western District of Washington, Northern Division, at his office in the City of Seattle, State of Washington, commencing Wednesday, September 14th, 1910, at 10 o'clock A. M.

Present:

Walter B. Raymond, for Plaintiff.
Ralph W. Emmons, for Defendant.

ARTHUR A. WATERMAN, a witness called on behalf of the plaintiff, of full age, first being duly sworn, deposes as follows:

Q1. Please state your name, age, place of residence and occupation? A. Arthur A. Waterman; age 51; reside in Minneapolis, Minnesota. Occupation, fountain pen salesman.

Q. Are you here under subpoena? A. Yes, sir.

Q3. What time do you expect to return to Minneapolis? A. The earliest I can get there is the 25th of November, may be later.

Q4. Are you the Arthur A. Waterman formerly a member of the firm of A. A. Waterman & Company, of which firm 278
Isaac E. Chapman and William L. Chapman are the other members? A. I am.

Q5. When did you first enter into partnership in the fountain pen business? A. I entered into partnership with E. L. Gibson in 1897.

Q6. Under what name did you do business? A. A. A. Waterman Pen Company.

Q7. Was your right to do business under that name questioned? A. Yes, sir.

Q8. By whom and with what result? A. We were sued by the L. E. Waterman Company, and there was an injunction issued—judgment obtained. The chief effect of that was that we must not use a corporate style in our business, we must use a 279
firm name.

Q9. When was that decree entered? A. Sometime in September, 1898.

Q10. Under what style did you continue the business? A. As A. A. Waterman & Company.

Q11. Was E. L. Gibson still your partner? A. For a short time.

Q12. What happened in February, 1899? A. Gibson and I dissolved partnership, by mutual consent.

Q13. Did you then continue doing business? A. Yes, I did business for a time as A. A. Waterman, alone.

Q14. And how did you mark your pens? A. A. A. Waterman, maker, Boston.

Q15. You had no partner? A. I had no partner.

Q16. There was no firm of A. A. Waterman & Company in existence? A. Not for that short interval.

Q17. In the latter part of 1900, what did you do in reference to forming a partnership? A. I dissolved the existing partnership with Edsen E. Dewey, and negotiated with William G. Frazer, of New York, for a partnership.

Q18. And did you make any contract with Frazer? A. Yes, sir. I cannot remember whether that month or the next month,
281 I made a contract with William G. Frazer and Hobart W. Geyer. The papers were signed January, 1901.

Q19. Now you may state the arrangement which you entered into at that time concerning the making and marking of pens? A. The pens were made under the firm name and date of patent. They were marked A. A. Waterman & Company, New York.

Q20. Who was to manufacture the product? A. We hired Frazer & Geyer Company to manufacture the parts. Frazer & Geyer Company was a corporation.

Q21. How long was the partnership which you formed to continue? A. I think it was to continue ten years.

Q22. Was there anything said about making the term of the partnership ten years? A. Yes, sir. I think it was to be 10 years at first. We had had the partnership extended once or
282 twice. Finally it was extended to forty years under certain conditions.

Q23. Was there anything said between you and Mr. Frazer and Mr. Geyer, as to the reason for making the partnership for such a long term? A. Well, they regarded the connection with me as being most advantageous, and they wished to increase their capital, and so felt that a long term would be much better as an asset than anything uncertain, not bearing my name.

Q24. Did you have any interest in the corporation of Frazer & Geyer Company? A. No.

Q25. To what did you look for your profits? A. To A. A. Waterman & Company.

Q26. Solely to the copartnership? A. Solely to the copartnership.

Q27. Now, what were you to receive under that? A. I had a salary and a royalty—a royalty so-called. So much per pen that bore my name.

Q28. At that time did you know one Isaac E. Chapman and one William L. Chapman who became interested in the company? A. You mean the Frazer & Geyer Company?

Q29. Yes, sir. A. No, I did not know them when they first made investments but I think Isaac Chapman came in a short time before William Chapman, by buying some of the Frazer & Geyer Company stock. All I know was from remarks of Frazer 284
dropped from time to time.

Q30. In the fall of 1901, did you have any negotiations with the Chapmans? A. Oh, yes, sir.

Q31. Will you state what these negotiations were. What was said by the Chapmans and what you said? A. Well, that is a long story. I first got a number of messages on my western trip from Frazer, saying that Chapman was not only interested, but was likely to become much more interested, and furnish large capital. But he conditioned his going in further upon getting a modification of the partnership by which they would tie me up for a longer time.

Q32. You mean by tie you up, you or your name? A. I suppose the chief consideration was the name, because they feared
that I might engage in business at the end of the ten years 285
that was already provided for, and they could not have as much manufacturing, in that case. I think Chapman made a very strong point that I must become interested in the company, in the corporation and not in the firm. He made the plea that I was not taking any chances; I was getting a dead sure thing and the others were taking chances, and that I must merge all my interest in the firm into the corporation.

Q33. Did you return to New York and have any conferences with them? A. Yes, I returned early in December and had a number of days of interviews and arguments. Got my lawyer from Boston and went over the whole ground carefully.

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Q34. Now what contracts were entered into after these conferences? A. Well, for one thing, the partnership was extended for a long term. The firm—I should say the three partners —made over to the Frazer & Geyer Company all their interests in the partnership. I think Frazer and Geyer individually had made over before that, but I had not. And I turned over my profits, my royalties, and arranged with the Frazer & Geyer Company to take a block of stock, and to work for them as well as for A. A. Waterman & Company—put all the interests together. But they held the stock to secure my staying with them for a number of years—I have forgotten how long—before
287 I could get that stock; they put it in a trustee's hands.

Q35. Did you have a conversation with the Chapmans as to putting the stock into the hands of a trustee? A. Yes. Asa Spear was their attorney; he was to hold the stock.

Q36. Was there anything said as to the reason that stock was to be put into the hands of a trustee? A. Well, it was due to the same fear they had expressed before, that I might go out of business, and they wanted to make the loss as much as possible if I did go out and forfeit my stock.

Q37. Who took part in these negotiations? A. I. E. Chapman was the chief one, but he was assisted by William L. Chapman, that is his brother, and by Mr. Frazer.

Q38. The Chapmans took the initiative in these negotiations? A. Yes, necessarily so, on account of the question of the money
288 that they were to try to get.

Q39. Did the Chapmans insist on this forfeiture provision? A. Yes, sir.

Q40. Now what did you have to do with the management of this company? A. You mean the firm?

Q41. The firm. A. They gave me stock in the corporation, but I may say the firm gave me a complimentary standing. I was to be considered; I was to be consulted before they changed the form or style of the goods.

Q42. Did you have anything to do with the business management? A. No, sir. That was absolutely excepted. William G. Frazer was the manager of the firm, absolutely.

Q43. What part did the Chapmans have under this new arrangement? A. Well, they figure, of course all together through the corporation, as the Frazer & Geyer Company was a sort of a holding company.

Q44. Were you an officer of that company, the Frazer & Geyer Company? A. I cannot remember whether I was made a director or not. Of course I was a stockholder. I became a director later, but I cannot remember the date.

Q45. Did you hold any of the principal offices of the company? A. Of the corporation?

Q46. Yes. A. No. I was merely on the Board of Directors after a time. I cannot remember whether I was on first 290
or put on later.

Q47. Did you have any financial control of the company? A. No. That was all in the hands of the other officers. I rarely met the directors and officers; I was away most of the time.

Q48. Now, what, if any changes took place in 1905, both in the copartnership and the corporation? A. Well, without referring to my partnership contract, I cannot remember whether the firm was still further extended then or not. But I know it was made forty years for one thing. I know that my relations with the corporation were changed so that it gave me the option of going into business separately in the far west in July, 1906. Some other changes were made; for example, they released the stock.

Q49. Was not that release of stock under a collateral agree- 291
ment with the Chapmans? A. No, I think a collateral agreement was made later than that.

Q50. Do you remember that the Chapmans advanced you a certain sum of money on that stock? A. No, I do not. I was assessed later on, in 1905, and they furnished the money for that assessment, and they took the new Modern Pen Co. stock as collateral. But the chief thing, it seems to me, was the division of territory, by which I had the chance to go into business in 1906.

Q51. What provision was made or what conversation did you have with the Chapmans, as to retiring from the firm of A. A.

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Waterman & Company? A. I was to retire, in consideration of something they gave me. I was to retire absolutely from the business of the firm A. A. Waterman & Company, July 1, 1906. I was to remain as salesman on one condition, one contingency, or I was to go into business in the far west in a separate undertaking.

Q52. What was said about your name remaining, the firm name of the partnership? A. Well, that was the condition, that my name should stay there perpetually with the business.

Q53. Did you have any conversation with I. E. Chapman about the use of your name by the partnership, after you had
293 retired as a member? A. Yes, sir; we had a good deal of discussion because of the Kellogg decree years before.

Q54. Now can you recall what you said to him and what he said to you? A. Well, I said that he might be called upon to defend himself, if they used that name. Col. Bacon thought that the fact of having the firm in existence—

Q55. This was before Col. Bacon came into this. That is the February, 1905, contract. Did Col. Bacon come into the case prior to the re-organization of the Frazer-Geyer Company? A. I think not. I think he did not appear there until along in May or June, when the re-organization was up.

Q56. Do you know by whom these contracts of February, 1905, were drawn? A. Well, I think they were gotten up by my attorney, Wm. E. Weaver, and Mr. Chapman's attorney,
294 probably Mr. Spear. I could not say which got them up in toto, because it was a question of altering and going back and forth a great deal.

Q57. Do you remember any provisions made in the contracts about forming a corporation under your name? A. Yes, sir.

Q58. Now state what conversation you had with reference to that provision with the Chapmans? A. Well, we were generally of the opinion that it might be safe to incorporate outside of the State of New York, as the Kellogg decree was a State matter entirely, but I had some apprehension about that, if I was not in the business.

Q59. What do you mean by you were not in the business? A. In case they should go on without me.

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Q60. That is after your retirement from the firm? A. Yes, after the date fixed. I know that I asked for some protection so that I should not be considered in contempt of Court if I was held up in New York for seeming to disregard that original decree.

Q61. Did you have any discussions with the Chapmans as to the use of your name in the incorporated company? A. Yes, sir.

Q62. At this time, February, 1905? A. That is the agreement of February between myself and the corporation?

Q63. Yes. A. Yes, sir, I think there was some. I think they then began to lay the ground for enlarging the company and incorporating with the trade name of A. A. Waterman.

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Q64. Which one of the Chapmans did you have that conversation with? A. Well, chiefly always with I. E. Chapman; sometimes W. L. Chapman participated.

Q65. What did they say in reference to indemnifying you against any loss or litigation, by reason of the use of your name in an incorporated company? A. They satisfied me that they would indemnify me. I do not know the exact terms of the offer or assurance, but there was an assurance given me that they would take care of me.

Q66. Was there anything said after the execution of these contracts, about incorporating the company under your name? A. Yes, I think there was. The matter was up a number of times in the following spring.

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Q67. With whom did you have your conversations about that? A. I. E. Chapman.

Q68. Did he say that he wanted to incorporate a company under your name? A. Yes. They have always desired it. I think they felt as though it might not be safe. And the question of reorganization of Frazer & Geyer was uppermost, and there seems to be a tendency to put off settling details as long as possible. I think the name they finally took for the reorganization was not determined until the last minute.

Q69. And your name was discussed by the Chapmans as the name for the new company to be formed? A. Yes, sir.

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Q70. Now, what happened in the spring of 1905, to these companies, that is the Frazer & Geyer Company and A. A. Waterman & Company? A. Well, Mr. Chapman, as the one most interested in the combined business—you know they treated it as a combined business. Our annual statements were made out in one set of figures headed, A. A. Waterman & Company and Frazer & Geyer Company, and all the capital and everything put into one showing, so Mr. Chapman was the one who considered that he practically owned it. He had large interests, that is he and Frazer and others did, but he got at loggerheads with Frazer and succeeded in getting him into an insolvent con-
299 dition apparently, as he could not satisfy certain judgments for technical liabilities from A. A. Waterman & Company to either the Chapmans or Frazer & Geyer Company, I forgot which, and in advising with Col. Bacon, they regarded Frazer's condition in being unable to satisfy these judgments as acting as a dissolution of the firm, because he was a bankrupt, although he was not put into bankruptcy; and being so, it was thought that A. A. Waterman & Company existed no longer. And then I made a new partnership with I. E. Chapman and William L. Chapman, under the name of A. A. Waterman & Company.

Q71. Now, you may state the relations between A. A. Waterman & Company and the Frazer & Geyer Company, under the contract, prior to June 12, 1905. That is, the way they did their business, the way they kept their accounts, and what busi-
300 ness was done by the partnership and what business was done by the corporation? A. Well, the corporation owned the manufacturing plant for making gold pens and the holders—for making the complete pens as well. They sold some complete pens directly under their own name, the Frazer & Geyer Company, but the chief part of their manufacturing was the producing of A. A. Waterman & Company goods, and A. A. Waterman & Company bought the goods of the corporation, in a sense. They were charged up at very high prices for the express purpose of keeping A. A. Waterman & Company indebted to the Frazer & Geyer Company corporation; and, indebted beyond the possibility of paying. Now, A. A. Waterman

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& Company, as a firm, took these goods on credit and sold them generally, and made collections and turned over what money they had left from their particular department after paying expenses to Frazer & Geyer Company on account, but always having a large indebtedness, which annually was washed off the slate.

Q72. Now, did A. A. Waterman & Company, the partnership, make any profits under these old contracts, that is, the contract prior to June 12, 1905? A. The partners?

Q73. Yes? A. No, the profits were all given to the Frazer & Geyer Company. It was expressly stipulated that whatever each partner should get in the old partnership, was turned over for the good of the Frazer & Geyer Company corporation.

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Q74. Did you receive any pecuniary profit from A. A. Waterman & Company? A. No, I just said I had nothing there at all.

Q75. That is, under the contract from December, 1901, to June 12, 1905, you received no profits from A. A. Waterman & Company? A. They audited my salary through the A. A. Waterman & Company It was a nominal salary and expense account, but the profits, the returns to me that I depended upon, were a certain share of the earnings of the corporation and the dividends on stock that I got. I had a contract that called for certain share of their gross earnings as well as the net earnings which came in the form of a dividend.

Q76. That is from the gross earnings and the net earnings of the one corporation? A. Yes. I got it on the corporation's earnings. Not from the firm; these earnings had nothing to do with the firm at all.

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Q77. Now, June 12, 1905, you testified that you entered into a new partnership of A. A. Waterman & Company, with Isaac E. Chapman and William L. Chapman. Did that new partnership assume any of the indebtedness of the old partnership? A. No. I cannot recollect that it assumed anything.

Q78. Now, what were your functions under this new partnership of June 12, 1905? A. I do not recollect that I had any functions. Possibly I was to be consulted as regards forms and styles of goods.

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Q79. Did you have any active management in the copartnership? A. No.

Q80. Did you have any management whatever in the partnership? A. No.

Q81. Who managed the partnership? A. I do not know whether it was expressly stated that I. E. Chapman should manage it alone or whether he with William Chapman. I know that I was to have nothing to do with the management. The copartnership was only organized to continue the good will and name of the business, and the firm was to have no function whatever, no active function. A. A. Waterman & Company was
305 just on paper. And Col. Bacon said it was not necessary for it to do anything, but just let the Modern Pen Company go ahead as though it was the only party.

Q82. Was there anything said about the use of your name? A. Yes, of course, the partnership was to use my name. That is the only condition in which they made the partnership, that it should be A. A. Waterman & Company.

Q83. And what function had the Modern Pen Company? A. Well, ostensibly they were to be the selling agents of the manufactory of A. A. Waterman & Company. But actually A. A. Waterman & Company was not to do anything.

Q84. Did you still balance accounts between the firm and the Modern Pen Company? A. No; there were no accounts at all, no relationship in the matter.

306 Q85. The entire business was done by the Modern Pen Company? A. Yes, sir.

Q86. Did they bill goods from the copartnership to the Modern Pen Company? A. No.

Q87. Did the partnership have any office? A. Yes. I think the name was on the old door; always had been up there. They had the same offices they used to have when it was a dual relation between A. A. Waterman & Company and the Frazer & Geyer Company, and this was kept up, I think the name probably is there yet.

Q88. Now, what was said by the Chapmans to secure the use of your name under this partnership of June 12, 1905? A. Why, there is a clause there somewhere—

Q89. Never mind that. What was the conversation between you and Chapman there, I. E. Chapman or W. L. Chapman, about securing the use of your name for this partnership of June 12, 1905? A. That almost goes without saying that *sin que non*, I was to go into it and drop out after a certain time, and they were to continue the name.

Q90. For how long were they to continue the name? A. For the time of that old partnership, I think forty years. Perhaps about 35 left then.

Q91. After you got out of the partnership how long were they to continue the use of your name? A. Perpetual—I do not suppose it would be beyond the life of the partnership, which would be about thirty-five years. It was to go to their heirs. 308

Q92. What was said by the Chapmans about securing the use of your name, and for what period, in this contract of June 12, 1905? A. I do not remember that they seemed to have any desire to hold the name beyond the period of the contract, the limits of the contract, but they should have it if I dropped out or died. I remember that.

Q93. If you dropped out of the partnership? A. Yes, if I dropped out of the partnership for any cause that I have very clearly in my mind. I cannot tell about the exact wording of their conditions.

Q94. Do you remember whether you transferred the right to use the name of A. A. Waterman and the firm name of A. A. Waterman & Company, perpetually, to this new partnership? 309
A. Yes, I remember there was a remark about perpetual.

Q95. Do you remember any conversation you had with Chapman or either of them, about this perpetual use of your name and the name of A. A. Waterman & Company? A. Why, it seems to me they wanted it perpetual, but I did not attach any importance to it, because I would be dead and gone before the partnership was over, and I thought they could have anything they wanted. To me it was sufficient that I had the intention of going into western business and staying there, and having no more to do with the east, and did not care what they did.

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Q96. Was this arrangement about the division of territory continued? A. Yes, it was continued but in a modified way.

Q97. What was said to you by Isaac E. Chapman about starting in business under your own name, under this contract of June 12, 1905? A. About my going into business?

Q98. Yes? A. I do not think he said much to me about my going into business in my own name or incorporating. Of course it was all provided for in the contract that I should do so, and he said if I incorporated he would be curious to watch the result of it, but I did not feel very friendly to him then and did not take him very much into my confidence as to what I was to do in the west after the thing was through.

311 Q99. Did he say anything to you about the participation in the management you should have in this new copartnership? A. Oh, that was effectually provided for that I should have none at all.

Q100. Did you, as a matter of fact, have anything to do with the management of this new partnership? A. No, nothing whatever.

Q101. What did you actually do under this partnership agreement of June 12, 1905? A. I was a salesman for the Modern Pen Company.

Q102. For the Modern Pen Company? A. Yes, sir.

Q103. Did you advise with the Chapmans about the business of A. A. Waterman & Company? A. Well, only so far as we

312 talked of the lines of goods and the literature, the Modern Pen Company would, yes.

Q104. Only as the Modern Pen Company would use it? A. Yes, sir.

Q105. Did I. E. Chapman say anything to you with reference to his desire to secure the use of your name for the fountain pen business? A. Yes, that was gone over from the start repeatedly.

Q106. That he wanted your name, that he wanted to use your name in the fountain pen business? A. Why, certainly.

Q107. Did you ever ask I. E. Chapman or W. L. Chapman for a voice in the management of the partnership? A. Not after the partnership was made.

Q108. Before it was made? A. Yes, I strove to get a position there that would give me more or less control of the business, but it was impossible.

Q109. What did they say? A. I was not financially important; my experience was not sufficient. They were the ones to furnish the money and manage the business.

Q110. And did they say to you that all they wanted of you was the use of your name? A. Well, not all, but that was the large asset, that was the reason for making the partnership; would not have made that with me if I had had some other name.

Q111. With whom did you have these conversations? A. Chiefly with I. E. Chapman. Sometimes with W. L. Sometimes with some of the investors or stockholders 314

Q112. Who drew this contract of June 12, 1905? A. Col. Bacon. Some changes were made at my instance.

Q113. What reorganization, if any, took place in 1905, in the Frazer & Geyer Company? A. The stockholders of Frazer & Geyer Company took stock in the Modern Pen Company, and paid something equivalent to an assessment; they paid a premium to get the stock. I think it was 20% on the new stock issue, twenty or twenty-five per cent. It was twenty per cent because I held five thousand dollars of the stock, the old stock, and I took that amount in the new, and agreed to pay a thousand, and then I put my stock in as security for some notes that I gave the Chapmans to make these payments. 315

Q114. Who did you give the notes to? A. I do not remember whether I gave them to I. E. Chapman personally or to the Modern Pen Company. I think it was the Modern Pen Company.

Q115. What happened to your stock? A. I refused to pay after we got at loggerheads. I paid part of it, and they sued me on the notes.

Q116. Who sued you? A. I think the Modern Pen Company. The suits were brought in Chicago. Yes, it must have been the Modern Pen Company, because I became bankrupt last winter and I stated there were judgments in favor of the

Modern Pen Company. They retained the stock, of course. The stock was notified and sold off in New York. I remember seeing notice, and I tried to get some friends of mine to go and make them pay high for it. I remember that. It was a legal sale to satisfy these judgments, I suppose.

Q117. Now, what was said to you by the Chapmans in reference to going into business under your own name and management? A. That is a pretty comprehensive question—what is that?

Q118. What was said to you by the Chapmans about going into business under your own name and management, under
317 these contracts of June 12, 1905? A. Do you mean what was provided for in the agreements?

Q119. No, what conversations did you have with them about going into business? A. You mean the reasons for going into business, or the plans for going into business, or what?

Q120. The reasons or plans for going into business? A. The reason was I wanted a separate business was because the New York business was not managed to my liking. I wanted to organize a business in the west and take hold of the field I had travelled over, and have it for my own. They conceded that to me reluctantly, if I would do certain things. One of these things was to form this partnership—

Q121. That is the partnership of June 12, 1905? A. Yes. They got Frazer out of it, and they got control as the chief
318 monied interest.

Q122. And that was one of the conditions on which the partnership of June 12, 1906, was made? A. Yes. I know one day Chapman says to me, if Frazer gets out will you make a partnership with me and my brother, if you can have your own way about the western territory, and I said yes, I would.

Q123. Was there anything said at that time to you about your dropping out of the partnership in the east? A. No, that was put in, I think, when we drew the partnership. I do not remember if it was part verbal—that was part of the verbal condition. For instance, I do not think he said to me, "Will you

form a partnership with us, and then drop out?" But it was provided for when we came to discuss the papers. 319

Q124. Well, did they insist or say anything to you about dropping out July 1, 1906? A. It was insisted on or they would not have signed the papers. They insisted on that as one of the conditions, yes.

Q125. That is, they required that you should drop out July 1, 1906? A. They required many things. That was one of them, that was one of the essential things, else they would not give me so good terms in the west. I asked for all the territory in the west; I asked them to keep out of all the territory west of a certain zig-zag line, and they said they would, if I did certain things for them. 320

Q126. One of these things was that you were to quit this partnership on July 1st? A. Yes, sir; and that was absolute.

Q127. Did they say they intended to continue the business in your name after July 1, 1906? A. Well, they wanted to be free to; they did not make any understanding to me to perpetuate the name, but they wanted to be free too. I was not sure that my name would stay in New York. They might sell it to L. E. Waterman, for all I knew.

Q128. They wanted to be free to use your name? A. They wanted to be free to use it, or play with it, or whatever they wanted to do.

Q129. And were you to have the right to come back in the east and start in business under your name? A. No. 321

Q130. Now, what was said in reference to your starting in business, the fountain pen business, anywhere, under your own name or firm name, provided that you did not go in business in the west under the terms of this contract of June 12, 1905? A. That is, provided I stopped being salesman and going into business both?

Q131. Yes? A. Then I was to quit the business. I was out.

Q132. Do you mean that they required that you should never go into the fountain pen business under your own name? A. Yes. I cannot say that was expressly stated in the partnership, but I think that was the intention of it.

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Q133. That was said to you? A. That was the consideration proposed. I offered as much. I wanted to get certain points in order to get my western opportunity. I was ready to concede most anything to get it.

Q134. Was that one of the requirements made as a condition of granting you this western territory? A. Why, yes, it was. I do not think I could have got any agreement out of them with that left out. I remember what stress they laid upon it. We always discussed half a dozen things at once, that and other things, and so they would always shade one thing and not another.

323 Q135. Was anything ever said by the Chapmans about continuing an independent business under any other name than your own? A. No. I think there was a casual mention of the fact that they were at liberty to do what they pleased—because that is obvious. It was clear to my mind that they would not take any other name than my name.

Q136. Did they say they wanted to use your name because it was "Waterman"? A. Well, I think they were cautious to say because it was A. A. Waterman. I have heard them say to the stockholders that that Waterman was a big asset. I had lectured them so much on the prior rights of the L. E. Waterman Company and that old injunction, that they were rather cautious how they spoke to me about it.

Q137. Now, what did you do with reference to entering into
324 business in the western territory prior to July 1, 1906? A. What plans did I make?

Q138. What did you do? A. Well, I worked for the Modern Pen Company, building up the trade as representative for them, for that period. That is, over a year, and laid my plans to go into business in the west.

Q139. Did you go into business in the west? A. Yes, July 1, 1906.

Q140. Since that time have you had any connection with the firm of A. A. Waterman & Company, composed of W. L. Chapman and Isaac E. Chapman? A. No.

Q141. Have you received any profits or employment from them? A. No, sir.

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Q142. Have you sold any goods for the firm? A. No, sir.

Q143. Received any commissions? A. No, sir.

Q144. Done any joint advertising with the firm? A. No.

Q145. Have you used any trade-marks, trade names, or patents, in which the partnership of A. A. Waterman & Company and the Modern Pen Company has any interest or rights? A. Why, yes, you speak of the Chicago business, then by their arrangement they were to use the same names and trade-marks that we used in the east.

Q146. But you personally? A. Personally I have not.

Q147. Have you taken out any patents or improvements on patents since July 1st, 1906? A. How would that effect them.

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Q148. Under the terms of the contract that they had the right to use it? A. No.

Q149. Have you used any patents which the Chapmans or the Modern Pen Company had taken out since July 1st, 1906? A. Personally?

Q150. Yes? A. No, not at all. Of course, there has always been that relation all the time—

Q151. Has any partnership of which you are a member, used any patent or taken out any letters on patents since July 1, 1906, in which the Chapmans have any rights or the Modern Pen Company have any rights? A. No.

Q152. Have you or any member of the firm of A. A. Waterman & Co. entered into any agreement as to the minimum price that goods are to be sold for in eastern and western territory?

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A. I personally?

Q153. You personally, with any member of the firm of A. A. Waterman & Company? A. No.

Q154. Is there any firm of A. A. Waterman & Co., in which you are interested, or of which you are a member? A. No, there is A. A. Waterman & Company, a corporation of Chicago, and a firm of the same name in New York. I have no connection with or interest in either concern.

Mr. Raymond: This closes the direct-examination of the witness.

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Mr. Emmons: We ask at this time for a continuance of the taking of this deposition for one week, to enable me to get advices from New York, so that I may be able to properly cross-examine the witness.

Mr. Raymond: I object to any continuance of the taking of this deposition.

Mr. Hopkins: I will deny the application for a continuance.

At this time, for the purpose of permitting the stenographer to prepare a transcript of the deposition taken, an adjournment was taken until September 15th, 1910, at the hour of 10 A. M.

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And now on this 15th day of September, 1910, at ten o'clock A. M. of said day, counsel for the respective parties appeared, and by agreement, the hearing was continued until the hour of 3 o'clock P. M. of said day.

And now, at 3 o'clock P. M., this 15th day of September, 1910, the respective counsel and the witness being present, the hearing of said deposition was proceeded with as follows:

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Mr. Emmons: I renew my motion for a continuance of this hearing until I have had time to hear from counsel in New York, so that I may be advised in relation to the same.

CROSS-EXAMINATION by Mr. Emmons:

XQ1. How long have you been in the manufacture of fountain pens? A. Since July, 1897, until July 1st, 1906.

XQ2. Then you were engaged in the manufacture of fountain pens prior to 1905? A. Yes, sir. My firm was. I had everything in a firm style at that time.

XQ3. How did you mark the pens manufactured and sold by you during that time? A. I do not know how to answer that. You understand I was manufacturing in the sense that I was a member of a firm. The firm's name I could give you.

XQ4. Were any of the pens manufactured and sold by you, or the firm of A. A. Waterman or A. A. Waterman & Company? A. Yes, sir.

XQ5. If so, for how long a time before 1905, did you manufacture pens and mark them A. A. Waterman? A. They were manufactured and sold as A. A. Waterman from February, 1899, until the following June. The various firms manufactured them all the rest of the time.

XQ6. For how long a time before 1905 did you manufacture 332
pens and sell them, marked A. A. Waterman & Company? A. That makes it nearly eight years.

XQ7. Is it not a fact that for a period of ten years prior to 1905, you were actively engaged in the manufacture and sale of fountain pens? A. No.

XQ8. Marking them A. A. Waterman or A. A. Waterman & Co.? A. The first pens so marked were manufactured in 1897.

XQ9. Were you continuously in business from 1898 to July 1st, 1906, in New York or Boston, and always openly manufacturing and selling fountain pens under your own name? A. Almost continually.

XQ10. For what period of time were you out of business? 333
A. When they were marked A. A. Waterman I was not very active. Probably half the period mentioned I did not handle any pens.

XQ11. Was this fact known to L. E. Waterman & Company? A. Yes, whatever I did was pretty well known to them.

XQ12. When did you first go into partnership with I. E. and William L. Chapman? A. In the spring of 1905.

XQ13. Was this partnership agreement in writing, that you had with them? A. Yes, sir.

XQ14. For how long a time was it to continue? A. It was to continue for thirty-five years, I think.

XQ15. Has this period expired yet? A. That period has not expired.

XQ16. Has the partnership ever been dissolved? A. As to me it has been dissolved, by my retiring.

XQ17. As a matter of fact, the partnership agreement is still in existence, and there has never been any dissolution of the partnership, has there? A. I can only speak from personal knowledge of having stepped out of it, by hearsay,—they are going on using the name of A. A. Waterman & Company.

Mr. Emmons: I renew my request that this hearing be continued until such time as I may have an opportunity
335 to cross-examine the witness further; or that it be adjourned to some other place where the witness can be examined.

Mr. Raymond: I object to this on the ground that it appears that counsel for the defendant had ample time to send his papers to Seattle, but instead of so doing, sent them to Minneapolis. And if he has lost any opportunity to more fully cross-examine, it is due to his own fault.

RE-DIRECT EXAMINATION by Mr. Raymond:

RDQ1. Do you know what office I. E. Chapman, referred to in your direct-examination, as the one with whom you had the conversations, held in the Frazer & Geyer Company, during
336 the times mentioned in your direct-examination? A. I think Mr. Chapman was simply a director of the Frazer & Geyer Company.

RDQ2. Do you know what office he held in the Modern Pen Company during the times when you held these conversations with him? A. He was president of the Modern Pen Company. But I will say that large part of the conversations were held prior to the existence of the Modern Pen Company, during its formative condition.

RDQ3. Now, do you know what office William L. Chapman held in the Frazer & Geyer Company, at the times when you

had the conversations with him? A. I am not sure that he held any position at all.

RDQ4. Do you know what office he held in the Modern Pen Company? A. Treasurer and secretary, I think of the Modern Pen Company.

Deposition closed.

ARTHUR A. WATERMAN.

UNITED STATES CIRCUIT COURT,

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SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

against

MODERN PEN COMPANY,
Defendant.

Testimony on Behalf of Plaintiff.

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Testimony taken before A. M. Parkins, a notary public in and for the District of Columbia, at her office, Room No. 516, Washington Loan & Trust Building, Ninth & F Streets, Northwest, in the City of Washington, District of Columbia, on the Twenty-ninth day of December, 1910, pursuant to notice annexed hereto; testimony taken for final hearing on behalf of the plaintiff.

Appearances:

Samuel S. Watson, for Plaintiff.
Alexander S. Bacon, for Defendant.

340 Mr. Bacon: I object to the taking of this testimony, on the grounds that the time for the plaintiff to take testimony in this action has long since expired.

Mr. Watson: Counsel for plaintiff states that pending the determination of a motion for a preliminary injunction in this action, he received a letter from the attorney for the defendant, suggesting that no further action be taken in the prosecution of this case until after a determination of the proceedings on the preliminary injunction. That acceding to this suggestion no testimony was taken in this action until after the Circuit Court of Appeals had passed on the injunction matter.

341 Mr. Bacon: I call for the production of the letter and for any other letter or writing in which the plaintiff's attorney acceded to any suggestion that may have been contained in any such letter.

Mr. Watson: Counsel for plaintiff has not the letter here at this time, but will produce it at the next hearing and the record will show that he acceded to the suggestion contained in the letter, in as much as no testimony was taken after the receipt of that letter until after the determination of the preliminary injunction proceedings in the Circuit Court of Appeals.

342 JOHN SAADI, a witness on behalf of the plaintiff, being first duly sworn, deposes as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, age, place of residence and occupation? A. John Saadi, 45, Washington, D. C., 602 Ninth Street, N. W., jewelry merchant.

Q2. Are you here under subpoena? A. I am.

Q3. When was that subpoena served on you? A. Last week.

Q4. You are in business in the City of Washington, D. C., at No. 602 Ninth Street, N. W., are you not? A. I am, yes, sir.

Q5. How long have you been in business there? A. I think this is my third year.

Q6. You were the defendant in an action brought by the L. E. Waterman Co. for infringement of trade-marks and unfair trade in the selling of fountain pens, were you not? A. Yes, sir.

Q7. That case has gone to final hearing and an injunction order issued thereon? A. Yes, sir.

Mr. Bacon: Objected to as immaterial, incompetent and not the best evidence, and all objections are made for the purpose of presenting them for final hearing.

Q8. Have you at any time sold fountain pens which were marked Royal Ideal Pens or A. A. Waterman & Co.? A. I sold Royal Ideal Pens and the points marked A. A. Waterman & Co. 344

Q9. From whom did you get these fountain pens? A. From A. A. Waterman & Co. or the Modern Pen Co.

Q10. Where is their place of business? A. 22 Thames Street, New York City.

Q11. I show you a fountain pen and ask you if that is a fair sample of the fountain pens which you received from the Modern Pen Co. or A. A. Waterman & Co., which you sold and which were marked Royal Ideal Pen and which also bore the name of A. A. Waterman & Co.? A. Yes, sir.

Mr. Watson: The plaintiff offers the pen identified by the witness in evidence and asks that it be marked "Plaintiff's Exhibit No. 14." 345

(The pen is so marked.)

Q12. When did you begin to get pens like Exhibit No. 14, and marked as that exhibit is, from the defendant? A. The latter part of the summer of 1910—I mean 1909—1909.

Q13. You previously testified, did you not, that you begun to get these pens and sold these pens in the early summer of 1909? A. Well, during the summer—it was during the summer of 1909.

Q14. How long did you continue to get these pens like Exhibit No. 14 and marked as that exhibit is, from the defendant? A. Until the fall of 1909.

346 *John Saadi*

Q15. You got some of these pens marked as Exhibit Fourteen is as late as December, 1909, did you not? A. December, 1909—the early part, I think it was.

Q16. You testified in your former deposition, in the action in which you were the defendant, and L. E. Waterman Co. was the plaintiff, did you not? A. I did.

Q17. And in that deposition you testified that you received thirty-nine dozen of these pens in December, 1909, did you not?

Mr. Bacon: Objected to as very leading, irrelevant and incompetent.

347 A. Yes, sir.

Q18. Prior to the receipt of that bill of fountain pens, you had received a considerable stock of these pens, had you not? A. Not a considerable stock.

Q19. You had a stock of these pens in hand prior to December, 1909? A. Yes, sir.

Q20. And you had had all the time from sometime in the summer of 1909 until sometime in December, 1909? A. Yes, sir.

Q21. And you received all of these fountain pens from the defendant in this case, did you not? A. Yes, sir.

Q22. And you received these fountain pens in the same shape as you sold them, did you not? A. Yes, sir.

348 Q23. And you received them marked in the manner similar to the marks on Exhibit Fourteen, did you not? A. Yes, sir.

Q24. These were complete fountain pens when you received them from the defendant? A. Yes, sir.

Q25. You sold the fountain pens like Exhibit Fourteen in boxes similar to the one I now show you, did you not? A. (Witness after examining box.) Yes, sir.

Q26. Were these boxes furnished to you by the defendant in this case? A. Yes, sir.

Mr. Watson: Counsel for plaintiff offers the box identified by the witness in evidence, and asks that it be marked "Plaintiff's Exhibit No. 15." The box bears the im-

printing, "Royal Ideal Pen Co., 244 Steuben Street, Brooklyn, N. Y.—Royal Ideal Pen—Fountain Pen 14 Karat Gold—Sales Office 602 Ninth Street, N. W., Washington, D. C." The fountain pen (Exhibit No. 14), bears the imprinting "Royal Ideal Pen—Fountain Pen—14 Karat Gold," and in back-ground is some device that looks like part of the representation of a globe. The pen also bears the name "A. A. Waterman & Co., N. Y.," and the figure "1" underneath it.

Q27. Mr. Saadi, can you produce such books of account, memoranda, bills, letters and other data which you have, which shows the receipt by you of fountain pens from the defendant, 350 bearing the marks similar to the marking on Exhibit Fourteen? A. All I have I gave to you the last time.

Q28. Do you not keep any books of account? A. No, sir.

Q29. Do you keep no record of the goods you receive? A. No, sir.

Q30. You do business also in Richmond, Virginia, and Wilmington, Delaware, do you not? A. Well, I used to in Richmond, Virginia, but I gave it up—it did not pay.

Q31. You gave it up? A. Yes, sir—it was not paying and I started to do business about five weeks ago in Wilmington.

Q32. You were selling fountain pens received from the defendant, which were marked similar to Exhibit Fourteen, in Richmond, Virginia, and during the same time that you were 351 selling these pens in Washington, were you not? A. Yes, sir.

Q33. And you carried a stock of these pens in your Richmond store at that time, did you not? A. Yes, sir.

Q34. Did you stop selling these pens which were marked similar to Exhibit Fourteen, and when? A. Yes, sir, I did; as soon as the justice gave his opinion that it is an infringement or something to that effect.

Q36. You refer to Justice Barnard's opinion, that the pens similar to Exhibit Fourteen were an infringement? A. Yes, sir.

352 *John Saadi*

Q37. And that opinion was to the effect that pens marked like Exhibit Fourteen were an infringement of the L. E. Waterman & Co.'s trade-marks and trade names, was it not? A. Yes, sir.

Q38. That decision or opinion was given orally, was it not? A. Yes, sir; it was given orally.

Q39. When was that opinion given? A. I cannot give the exact date—just before Christmas.

Q40. What did you do with the fountain pens which were marked like Exhibit Fourteen, after you stopped selling them in December, 1909? A. Destroyed the name—the imprint, I mean, and changed the pen points.

353 Q41. Where did you do that? A. I changed the pen points in New York—at the A. A. Waterman & Co. factory.

Q42. Where did you change the marking on the rubber holder of the fountain pens? A. I burnt it myself.

Q44. Did you send these fountain pens to the defendant or the A. A. Waterman & Co. of New York, to have them change the gold pens in them? A. No—I took the gold pen out of the pens and gave them to them to change.

Q45. You did not send the whole pen to New York, to have the change made? A. No, sir.

CROSS-EXAMINATION by Mr. Bacon:

354 By Mr. Bacon: Cross-examination is made subject to the specification at the beginning of the testimony as to the plaintiff's time not being extended by order or consent.

XQ46. How long have you been dealing in fountain pens? A. Several years—eight or nine years or over.

XQ47. How long have you been buying pens of A. A. Waterman & Company? A. I think about four years or little over.

XQ48. Referring to Exhibit Fourteen of this date is any part on it marked Royal Ideal Pen except on the holder? A. No, sir.

XQ49. The pen point is marked A. A. Waterman & Co. A. Yes, sir.

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XQ50. And no part of the pen excepting the point is marked A. A. Waterman & Co? A. No, sir, no part at all.

XQ51. Did all of the pens that you bought from A. A. Waterman & Co., where the holders were marked Royal Ideal Pen have pen points bearing the name A. A. Waterman & Co., or were some of them blank? A. Some of them were blank.

XQ52. How many styles of that pen did you buy? A. Three styles, I think.

XQ53. How many had A. A. Waterman & Co. pen points in them? A. Two styles.

XQ54. Were there not two styles of each? A. Some of them were with the words "14 Karat" and some were not.

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XQ55. Can you tell how many of each you got at any time outside of that bill you are now reading or looking at? A. No, sir, they were mixed.

XQ56. Then after Judge Barnard heard the argument and reserved decision on December 17th, did you sell any pens marked "Royal Ideal Pen"? A. No, sir.

XQ57. Did you immediately erase the word "Ideal" from all pens or penholders in your possession on that date? A. Yes, sir.

XQ58. I believe you have stated that none of the holders bore the name A. A. Waterman & Co.? A. No, sir.

XQ59. Did you, at any time, advertise fountain pens without the name A. A. Waterman & Co.? A. No, sir.

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XQ60. Do you remember going to New York the first time any penholders were ordered marked Royal Ideal Pen? A. Yes, sir.

XQ61. Is this your handwriting? A. Yes, sir.

XQ62. Did you give this to Mr. Geyer with whom you made the arrangements? A. Yes, sir.

Mr. Bacon: This is offered in evidence and I ask that it be marked "Defendant's Exhibit C."

Mr. Watson: Objected to as immaterial and irrelevant.

XQ63. This memoranda that you gave to Mr. Geyer contains the statement "Registered in United States Patent Office No. 14975"? A. Yes, sir.

358 *John Saadi*

XQ64. Did you have a trade-mark registered as of that number? A. Yes, sir.

Mr. Watson: Objected to as incompetent and not the best evidence.

XQ65. Have you the Patent Office registers here? A. Yes, sir.

XQ66. Are these they? A. Yes, sir.

XQ67. Then you had two trade-marks registered? A. Yes, sir.

Mr. Watson: Objected to as incompetent and not the
359 best evidence.

XQ68. These are the only two? A. Yes, sir.

Mr. Bacon: I offer this in evidence. This certificate bears the words and figures "No. 14919, May 20, 1909," and it is registered by "John Saadi of Brooklyn, N. Y., and Washington, D. C."—"deposited in this office for registeration a label of which the following is the title 'Royal Ideal Pen (for fountain pens)'" and I ask that it be marked "Defendant's Exhibit D."

Mr. Watson: Objected to as incompetent and immaterial and irrelevant and on the further grounds that it is not a trade-mark.

360 Mr. Bacon: I offer in evidence "Defendant's Exhibit E"—certificate of registration No. 14975, dated June 17, 1909, registered by John Saadi of Washington, D. C., "deposited in this office for registration a label of which the following is the title 'Royal Ideal Pen for fountain pens.'"

Mr. Watson: Same objection as above.

(Stipulation by Counsel.)

It is consented that Mr. Saadi may retain these originals and that Patent Office copies may be used in their places.

Mr. Bacon (continuing examination):

XQ69. When you ordered these penholders marked Royal Ideal Pen did you at that time already have these trade-marks registered? A. Yes, sir.

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XQ70. Did you believe that you had a perfect right to use that name?

Mr. Watson: Objected to as entirely immaterial, irrelevant and incompetent.

A. Yes, sir.

XQ71. About how many penholders did you ever sell that bore the imprint Royal Ideal Pen? A. I have not sold one gross—may be less, but not more.

Mr. Watson: That is objected to as immaterial.

XQ72. After the Judge's oral decision did you send back to the A. A. Waterman Co. the gold pen points bearing their names? 362
A. Yes, sir.

XQ73. And since that time have you sold any fountain pens or any pen points bearing their name? A. No, sir.

XQ74. Of the gross that you sold how many of them do you think had pen points in them bearing the name of A. A. Waterman & Co.?

Mr. Watson: Objected to as incompetent and immaterial.

A. I cannot tell you exactly; I have no record of them. May be one-third and may be one-fourth.

XQ75. How long have you been using a trade-mark or device of a circle or globe with Africa inside of it? 363

Mr. Watson: Objected to as immaterial.

A. About ten years—may be nine years.

Mr. Bacon: That is all.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ76. When you bought these pens from the defendant which were marked like Exhibit Fourteen, whom did you buy them from? A. A. A. Waterman & Co.

264 *John Saadi*

RDQ77. Whom did you see when you bought them? A. Mr. Geyer.

RDQ78. The gentleman who is present here? A. Yes, sir.

RDQ79. Mr. Hobart W. Geyer? A. Yes, sir.

RDQ80. When did you first see him about buying these pens? A. About the summer of 1909.

RDQ81. And you begun to receive the pens shortly after that time? A. Samples; yes, sir.

RDQ82. When did you first receive your stock of these goods? A. Summer of 1909.

RDQ83. When did you see Mr. Geyer again after you made
365 your arrangements to buy these pens like Exhibit Fourteen? A. When I am in New York I call in to see him.

RDQ84. Did you not see him in December, 1909? A. No, sir.

RDQ85. The L. E. Waterman Co. begun action against you here in December, 1909, did it not? A. Yes, sir; but I did not see him in December, that was before Christmas—no, sir, I did not see him in December.

RDQ86. When did you see him after the action was begun? A. In January.

RDQ87. What did you say to him when you saw him in January? A. I told him that it seems that I cannot sell the Royal Ideal Pen and I have to change the words A. A. Waterman & Co. from the point and he said that he would change them.

366 RDQ88. You told him about the suit here? A. I did.

RDQ89. You told him that the L. E. Waterman Co. was bringing suit against you for selling pens marked with the words Royal Ideal Pen? A. Yes, sir; Royal Ideal Pen and any pens bearing the name of A. A. Waterman & Co.

RDQ90. And that was in January, 1910, or after Christmas? A. Yes, sir, right after Christmas.

RDQ91. Was it right after Christmas? A. I made him know of it as soon as I was served with the notice.

RDQ92. You wrote him a letter? A. I sent him a telegram.

RDQ93. Did you also write him? A. I did. I think I did—I do not keep records of my letters.

Mr. Watson: Counsel for plaintiff calls upon counsel for defendant to produce at the next hearing letters and telegrams received from John Saadi regarding these pens marked Royal Ideal Pen.

Mr. Saadi (the witness): The telegram was not for that Mr. Watson. The telegram was for them to give me the decision of the Court some eight years ago. That was the telegram and they sent me the decision of the Court, so the lawyers here could understand about how to defend the case of A. A. Waterman & Co.

RDQ95. You knew about that decision before this action was brought against you by the L. E. Waterman Co. did you not? A. 368
Yes, sir.

RDQ96. At or about the time that you sent this telegram, did you not also write the defendant or A. A. Waterman & Co. about this suit against you by the L. E. Waterman Co? A. I may have written.

RDQ97. About how many times did you see Mr. Geyer about this suit after it was begun against you by the L. E. Waterman Co.? A. Before or after it was begun?

RDQ98. After it was begun? A. I cannot tell you—two or three times.

RDQ99. You saw him in New York? A. Yes, sir.

RDQ100. And he was the man in charge of A. A. Waterman & Co. at that time? A. Yes, sir.

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RDQ101. He was in charge of the office and general manager of A. A. Waterman & Co. and the defendant? A. Yes, sir.

RDQ102. Do you remember me calling on you in November, 1909, about a month prior to the beginning of action against you by the L. E. Waterman Co. and notifying you that these pens marked like Exhibit Fourteen were infringements of the L. E. Waterman Co. trade-marks and trade names? A. I remember seeing you at the store buying a fountain pen and telling me that I had no right to sell these kind of pens.

RDQ103. That was about three or four weeks before suit was brought against you was it not? A. I cannot remember.

RDQ104. And you continued to sell the pens just the same after I notified you not to? A. I did.

RDQ105. And you continued to sell them until Justice Barnard passed his oral opinion just before Christmas, 1909? A. Yes, sir.

RDQ106. You advertised these pens in the newspapers did you not? A. I did.

RDQ107. And you advertised them in connection with the name Royal Ideal Pen and also in connection with the name A. A. Waterman & Co.? A. I did.

RDQ108. And you had a large sign on your window in which
371 these pens were displayed? A. Yes, sir.

RDQ109. That sign read "Fountain Pens"? A. Yes, sir.

RDQ110. And you also had on that window the name A. A. Waterman & Co.? A. Yes, sir.

RDQ111. And also the words Royal Ideal Pen? A. Yes, sir.

RDQ112. And you had a number of signs in the window where these pens like Exhibit Fourteen were displayed which bore the name Royal Ideal Pen? A. Yes, sir.

RDQ113. Also these signs bore the name A. A. Waterman & Co.? A. Yes, sir.

RDQ114. How long have you used the device which looks like a globe on fountain pens? A. On fountain pens?

RDQ115. Yes? A. Since the summer of 1909.

372 RDQ116. You never used it before that time did you on fountain pens? A. No, sir; not on fountain pens.

Mr. Watson: That is all.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ117. You used it on letter heads, labels and such as that did you not? A. Yes, sir.

RXQ118. A. A. Waterman & Co. or the Modern Pen Co. did not have anything to do with your signs? A. No, sir.

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RXQ119. And on the window was the name Royal Ideal Pen in connection with the words A. A. Waterman & Co. and on the opposite side were the words "Fountain Pen"? A. Yes, sir.

RXQ120. The words "fountain pen" were in big letters and on one side was Royal Ideal Pen and on the other side was A. A. Waterman & Co.? A. Yes, sir.

RXQ121. Have you paid for the last bill of goods sent you? A. No, sir.

Mr. Watson: Objected to as immaterial.

RXQ122. How much do you owe them on their bill for fountain pens marked Royal Ideal Pen?

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Mr. Watson: Objected to as immaterial.

A. $236.00.

RXQ123. About how long have you owed them? A. Since December, 1909.

Mr. Watson: Objected to as immaterial.

Mr. Watson further examines witness.

RXQ124. Mr. Saadi, how large were the letters bearing the name A. A. Waterman & Co. and Royal Ideal Pen on your window? A. About one and one-half or one and three-quarters inches high.

Mr. Watson: That is all.

JOHN SAADI. 375

376 *Harry H. Hollander*

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMEN COMPANY,
Plaintiff,

vs.

MODERN PEN COMPANY,
Defendant.

377 Testimony taken for final hearing, before A. M. Parkins, Notary Public in and for the District of Columbia, at her office, Room 516 Washington Loan & Trust Building, Washington, D. C., on January 18th, 1911, at 10:30 A. M., pursuant to the annexed notice.

Appearances:

Samuel S. Watson, Esq., for Plaintiff.
Alexander S. Bacon, Esq., for Defendant.

HARRY H. HOLLANDER, a witness produced on behalf of the plaintiff, being first duly sworn deposes and says as follows:

378 Q1. You are an attorney and counselor at law? A. Yes.

Q2. Residing and practising in the City of Washington, District of Columbia? A. Yes, sir.

Q3. You were the attorney of record for Mr. John Saadi in a case in equity in the Supreme Court of the District of Columbia, in which the L. E. Waterman Company of New York was the plaintiff, were you not? A. Yes, sir.

Q4. You gave your testimony in that case? A. Yes, sir.

Q5. I show you a letter and ask if you received that letter in due course of mail? A. Yes, sir.

By Mr. Bacon: I object to that answer on the ground that it is privileged. A letter from a client cannot be tes-

tified concerning without the consent of the client.

By Mr. Watson: Counsel for plaintiff states on the record that the letter identified by the witness was produced at the taking of testimony in the case of L. E. Waterman Co. vs. John Saadi, in the Supreme Court of the District of Columbia (Complainant's Exhibit No. 14), and is a part of the court records in that suit, and therefore cannot be offered in evidence in this case. Counsel for plaintiff states that he has made application to the Court to release this exhibit, and the Court refuses. Counsel for plaintiff therefore asks the Examiner to make a true copy of this letter and include it in the deposition now being taken, and asks that the said copy be marked "Plaintiff's Exhibit 17." 380

By Mr. Bacon: Defendant's counsel states that this exhibit is not in an action between the parties hereto, and was not properly an exhibit in the Washington action, and was produced in that action without the consent of the witness' client, which client is now represented by myself in this matter; and on behalf of A. A. Waterman & Co. I object to the introduction of the letter on the ground that it was a privileged communication between attorney and client.

Q6. You testified in the Saadi case that you were the attorney for the Modern Pen Co. and A. A. Waterman & Co., of New York, and were protecting their interests in that case, did you not? A. I don't remember testifying exactly like that. I did testify that I was the attorney for the Modern Pen Co. and the A. A. Waterman Co., both of New York, but I don't think I testified that I was their attorney in that case, referring to the case of L. E. Waterman vs. Saadi. 381

Q7. Did you have any correspondence with Alexander S. Bacon, of New York, regarding the Saadi case? A. I think I did.

Q8. When? A. The date I don't remember.

Q9. Was it before the case went to final hearing? A. I think it was.

Q10. Was it before testimony in the case had been concluded? A. I think it was.

Q11. Do you consider the letter which I have just shown you, and which has been marked "Plaintiff's Exhibit 17," a retainer or employment of you as attorney or counsel for the Modern Pen Co.?

Br. Mr. Bacon: Objected to, as the letter speaks for itself, and is not the letter of the Modern Pen Co.

By Mr. Watson: Counsel for plaintiff objects to the remarks of defendant's counsel as an attempt to prompt the witness.

383 A. I do not.

Q12. Do you consider the letter, "Plaintiff's Exhibit 17," a retainer or employment of you as attorney or counsel for the A. A. Waterman Co.?

By Mr. Bacon: Objected to as the letter speaks for itself.

A. I do not.

Q13. Did you have other correspondence relating to the Saadi case, besides "Plaintiff's Exhibit 17," with the Modern Pen Co. or A. A. Waterman & Co. of New York? A. I think I did; I don't just remember at this time. I think I did.

Q14. Was that correspondence prior or subsequent to the re-
384 ceipt of the letter "Plaintiff's Exhibit 17"? A. I think I had correspondence both before and subsequent. Still I am not sure at this time.

Q15. Were you at any time prior to the beginning of the Saadi suit employed as attorney or counsel for the Modern Pen Co.? A. I think not.

Q16. Don't you know that you were not? A. I am pretty sure not.

Q17. Did you not say on your previous examination, in answer to that identical question, "No, sir"? A. I don't exactly remember at this time, but I don't think I was of counsel prior to that suit.

Q18. In any matter whatsoever? A. No, sir.

Q19. And you never were employed as counsel or attorney for A. A. Waterman & Co. prior to the Saadi suit? A. No.

Q20. In your deposition in the Saadi case, in your answer to the following question, namely: "Do you consider the letter (Complainant's Exhibit No. 14) a retainer or employment of you as attorney or counsel for A. A. Waterman & Co.?" Did you make the following answer: "I do, taken in connection with other correspondence." A. I made that answer, yes, sir.

Q21. And did you in your previous testimony in the Saadi case, in answer to the following question, namely: "The letter (Complainant's Exhibit No. 14) to which you have referred in your 386
last answer purports to emanate from A. A. Waterman & Co. and not from the Modern Pen Co. Do you claim the privilege on the ground that you are attorney for the Modern Pen Co?" Did you make the following answer: "Yes, sir." A. I did.

By Mr. Watson: Counsel for plaintiff offers in evidence a certified copy of the decree pa sed down by Judge Stafford in the Saadi case, filed December 5, 1910, and asks the Examiner to mark it "Plaintiff's Exhibit 18."

By Mr. Bacon: Objected to as irrelevant, immaterial and incompetent and not binding in any way upon the defendant.

Q22. You saw Mr. Bacon, attorney for the defendant, this morning before coming to testify, did you not? A. Yes, sir. 387

Q23. Did you see Mr. Bacon prior to the entering of the decree of Judge Stafford, Plaintiff's Exhibit 18? A. I did not.

Q24. Were you in correspondence with Mr. Bacon regarding the Saadi case prior to Dec. 5th, 1910? A. Yes.

Q25. Have you letters which Mr. Bacon wrote you at that time? A. I have no letters with me this morning.

Q26. I asked if you had them in your possession? A. I don't know Mr. Watson.

Q27. Don't you keep your letters? A. I usually do. I made no effort to look them up. I don't know whether I have or not.

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Q28. Will you look them up and produce them this afternoon at this hearing?

By Mr. Bacon: I object to an adjournment of this hearing, on the ground that there has been no subpoena to produce letters.

A. I cannot reply to this request.

Q29. Why? A. I have other engagements for one thing; secondly, there has been no proper demand made upon me for the production of these letters, if letters I have.

By Mr. Bacon: I object further on the ground that they
389 are confidential communications.

Q30. Do you refuse to produce them because they are confidential communications from your client, or your client's attorney? A. I most assuredly do.

Q31. You put your objection entirely on that ground? A. Well, at this time I not only put it upon that ground, but upon the further reason that there has been no proper legal demand made upon me for the production of those letters.

Q32. The demand is made in accordance with the Rules of Practice in Equity of the United States, and the subpoena calls for your attendance to testify here today. The notice which was served upon defendant's counsel, and pursuant to which he is present, calls for such adjournments as may be found convenient?
390 A. I adhere to my objections.

Q33. Am I to understand then that you refuse, without the ruling of Court, to produce the letters which you have testified you have received from Mr. Bacon relating to the Saadi case? A. I have no letters from Col. Bacon, so far as I can remember, that refer exclusively to the Saadi case. I have correspondence with Col. Bacon which I consider privileged communications.

Q34. Because you and Mr. Bacon are representing the same clients? A. Yes.

Q35. And these clients are the Modern Pen Co. and A. A. Waterman & Co.? A. Exactly.

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Q36. Do you know what became of the bill from the Modern Pen Co. to Mr. John Saadi, dated Dec. 4, 1909, which was introduced in evidence and marked "Complainant's Exhibit No. 15" in the Saadi case? A. It was turned over to the Examiner at the hearing of that testimony and I have not seen it since.

Q37. The original does not appear to have been filed in the case of the Examiner. He includes in his return a copy. I show you his minutes as filed in the Court and ask you if that is your recollection of the bill which was "Complainant's Exhibit No. 15" in the Saadi case?

By Mr. Bacon: Objected to as irrelevant, immaterial and incompetent in this case. Proceedings in that case are not binding upon this defendant.

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A. It looks like the original, but I would not attempt to say that those figures are correct, for the reason that it has been many months since this testimony was taken.

Q38. The copy I have shown you is the certified Court record copy from the files of the Supreme Court of the District of Columbia, is it not? A. It bears the file stamp of the Clerk of that Court, and the testimony appears to be signed by Robert L. Miller, the Examiner in that cause.

Q39. Don't you know Mr. Miller's signature? A. I do not.

By Mr. Watson: The Examiner is asked to make a true copy of this Exhibit ("Complainant's Exhibit No. 15" in the Saadi case) and plaintiff offers the same in evidence and asks that the Examiner mark it "Plaintiff's Exhibit 19" in this case.

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By Mr. Bacon: Objected to as irrelevant, immaterial and incompetent.

CROSS-EXAMINATION by Mr. Bacon:

XQ40. Did you present to Judge Stafford a copy of the opinion of the United States Circuit Court of Appeals in New York in this action? A. I did.

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XQ41. And on receipt of that opinion did he strike out of the decree as presented to him the paragraph which related to A. A. Waterman & Co.?

By Mr. Watson: Objected to as the decree shows for itself.

A. He did.

XQ42. Did the plaintiff's attorney in the Saadi case present to Judge Stafford a decree like the one finally entered, with the exception that it contained a separate paragraph prohibiting Mr. Saadi from selling pens bearing the imprint A. A. Waterman & Co.?

395

By Mr. Watson: Objected to as entirely immaterial, as the decree speaks for itself.

A. He did.

XQ43. And that is the paragraph that Judge Stafford struck out?

By Mr. Watson: Same objection.

A. That is the same paragraph.

XQ44. And that paragraph does not appear in the decree, so that the decree does not speak for itself as to this matter?

By Mr. Watson: Same objection.

396 A. That is correct.

XQ45. How long have you known the L. E. Waterman pen, or known of it?

By Mr. Watson: Objected to as not proper cross-examination.

A. For a number of years.

XQ46. How long have you known the A. A. Waterman & Co. pen?

By Mr. Watson: Same objection.

A. Also for a number of years.

XQ47. Do you know how people in general designate these pens?

By Mr. Watson: Same objection.

A. I have heard people speak of Waterman's pen, and at different times refer by that name to the L. E. Waterman pen, and have also had them refer to the pen of A. A. Waterman & Co.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ48. The decree in the Saadi case contains the following, doesn't it "That the defendant, John Saadi, has violated and infringed the rights of the complainant by advertising, representing, selling and dealing in fountain pens (not of complainant's manufacture) bearing the names and marks 'Royal Ideal Pen,' 'A. A. Waterman & Co.' which names and marks are an imitation and simulation and infringement of complainant's said trademarks and trade names." A. It does. 398

Examination of witness closed.

(Sgd.) HARRY H. HOLLANDER.

Subscribed and sworn to before me this 23rd day of January, 1911.

(Sgd.) A. M. PARKINS, 399
(Seal.) Notary Public, D. C.

400 **Plaintiff's Exhibit 17.**

Plaintiff's Exhibit 17, referred to in the deposition of Mr. Hollander.

Isaac E. Chapman. W. L. Chapman.

A. A. WATERMAN & CO.,

Cable Makers of New York

Modern and

Address Fountain Pens London.

New York, U. S. A.

401

Modern Pen London.
New York.

22 Thames St., Cor. Greenwich.

THE MODERN PEN COMPANY,
Sole Selling Agent.

New York, Jan. 13th, 1910.

Mr. Harry H. Hollander,
Columbian Building,
416 Fifth Street, N. W.,
402 Washington, D. C.

Dear Sir:

Your favor of the 11th inst. at hand and contents noted.

We have considered the matter of paying you for defending the injunction suit of L. E. Waterman Co. against John Saadi, and are of the opinion that the matter is not one of great importance to us, as the L. E. Waterman Co. could continue to bring these suits against our customers in any part of the United States, until we restrained them by an action here in New York from so doing. However, it goes against our grain to let a

decree be entered which affects us, without opposing it, at least to some extent.

Under the circumstances, if you would care to protect our interests, we would be pleased to pay you $100 for so doing, and in case you are successful in preventing them from getting a decree which would in any way interfere with our customer, Saadi, selling and advertising goods made by A. A. Waterman & Co., and so marked, we will pay you $250.

The complaint of the L. E. Waterman Co. in this action says nothing about the use of the name "A. A. Waterman & Co.," and we presume they left it out intentionally, on account of the injunction which they secured in New York, which expressly gave 404
A. A. Waterman & Co. the right to use such name; and we do not see how a judge, with a copy of that decision before him, can give them a broader decree than that received in New York.

In regard to the statement made by Mr. Watson as to A. A. Waterman having engaged in business, and going from one place to another, organizing copartnerships and corporations, we would state that Mr. A. A. Waterman came to New York some ten or twelve years ago and formed a copartnership, which was reorganized in 1905, but from which he withdrew in 1906 on account of not being able to agree with his partners. Since then his actions have been very detrimental to the New York firm of A. A. Waterman & Co.

We have been engaged in legitimate business selling our product to our customers distinctly as A. A. Waterman & Co. and 405
never in any way trying to give them to understand that they were made by the L. E. Waterman Co., or tried in any way to imitate their products or trade-marks.

Our principal pen is our "Modern Self Filling" pen, and there is no other firm in business which makes a pen that in any way corresponds to this. We claim that our pens are far superior to any other fountain pens made.

We have also been exporting our products from the United States to foreign countries.

When Mr. A. A. Waterman withdrew, the fact was advertised in the newspapers, according to law, and there is no reason why

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we should be made to suffer for Mr. Waterman's actions since withdrawing from the firm.

Yours very truly,

A. A. WATERMAN & CO.

IEC/RE.

CHARLES G. ALLEN, a witness produced on behalf of the plaintiff, being first duly sworn, deposes and says in answer to interrogatories by Mr. Samuel S. Watson, as follows:

407 Q1. Please state your name, residence and occupation? A. Charles G. Allen; attorney at law; residence, Florence Court, Washington, D. C.

Q2. At my request did you go with me to Mr. Saadi's store on Ninth Street, in Washington, and purchase a fountain pen? A. I did.

Q3. When was that, about? A. It was during the month of November, 1909.

Q4. When you purchased that pen, what did you ask for?

By Mr. Bacon: Objected to as irrelevant, immaterial and incompetent, and not binding upon this defendant.

A. For a Waterman Fountain Pen.

408 Q5. And what did you get? A. I got a pen, the trade name of which I am not exactly sure, so that I guess my answer will have to contain a description of it.

Q6. What was on the fountain pen? A. The pen, as nearly as I can remember, bore the name "Waterman" coupled with the initials "A. A." and it bore the imprint of a globe or sphere with a tracing of a continent on it.

Q7. Did it bear any other words that you remember? A. My impression is that it bore the words "Royal Ideal Fountain Pen."

Q8. Were there signs displayed in connection with these pens in Mr. Saadi's window and store? A. There were.

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Q9. And did they contain the name "Waterman" and "A. A. Waterman & Co."? A. They contained the name "Waterman," but whether "A. A. Waterman & Co." I am unable to state.

Q10. Did these signs contain the words "Royal Ideal Pen"? A. They did.

Q11. How many of these pens were displayed in the window and store of Mr. Saadi, so far as you could see? A. Mr. Saadi's store was divided by a central aisle opposite to the central entrance in the front, and the north half of the store, together with the north window was apparently devoted to the business of handling these pens.

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Q12. There were a large quantity of them in the window? A. To the best of my recollection, in the north window nothing but pens were displayed.

Q13. And a long case of these pens in the store on the north side? A. Yes.

Q14. Were quite a number of these pens shown you on which you saw these same words? A. Yes.

Q15. How long have you known about Waterman pens? A. Upwards of twenty years.

Q16. And what do you understand that I mean when I say "Waterman Pens"? A. I understand you to mean the Waterman Ideal Pen.

Mr. Bacon: Objected to as leading.

411

Q17. How long have you used Waterman Ideal Fountain Pens? A. For upwards of twenty years.

Q18. And when did it first come to your knowledge that there was another concern that was using the name of Waterman in the fountain pen business? A. About five years ago.

Q19. And how did you come to know about that? A. By conversation with yourself at Cape May, New Jersey.

CROSS-EXAMINATION by Mr. Bacon:

XQ20. You went to Mr. Saadi's store with Mr. Watson, at his request? A. Yes.

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XQ21. For the express purpose of buying a pen to be used in evidence? A. Yes.

XQ22. He furnished the money? A. Yes.

XQ23. How many pens did you examine openly with your own eyes to see what was on them? A. I should say five or six.

XQ24. What part of them did you examine? A. The barrel, if that is the technical term.

XQ25. Did you examine any other part than the barrel; that is, what is called the pen point? A. I do not think so.

XQ26. Do I understand you to swear that you found on the barrel of any pen the words "Royal Ideal Pen," and also the
413 words "A. A. Waterman & Co."? A. I stated that as my impression, and will swear that is my impression at this date.

XQ27. But if I should tell you that no such pen holder or barrel was ever manufactured, would you then wish to revise that impression?

By Mr. Watson: Objected to as entirely improper in form and immaterial in substance.

A. My impression is so distinct that I should be inclined to think you were mistaken.

XQ28. Are you willing to swear that you saw in the window more than fifty or sixty pens, all told? A. I am.

XQ29. How many did you see? A. The exact number, of
414 course, it is impossible for me to state, but there were several trays of pens of different grades and bearing different price marks displayed in the window, and I should say that a tray would hold at least a dozen pens, and there were probably a dozen trays.

XQ30. Will you swear that you saw more than one show case of pens on the inside?

By Mr. Watson: Objected to as entirely immaterial.

A. The show case which I saw on the inside extended from very near the front of the store to very near the back. Whether it constituted more than one show case I am unable to state.

XQ31. How many feet would that be? A. Possibly twelve.

XQ32. From whom did you buy this pen? A. From a clerk in the store.

XQ33. Did you have any conversation with Mr. Saadi in relation to it? A. I personally did not.

XQ34. Did Mr. Watson? A. He did.

XQ35. In your presence? A. He did.

XQ36. What did he say? A. He said to Mr. Saadi, in substance, that he was the attorney for the Waterman Pen Company; that the pen that Mr. Saadi was selling was an infringement of the Waterman Pen Company's trade-mark, and cautioned Mr. Saadi to desist, warning him if he failed to do so he would be compelled to bring suit. 416

XQ37. He left no written notice of any sort? A. He gave Mr. Saadi his professional card.

XQ38. That was all? A. As far as any written notice was concerned, that was all.

XQ39. Are you willing to swear what kind of pens were displayed in the window outside? A. Not having been afforded the opportunity of examining the pens in the window, I cannot do so.

XQ40. Then you do not know whether they were L. E. Waterman pens, A. A. Waterman pens, Royal Ideal pens, Parker pens, or any other kind? A. Except as announced by the advertisement on the window, I have no means of knowing what the window contained, other than that it contained fountain pens. 417

XQ41. Would you make the same answer, referring to the pens in the show case in the store? A. I would not.

XQ42. What would your answer be in relation to such question? A. That in the course of my selection of the pen which I bought I had occasion to examine in my own hands half a dozen or more of the pens from the show case, and that they were not L. E. Waterman Fountain Pens.

XQ43. Do you know what pens they were that you examined? A. As I have previously stated they bore the imprint of a globe and, according to the best of my recollection, were labelled A. A. Waterman or A. A. Waterman & Co.'s pens, and, I am not

certain on this point, but my impression is that the words "Royal Ideal" were used in connection with the trade designation.

XQ44. On the barrel? A. On the barrel.

XQ45. And A. A. Waterman & Co. was on the barrel too? A. I have stated this as to the best of my recollection and cannot be positive after this lapse of time.

XQ46. Did you get a box with this pen? A. I did.

XQ47. And a guarantee on the inside of the box? A. I do not recall a guarantee.

XQ48. Do you not remember that inside of this box was a written guarantee of the Royal Ideal Pen, and stating that the pen point was the manufacture of A. A. Waterman & Co.? A.
419 I do not recall such a guarantee.

XQ49. Are you willing to say that any pens on those counters, other than the five or six that you examined, were of any particular make? A. Certainly not.

XQ50. The prices that you saw indicated on these pens ranged from 25 cents up to several dollars? A. I would not say that there were any as cheap, but some of them were possibly several dollars; that is to say, three or possibly four dollars.

XQ51. Did not some of the signs indicate that these pens were sold for less than a dollar? A. I cannot recall.

XQ52. You have heard the A. A. Waterman pen spoken of very often, have you not? A. During the last five years.

XQ55. You have often heard it spoken of as the Waterman
420 Pen? A. Yes.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ54. By whom? A. Chiefly in advertising matter.

RDQ55. By advertisements of dealers here in Washington? A. It was spoken of as the Waterman Pen in Mr. Saadi's establishment and, if I recall aright, the drug store known as Ograms at 13th and Pennsylvania Avenue, at one time embarked on the sale of these pens.

RDQ56. Did you ever personally hear anybody refer to the A. A. Waterman pen as the Waterman Pen, except in Mr.

Saadi's store? A. I have been shown A. A. Waterman pens by individuals who owned them, and who referred to them, through ignorance possibly, as the Waterman Pen.

RDQ57. Did not all of these people say to you that they had been deceived by purchasing a pen marked A. A. Waterman, thinking it was a pen of the L. E. Waterman concern? A. No, they did not say that.

RDQ58. Then, as I understand your testimony, when you say that people have referred to the A. A. Waterman pen as the Waterman Pen you refer to the representations made in Mr. Saadi's store and by the advertisements of dealers in Washington, and by certain persons who have referred to the A. A. 422
Waterman pen in ignorance as the Waterman Pen? A. Yes.

RDQ59. In connection with the fountain pens displayed in Mr. Saadi's window, were there signs displayed also? A. I have stated that there were signs on the window. As to whether there were signs on the trays of pens or not I can't state.

RDQ60. Did the signs on the window display the name "A. A. Waterman" and "Royal Ideal Pens" in connection with the words "Fountain Pens"? A. It displayed the word or name "Waterman," but whether coupled with the initials "A. A." or not, I am unable to state. It also displayed the words "Royal" and "Ideal."

RDQ61. And the name A. A. Waterman was on the pens shown you in Mr. Saadi's store, on some part of the pen, was it 423
not? A. According to my recollection it was on the barrel of the pen.

RDQ62. Might it not have been on the pen point? A. Possibly.

RDQ63. How long have you known of the Waterman Ideal Fountain Pen as being generally called the "Waterman Pen," or the "Waterman Fountain Pen"? A. Since 1886 or 1887.

RDQ64. And during the period since that time has the Waterman Ideal Fountain Pen, made by the L. E. Waterman Company, been generally known as the "Waterman Pen" or the "Waterman Fountain Pen"? A. Yes.

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RDQ65. And has the L. E. Waterman Company, who makes these pens, been generally known as the Waterman Pen Company? A. It has.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ66. You are an attorney; not in business? A. Yes.

RXQ67. Never have been in the pen business A. No.

RXQ68. Never have had occasion to know very much about fountain pens? A. I have had occasion to know a good deal about fountain pens.

425 RXQ69. Attorney for the L. E. Waterman Co.? A. No, never.

RXQ70. In what way? A. I have several friends who are members of the patent bar and have often discussed the merits of different fountain pens with them, and I am in a small measure posted on them.

RXQ71. Did any of these men ever tell you that the L. E. Waterman Co. did not manufacture their pens at all, that they got the barrels from one party and the pen points from various parties, and merely assembled the parts

By Mr. Watson: Objected to as entirely immaterial, if true; and notice is given now that the attorney for plaintiff will move the Court to strike out this irrelevant testi-
426 mony and have the same taxed against defendant. Furthermore, counsel for plaintiff gives notice that he will introduce in evidence the decisions of the courts of the State of New York to show that the L. E. Waterman Co. are manufacturers of its goods, in an action wherein that question was expressly in issue.

By. Mr. Bacon: Attorney for defendant states that that decision was in 1898, and that the evidence of the plaintiff's own manager is to the effect that plaintiff do not manufacture the parts of their pens, but that they have even brought pen points from this defendant.

By Mr. Watson: Absolutely false.

A. No.

RXQ72. Have you ever heard the A. A. Waterman pen discussed? A. I have.

RXQ73. Has anybody ever told you that they manufactured every part of their pens from the very best materials and by the highest priced workmen to be found?

By Mr. Watson: Same objection and notice.

A. No.

RXQ74. Are you willing to swear that when you went into Mr. Saadi's store you were not shown two kinds of pens, one bearing the imprint of A. A. Waterman & Co., and the other bearing the imprint of the Royal Ideal Pen? A. I am; while 428
my recollection is not absolutely clear as to the exact imprint which the pens bore I would swear that they were all of the same manufacture.

RXQ75. Did you examine the barrel of each pen of the half dozen that you looked at? A. I did.

RXQ76. Were they all of the same imprint? A. They were.

RXQ77. Are you willing to swear that the clerk who sold you this pen did not state that the pen point was made by A. A. Waterman & Co.? A. I am, for the reason that when I asked the clerk for a Waterman Pen, and asked him if he was sure that that was a Waterman Pen, he at once referred us to Mr. Saadi.

RXQ78. And what did Mr. Saadi say? A. In my direct-examination I have given the substance of the greater part of 429
Mr. Saadi's conversation with Mr. Watson. Mr. Saadi only added to that that he was protected in the use of a device which marked those pens by a registered trade-mark of which, I think, he undertook to give Mr. Watson the registry number.

RXQ79. Did he say that that registered trade-mark included the name A. A. Waterman & Co.? A. He did not.

RXQ80. Did he tell you of what his trade-mark consisted? A. He did not.

RXQ81. Are you absolutely sure that this conversation related to A. A. Waterman & Co., and not exclusively to the trade-mark the "Royal Ideal Pen"? A. I must assume that Mr. Wat-

430 *Charles G. Allen*

son and Mr. Saadi were talking of the same subject-matter. Mr. Watson was talking with reference to the pens which had been shown us bearing the word "Waterman."

RXQ82. And you are sure that those pens bore the name "Waterman" on the barrel? A. I have not as yet made that statement.

RXQ83. And you did not examine the pen points to see what name they bore? A. I do not recall examining the pen points, and do not think I did examine them.

RXQ84. And if you saw the words "A. A. Waterman & Co." on these pens at all you saw the words on the barrel?

431 By Mr. Watson: This line of testimony is objected to as entirely immaterial, and notice is given that motion will be made to strike it out and have the costs taxed against the defendant. Plaintiff's counsel also wishes to bring to the attention of the Court the fact that it is immaterial whether the name "A. A. Waterman" appeared on the barrel or on the pen point, as long as it did appear on one or the other. Further objection is made that the witness has already covered this ground five or six times and stated very carefully that he is not sure whether it was on the barrel or on the pen point.

By Mr. Bacon: Objected to as prompting the witness, and not in accordance with the witness' testimony at this
432 hearing.

A. I presume that to be the fact.

RXQ85. And on the same barrel were the words "Royal Ideal Pen"? A. I have previously stated that my recollection as to the marking of the barrels is somewhat vague, but coupled with the advertising matter displayed on the window I was under the impression that the pens were advertised as Waterman's or A. A. Waterman's and as Royal Ideal Pens. Whether all of these marks were used on the barrels of the pens shown me, or only part of them, I am unable to state.

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RXQ86. Is it not a fact that the advertisement "Royal Ideal Pen" on the window was on an entirely different part of the window from the words "A. A. Waterman"? A. It is not.

RXQ87. Were they near together? A. Yes.

RXQ88. How far apart?

By Mr. Watson: Objected to as entirely immaterial.

A. The show window in question is a small one, the advertisements being displayed on the front pane of the same, and it necessary follows that the different portions of the advertisement must have been near together and could not have been far apart.

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RXQ89. Were they on the same side of the window? A. Yes.

RXQ90. Are you sure of that A. I am.

RXQ91. Was it not the fact that you asked for an Ideal pen when you entered this store? A. I asked for a Waterman Pen, meaning a Waterman Ideal Pen. Whether I used the word "Ideal" or not I cannot state.

RXQ92. And when you asked for a Waterman Pen is it not a fact that you were shown a pen with the name A. A. Waterman & Co. on the barrel? A. I have previously and repeatedly stated my impression of what the barrels of those pens bore in the way of advertising or descriptive matter.

RXQ93. Kindly do it again?

435

By Mr. Watson: Objected to as an abuse of the practice and rules of this Court.

A. As previously stated, the pens which I examined bore the word "Waterman," either coupled with or without the initials "A. A.," the words "Royal Ideal," either one or both of these designations.

Examination of witness closed.

(Sgd.) CHARLES G. ALLEN.

Subscribed and sworn to before me this 24th day of January, 1911.

(Sgd.) A. M. PARKINS,

(Seal.) Notary Public, D. C.

436 **Plaintiff's Exhibit 19.**

MODERN PEN COMPANY.

Sole Selling Agent For
A. A. WATERMAN & Co.

Modern Self-Filling
(Picture of Pen) And Middle Joint
FOUNTAIN PENS, GOLD PENS And
Lincoln Fountain Pens

125 Greenwich Street—22 Thames Street
New York,
437 Dec. 4. 09.

Sold to J. Saadi,
602 9th St., N. W.,
Washington, D. C.
4 Jan. 1910.

X. Coll.

144	Imprinted Royal		14	4 50	Dz. Net		54	00
144			12	6 00	"		72	00
144	Ideal		11	4 50	"		54	00
36			15	9 00	"		27	00
24	Mod.		20	2 00	50	48	24	00
12	Feeds	11	1 00	Dz. Net			1	00
438 12	"	12	1 00	"			1	00
12	"	14	1 00	"			1	00
12	"	15	1 00	"			1	00
1	Mod Clips	B	2 75	"			2	75
	24 Mah Trays.							

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.
} In Equity.

New York, March 13, 1911. 440

Met pursuant to adjournment.

Present.
S. S. Watson, for Plaintiff.
Alexander S. Bacon, for Defendant.

VAN BRUNT TANDY, a witness called on behalf of the complainant, being duly sworn, testifies as follows:

Direct-examination by Mr. Watson:

Q1. Please state your full name? A. Van Brunt Tandy.
Q2. Your residence? A. 165 Seventeenth Street, Brooklyn.
Q3. What is your business? A. Manufacturing stationer. 441
Q4. With what concern are you now? A. John M. Bulwinkle.
Q5. Where is his place of business? A. 413 Fulton Street, Brooklyn, N. Y.
Q6. Does the concern you are with, Mr. Bulwinkle, handle and sell fountain pens? A. Yes.
Q7. How long has that been a fact? A. It has been a fact ever since the L. E. Waterman pens were manufactured. They sold the first pens.
Q8. To your personal knowledge how long has that been a fact? A. Sixteen years minus one month.

442 *Van Brunt Tandy*

Q9. Have you been connected with him those sixteen years? A. Yes, I never have been out a week until the past week.

Q10. During that period have you been familiar with the fountain pens which were carried and sold by Mr. Bulwinkle? A. I have, yes.

Q11. Have you been during this period, or any part of it, familiar with the fountain pens that were generally on the market? A. Yes.

Q12. During what period has Mr. Bulwinkle been handling and selling Waterman Ideal Fountain Pens? A. Ever since they were first made.

443 Q13. To your personal knowledge how long? A. Ever since I have been in his employ.

Q14. By what name, or names, are the pens manufactured by the L. E. Waterman Company generally known by the trade and public? A. The Waterman pen, Waterman Ideal Pen, L. E. Waterman Pen. That is practiaclly all.

Q15. How long have the goods of the L. E. Waterman Company to your personal knowledge been generally known by the trade and public, by these names that you have mentioned? A. As long as I have been in business; sixteen years minus one month.

Q16. What is the name by which the fountain pens manufactured by the L. E. Waterman Company are generally called for by your customers? A. Waterman Fountain Pen.

444 Q17. How long has that been a fact to your knowledge? A. Ever since I have been with Mr. Bulwinkle, or in business.

Q18. Has it come to your notice that there has been any confusion in the trade on account of the use of the word or name Waterman by A. A. Waterman & Company of this city? A. Yes, considerable.

Q19. In what way? A. A party would come in our store and ask for Waterman Pens and sometimes would have one that they wanted to be exchanged for a new one and immediately upon presenting it I would tell the party that that pen was never bought at our place. "That is funny," they would say, "It is a

Waterman Pen." "Yes, but it is not a genuine Waterman Pen and it is not worth one-half what the L. E. Waterman Pen is worth, therefore we cannot do anything for you," and they get up and go out the door and slam it.

Q20. The confusion that you speak of comes from the use of the name Waterman, does it not? A. Yes.

Q21. From the marking of the goods? A. Yes.

Q22. Did anything ever come to your attention from your customers that made you believe or think that a customer asking for a Waterman Pen or a Waterman Fountain Pen expected to receive a fountain pen made by A. A. Waterman & Co.

Mr. Bacon: Objected to as immaterial, irrelevant, incompetent and leading. 446

A. No, sir.

CROSS-EXAMINATION by Mr. Bacon:

XQ23. You have never sold any A. A. Waterman & Co. goods? A. No, sir; I never handled anything but L. E. Waterman Pens in my experience in that store.

XQ24. No pen of any make whatever except L. E. Waterman? A. No pen of any make whatever.

XQ25. You are a salesman? A. I am general manager of that store.

XQ26. Then you have never dealt in other pens? A. No. 447

XQ27. And you have never had occasion to compare them with other pens? A. Considerably, yes.

XQ28. You never had anything to do with manufacturing pens? A. No.

XQ29. You would not call yourself an expert in fountain pens if you never had anything to do with their manufacture? A. There would be very few that you could call experts in fountain pens.

XQ30. You do not call yourself an expert? A. I call myself as knowing as much about a fountain pen as anybody does that never manufactured them.

448 *Van Brunt Tandy*

XQ31. That is from selling one pen only? A. More than one—thousands.

XQ32. One kind of pen? A. Yes, one kind of pen only.

XQ33. Do you mean to say you could pick up an A. A. Waterman pen and a L. E. Waterman pen and say by examination that one was worth only one-half as much as the other? A. Yes, I could.

XQ34. How could you do it? A. Because, in the beginning, the pen has not got quality in any line.

XQ35. How do you know? A. Because the A. A. Waterman people never had any money to go in business to produce anything that was equal to the L. E. Waterman.

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XQ36. That is your reason for it? A. That is my reason. It never gave satisfaction.

XQ37. If you never dealt in them how do you know? A. Because I know the man who made the A. A. Waterman pen originally.

XQ38. Who was that? A. Mr. Gibson.

XQ39. And that is the reason you judge of the pen today? A. No, I had one presented to me when they were first made, by him, in our store.

XQ40. That was in 1898? A. Yes. I would not say it was the year exactly.

XQ41. And your judgment is founded upon that fact? A. Yes, and the quantities that come to us for repairs and com-

450 parison.

XQ42. Suppose I should tell you that the L. E. Waterman Company do not manufacture pens at all, that they simply collect the parts from different people, would that change your judgment in any way? A. No, because I know different.

XQ43. You know that is not so? A. I know that is not so.

XQ44. As you understand, the L. E. Waterman Company manufacture holders? A. They do, sir.

XQ45. As you understand, they manufacture the pen points? A. They do, sir.

XQ46. How did you get that impression? A. They have a factory in the City of Brooklyn where they are made.

XQ47. In the City of Brooklyn? A. Yes.

XQ48. Whereabouts—in Williamsburg? A. No, it is in New York, on the water's edge. I had an invitation to go to it. I would not say it is Brooklyn but it is on the water's edge.

XQ49. You know that they manufacture their holders there? A. Yes. I think it is Van Dine Street.

XQ50. And they manufacture the holders over there? A. They do.

XQ51. And they manufacture all their pen points over there? A. They do.

XQ52. And they always have, for many years? A. No, not always.

452

XQ53. How many years? A. Off hand, for the last eight or ten years.

XQ54. Before that how did they get their pens? A. The parts were made then. The pens were made by Aikin-Lambert of New York.

XQ55. Always? A. Always, to my knowledge they were.

XQ56. Is it not a fact that you don't know anything about them except that some of the L. E. Waterman Company have told you? A. I think experience is worth something in this world.

XQ57. Is it not a fact that you do not know anything about what you have been speaking of except what they have told you? A. No, I do not say so.

453

XQ58. If I should tell you that the evidence in this case indicates that they have never made a penholder in their existence, would you believe me? A. No.

XQ59. You would say I was telling what was not true? A. I would take my own mind for it, knowing they make pens today, both the pen points and penholders.

XQ60. If I should tell you that right up to the present time they are in the habit of buying pen points from other people you would not believe it? A. No, I would not.

XQ61. Even though I should tell you that the evidence in this case has been that they do?

454 *Van Brunt Tandy*

Mr. Watson: Counsel for complainant has quietly set here and listened to these misleading questions, questions that have nothing whatever to do with the issues in this case, to see how far counsel would go in putting a lot of irrelevant matter on this record.

Counsel for complainant gives notice that he will move at final hearing to strike out all of these irrelevant questions and testimony and ask that the Court tax the cost of taking the deposition against the defendant.

The Court's attention is particularly directed to the misleading character of the form of the questions and
455 the attempt to trap the witness.

XQ62. And even though I should tell you that the evidence in this case has been that they do, you would still say that they manufacture everything themselves? A. I do.

XQ63. Upon what do you base that assertion? A. I base that on the fact that I can go at present to their factory and see them made.

XQ64. You have seen them making penholders there? A. Yes.

XQ65. You are sure of that? A. I will take you over to the store and show you parts that come from there.

XQ66. Are you sure that you have with your own eyes seen penholders made in the plaintiff's factory in New York? A.
456 No, sir; I am not, not with my own eyes.

XQ67. When people come into your store with an L. E. Waterman Pen they call that the Waterman Pen, don't they? A. Yes.

XQ68. And anybody that has an A. A. Waterman Pen would call it a Waterman Pen? A. Yes.

XQ69. That is usual with everybody, is it not? A. Yes, that is usual.

XQ70. And a great many would come into your store with an A. A. Waterman Pen and think that is the only Waterman Pen in the world, wouldn't they? A. Yes.

XQ71. Another man would come in with an L. E. Waterman Pen and think that was the only Waterman Pen in the world? A. Yes.

XQ72. And not know that there were two different ones? A. Yes.

XQ73. Then the people who own the A. A. Waterman & Company's pen were just as much confused as those who owned the L. E. Waterman pen? A. No, sir.

XQ74. Why not, if they thought they were the only one in the world? A. Because the Waterman Pen of A. A. Waterman & Company was put on the market for sale under Waterman's name and the people that put it on the market never had any 458
capital to put it there and Mr. Gibson thought that the name of L. E. Waterman would put it on the market and from that he received most of his revenue.

XQ75. Don't you know that Mr. Gibson died way back in 1898 or 1899? A. Yes, I know it very well. I can remember Gibson long before he thought of fountain pens.

XQ76. Have you known anything about the partners in the business since 1899? A. Nothing at all.

XQ77. And you don't know anything about the A. A. Waterman & Company since 1898 or 1899? A. No.

XQ78. You do not know Mr. Geyer? A. I never saw him.

XQ79. You never knew Mr. Fraser? A. No.

XQ80. You do not know Mr. Isaac E. Chapman? A. No.

XQ81. Or William L. Chapman? A. No. 459

XQ82. You have never been to the A. A. Waterman & Company's factory? A. No.

XQ83. In fact you have not known anything about A. A. Waterman since 1898, when Mr. Gibson was there? A. I knew them by the pens which came around, trying to be sold.

XQ84. Trying to be sold by whom? A. By A. A. Waterman or the Modern Pen Company people. For us to put on our shelves and sell.

XQ85. And when they came to you, they told you they were A. A. Waterman, did they? A. Yes, sir.

XQ86. They never palmed them off as L. E. Waterman pens? A. No.

XQ87. Never palmed them off even as Waterman Pens? A. No.

XQ88. They always called them the A. A. Waterman Pen? A. Yes.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ89. When people brought in an A. A. Waterman Pen and called it a Waterman Pen were any of these people under the impression, or did they give you to understand that they were under the impression that these were Waterman Ideal Fountain Pens? A. Many times.

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RDQ90. And when they called a pen a Waterman Pen they thought they had an L. E. Waterman pen? A. They certainly did.

RDQ91. And did they give you evidence of that fact in any way? A. Yes, saying that they had been done by being shown an A. A. Waterman pen when they wanted an L. E. Waterman Ideal Pen.

RDQ92. When they wanted a genuine Waterman Pen they had been sold an A. A. Waterman Pen? A. Yes.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ93. Can you give the name of any one person who ever came to your store with an A. A. Waterman Pen and told you they thought that it was an Ideal Pen? A. At present, no.

462

RXQ94. Has there been such a man within the last year? A. Yes.

RXQ95. Can you give his name? A. No, sir.

RXQ96. How many such within the last year? A. I should say hundreds.

RXQ97. Hundreds have come in with A. A. Waterman Pens? A. Yes.

RXQ98. And told you that they thought they were Ideal Pens? A. Yes.

RXQ99. And yet you cannot give the name of one man? A. No, sir; because I don't keep the order book in the store or attend to the fountain pen department and repairs.

RXQ100. They do not come to you personally? A. They do come to me personally and I hand them over to the order clerk.

RXQ101. Do you mean to say that everybody that comes in there with an A. A. Waterman Pen has told you that they thought they had a Waterman Ideal Pen? A. No.

RXQ102. How many pens have you had for repair in the last year that were made by the A. A. Waterman Company? A. I never figured them. 464

RXQ103. About how many? A. I should say from 200 to 300.

RXQ104. Within one year? A. Yes.

RXQ105. And how many L. E. Waterman Pens to be repaired? A. I should say about in the neighborhood of 200.

RXQ106. What do you do with them when they come into your shop? A. We repair the pen, no matter whose make it is, that comes into our shop.

RXQ107. Do you repair them yourself? A. No.

RXQ108. Where do you send them? A. Send them out to the repair man, if it is any pen but the L. E. Waterman Pen.

RXQ109. Who is the repair man? A. Kimball.

RXQ110. Where? A. His place of business is 397 Fulton 465 Street.

RXQ111. New York or Brooklyn? A. Brooklyn.

RXQ113. He does all of your repairing outside of L. E. Waterman Pens? A. At the present time, yes.

RXQ114. And for how long? A. For the last six months.

RXQ115. Who did it before that? A. Hambler & Co.

RXQ116. Where are they? A. They used to be at the corner of Fulton Street and Broadway, New York City.

RXQ117. Are they in business now? A. No, sir; they failed, went out of business.

466 *Van Brunt Tandy*

RXQ118. How many A. A. Waterman Pens have you turned over to Kimball in the last six months to be repaired? A. Possibly in the neighborhood of 100 or more.

RXQ119. Are you willing to swear how many of those one hundred that have come in within the last six months and told you that they thought that they owned a Waterman Ideal Pen? A. I never kept any account and the numbers I could not say.

RXQ120. You cannot give the name of one person? A. At present, no.

RXQ121. Can you ascertain the name of one person? A. I certainly can.

467 RXQ122. Have you got it on your books? A. No.

RXQ123. Will you at the next hearing give us the names of any persons who have so thought? A. Of course the conversation would not be in our books, how they have been buying A. A. Waterman Pens for L. E. Watermans but I could tell you the parties who we repaired A. A. Waterman Pens for.

RXQ124. That is not an answer to my question. I asked you if you could give me from your books or from refreshing your recollection in any way, the name of one person who within the last six months has brought in an A. A. Waterman Pen to be repaired and told you that he thought it was a Waterman Ideal? A. No.

RXQ125. Have you any way of finding out the name of any such person? A. No.

468 RXQ126. I repeat the question as to any time preceding the last six months. A. No, sir.

RXQ127. Then there is no way on earth by means of which you can find out the name of any person that has ever told you, or anybody in your store, that he thought an A. A. Waterman Pen was an L. E. Waterman Pen? A. No.

Deposition closed.

Signature waived.

Adjourned to Tuesday, March 14, 1911, at 2 P. M.

UNITED STATES CIRCUIT COURT, 469

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.
} In Equity.

New York, March 23, 1911.

Testimony taken on behalf of the complainant at final hearing before Frederic M. Adams, an examiner of this Court, at the office of Watson & Raymond, 10 Wall Street, New York, the 23rd day of March, 1911, at 11 o'clock in the forenoon, pursuant to notice hereto annexed. 470

Appearances:

Samuel S. Watson, for the Complainant.
Alexander S. Bacon, for the Defendant.

Mr. Watson: Counsel for plaintiff gives notice on the record to counsel for the defendant to produce all the letters, telegrams, invoices, orders and other communications, sent or received by the Modern Pen Company to or from John Saadi of Washington, D. C., in reference to the sale of fountain pens by the defendant, or A. A. Waterman & Co. of New York, to John Saadi. The letters and other communications already produced, as counsel for plaintiff is informed, are not all of the communications. The earliest communication produced by the defendant is dated December 7, 1909, and plaintiff's counsel is informed that there were earlier communications regarding the sale of Royal Ideal Pens to John Saadi, which passed between the defendant or A. A. Waterman & Co. and John Saadi. 471

472 *Robert C. Liddell*

Mr. Bacon: The attorney for the defendant states that all the letters have been produced except two short ones, later than those already produced, in which said short letters there was nothing except a request to pay the balance due. I will try to find those two letters.

Mr. Watson: Plaintiff's counsel states that John Saadi has testified to an invoice dated December 4, 1909, and also testified as to receiving pens prior to that time, which plaintiff's counsel believes were covered by other invoices.

473 ROBERT C. LIDDELL, a witness of full age, produced on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, place of residence and occupation? A. Robert C. Liddell; residence, Montclair Heights, New Jersey; manager of the retail department of L. E. Waterman Company.

Q2. Where is the retail department of the L. E. Waterman Company located? A. At 173 Broadway, New York City.

Q3. How long have you been connected with the L. E. Waterman Company? A. Fifteen years.

Q4. How long have you been in their retail department? A. Twelve years.

474 Q5. How long have you been the manager of their retail department? A. Twelve years.

Q6. Have any evidences come to your attention of confusion in the minds of the public between the pens manufactured and sold by the plaintiff and those marked A. A. Waterman & Co., New York, N. Y.

Mr. Bacon: Objected to as irrelevant, immaterial and incompetent; confusion itself being no evidence of fraud or any impropriety.

A. Yes.

Q7. How does this evidence of confusion come to your attention? A. Pens marked A. A. Waterman are presented for repairs or exchange at our place of business and when we enlighten them on the fact that they are not our manufacture they seem surprised.

Q8. Do these people that present these pens to you marked A. A. Waterman & Company for exchange or repair, indicate to you in any way that they believe that they are Waterman Ideal Fountain Pens? A. Yes.

Q9. In what way? A. They very frequently point to the name Waterman on the barrel which they seem to think indicates that it is our manufacture.

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Q10. Do these instances occur frequently or how often? A. I would say frequently, every day.

Q11. Do these people tell you who they are or where they bought the pens? A. Yes, some of them do.

Q12. Do you wait on customers yourself at the store of the L. E. Waterman Company? A. I do, yes.

Q13. Can you give me any instances of persons that have presented pens marked A. A. Waterman & Co., and have indicated to you that they were confused and believed that the pens which they had were Waterman Ideal Fountain Pens? A. I cannot say offhand but I have a few memorandums to that effect.

Q14. Would those memorandums refresh your recollection as to the instances when people have given you their names? A. Yes.

477

Q15. Will you please refer to some of those memorandums and tell me some of the instances that have come to your attention? A. On February 9th, 1911, Mr. William George Kirkland, of 346 Fulton Street, Jamaica, Long Island, called and presented an A. A. Waterman pen for repair and upon informing him that it was not of our manufacture he immediately traded in, stating that he did not want any but of our own goods.

Q16. Did he state to you that he believed that he had a genuine Waterman Ideal Fountain Pen? A. He stated to me that he believed it to be a genuine Waterman pen.

478 *Robert C. Liddell*

Q17. Did he tell you where he bought the pen that he presented to you? A. Yes, he bought it on 42nd Street, three doors away from the Children's Hospital. He bought it on January 18th, 1911.

Q18. Where is the Children's Hospital on 42nd Street; do you know? A. I do not know myself, no.

Q19. What did he come into the store for? A. He brought the pen in to receive attention; it was not working properly.

Q20. Can you give me any other instance where anybody has brought an A. A. Waterman & Co. fountain pen into the store and indicated to you confusion, or that he had a Waterman's
479 Ideal Fountain Pen? A. Yes, Mr. Otto Loca, 39 East 12th Street, New York City. He purchased an A. A. Waterman pen thinking it was our manufacture. When purchasing it he asked for a Waterman.

Q21. Did he say where he bought it? A. He bought it on Broadway, between 12th and 13th Street, New York.

Q22. Did he say when he bought it? A. He just said "A short time ago."

Q23. How did he happen to come into the store? A. For the repair of the pen, when the pen was not working properly.

Q24. Were these two pens that you have referred to as A. A. Waterman & Co., pens marked "A. A. Waterman & Co., New York"? A. Yes.

Q25. Did either of these gentlemen give you any idea how
480 they happened to come to the plaintiff at 173 Broadway, New York? A. Yes, they thought it was our manufacture when they brought it in for repair.

Q26. Can you give me any further instance of this confusion among your customers? A. I have another one here, Mr. William John Richardson, Chief Engineer of the Steam Ship Gloria de Larrinago.

Q27. When did he come in the store—recently? A. He was in the store May 18, 1910.

Q28. How did he tell you he happened to go to 173 Broadway, New York? A. He is a gentleman that calls at 173 Broadway, our store, every trip that he makes to New York, to re-

plenish his supply of ink. He has done that for some time back; and this A. A. Waterman pen which he had in his possession he took to be of our manufacture because it had the name "Waterman" on it and he knew our pen by the name of Waterman only.

Q29. How do your customers usually ask for plaintiff's goods in your store, as far as it comes to your personal knowledge? A. Waterman fountain pen.

Q30. How long has that been the fact to your knowledge? A. Ever since I have been manager of the department.

Q31. In all of these instances that you have mentioned, the name and time and the other facts you have stated regarding 482
these persons were given you by the customers themselves? A. Yes, by the customers themselves.

Q32. Without going into details, will you please name some of the other instances that have come to your attention in your department and state in a brief way the circumstances as far as they are in your knowledge? A. Very frequently pens of the A. A. Waterman manufacture are brought to the clerks for repair. Some of the new clerks, not knowing what to do with them, refer them to me for instructions, which was to state that the pen was not of our manufacture and we had no parts to supply for them, so could not repair them.

Q33. Please give the names of any other cases of confusion that have been handled in your department? A. Mrs. M. L. 483
Tibbits, 2417 Valentine Avenue, Bronx, New York, called at the store January 26th, 1911, and presented an A. A. Waterman pen for repair which she had purchased six months prior to her call, and thought it to be of our manufacture; she purchased it in a store near Lexington Avenue on 42nd Street about opposite the Grand Central Station.

Q34. Any others? A. Mr. Joseph von Liskowsky, St. Paul, Minnesota, called at the store May 16th, 1910, with an A. A. Waterman pen for repair, which was purchased from Wilson & Co., of St. Paul, Minnesota; he thought it of our manufacture.

Mr. E. Garry, 124 East 59th Street, New York called on February 19th, 1911, with an A. A. Waterman pen for repair

thinking it of our manufacture; purchased it from Jackson's Stationery Store, 3rd Avenue and 69th Street, New York.

Mr. D. Butterfield, Kasson, Minnesota stated that he purchased an A. A. Waterman pen from Hibbard, Spencer & Bartlett Co., wholesale hardware dealers in Chicago, Ill., thinking it of our manufacture. He did not like the pen point and called upon us to exchange it. He stated, when he was informed that it was not of our manufacture, that he would return it to the dealer from whom he had purchased it.

Mr. G. G. Gibson, 2217 Washington Street, St. Louis, Missouri, of the Gibson Furniture Company, purchased an A. A. Waterman pen for his wife and thought it our make.

485 Q35. What did he want done with his pen? A. He brought it for repair.

Mr. J. Dardeck, 110 East 56th Street, New York, presented a pen for repair at our retail store thinking it of our manufacture. He promised to send the address of the dealer whom he bought it from.

Mr. McSorley, 974 Rogers Place, Bronx, New York City, called on May 11th, 1910; bought within the past month an A. A. Waterman pen thinking it of our manufacture, in a store on Grand Street, New York, about two blocks east of Second Avenue.

Q36. Is it a fact that most of the people that present A. A. Waterman & Co. pens to you telling you that they think it is

486 of plaintiff's manufacture, refuse to give their names or address or any data about it? A. The majority of those people who present those pens do not care to give the name but as a rule will state where they purchased and remark that they will return to the dealer whom they purchased it from.

Q37. Do you have any cases where people get very angry over the matter? A. Yes, we have had cases where people become very indignant when we told them that the pen which was stamped A. A. Waterman was not of our manufacture.

Q38. And these people that become indignant, do they ever give you their names and addresses? A. These names that I have mentioned are some of the people who have become in-

dignant on learning that it was not of our manufacture, the pen which they presented for repair.

Q39. In what proportion, if you can say, are you able to get the name and address of these people who state that they have been deceived? A. A very slight proportion.

Q40. And it is a fact that you have not been trying to get their names until recently? A. Yes.

Q41. During the last few months? A. During the last few months, yes.

CROSS-EXAMINATION by Mr. Bacon:

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XQ42. How many months do you mean by the words "during the last few months"? A. From six to eight months.

XQ43. Are these names that you have given all the names you have been able to get during that time, that indicated confusion? A. Yes.

XQ44. These are all? A. These are all, yes.

XQ45. During this time there were only three names who said that the pen sold to them had been sold as a Waterman pen; is not that true? A. Yes.

XQ46. And all of the others simply said that they thought they had a Waterman pen? A. They thought they had a Waterman pen, yes.

XQ47. And they did not know the difference between L. E. Waterman and A. A. Waterman? A. No, they did not know the difference. 489

XQ48. That is all there was to it, was it not; they brought A. A. Waterman pens in and thought there was not but one kind of Waterman? A. No.

XQ49. What was it? A. They brought an A. A. Waterman pen in thinking it of our manufacture and asked us to repair it.

XQ50. Why do you say, "thinking it was our manufacture"? A. Because they brought it to our establishment.

XQ51. That is the only reason, is it not? A. No, that is not the only reason, because the name Waterman on it indicated to them that it was our manufacture.

490 *Robert C. Liddell*

XQ52. They saw the sign Waterman out on Broadway and went in with a Waterman pen to have it repaired?

Mr. Watson: Counsel for complainant objects to this as calling for the mental attitude of the customer.

XQ53. Is that about all there was to it? A. No, sir they brought in an A. A. Waterman pen thinking it of our manufacture.

XQ54. Well, thinking is an attitude of the mind. What did they say? A. "Please repair this Waterman pen."

XQ55. What else did they say? A. When I told them it was
491 not of our manufacture they said, "Yes it is, there is the name Waterman on the barrel."

XQ56. And they showed you the name of A. A. Waterman & Co.? A. They showed us the name Waterman.

XQ57. You do not mean to say that the name Waterman was alone on the barrel? A. No, that they indicated or pointed to the name Waterman.

XQ58. Take up the first three names that you have given us; the first is William George Kirkland. State just what he said to you and what you said to him? A. He presented his pen and asked me if I would repair it and I told him we could not repair it, that it was not of our manufacture, and he stated that he had purchased it on 42nd Street and thought it was of our manufacture; he readily saw that he had been misled and
492 stated that he was in the habit of using the genuine Waterman Ideal pen and wished to get a genuine Waterman's Ideal pen and discard the one that he had and I told him that we were unable to repair that A. A. Waterman pen but we could help him out of his difficulty by making him an allowance for it, which he agreed to and stated, when we offered the allowance, that that was more than what it was really worth.

XQ59. Is that the substance of the whole conversation? A. Then he gave me his card which I have here and stated that he realized that that was misleading to the public and he would be willing to assist us at any time.

XQ60. You asked him for his card? A. No, sir.

XQ61. Did he tell you what the salesman had told him when he bought the pen? A. No, he did not state just what the salesman said.

XQ62. Then you made an exchange with him? A. Yes.

XQ63. And you made a good profit on the exchange didn't you? A. As far as the profit is concerned I do not know.

XQ64. What was the retail price of the pen that you sold him? A. As near as I can recollect it was a No. 12, a $2.50 pen.

XQ65. How much did you allow for the A. A. Waterman? A. 62 cents.

XQ66. Then you got $1.98 in cash from him? A. No, I got $1.88. 494

XQ67. I should have said $1.88; and you don't know how much that pen cost? A. No.

XQ68. You are not confided with any of those secrets? A. No.

XQ69. He did not have the name of the people who sold him this pen? A. No, he did not know the name; he merely gave the location.

XQ70. When did he make that purchase? A. A month or two before his call at our office.

XQ71. Tell us about Otto Loca, of 39 East 12th Street. Give us the exact conversation with him. A. That pen was brought in some time ago. My recollection of the conversation then is not very good. I can not state exactly what he did say. 495

XQ72. Can you tell when it was? A. It was in the fall some time; I cannot state the date.

XQ73. Of what year? A. 1910.

XQ74. Then you do not remember anything about that particular incident; simply that he brought in a pen for repair? A. That particular incident, I do not remember exactly his bringing the pen in for repair other than the memorandum that I made at the time he was in.

XQ75. Have you got the memorandum? A. Yes.

XQ76. May I see it? A. Yes (producing a paper.)

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XQ77. Didn't he know the name of the party from whom he purchased it? A. No, he did not, as far as I can remember.

XQ78. You asked him for his name? A. I asked him for his name, yes.

XQ79. Give us the exact conversation with William John Richardson, Chief Engineer of the Steamship Gloria de Larrinago? A. Mr. William John Richardson called with an A. A. Waterman pen. He stated to me he instructed his second engineer to purchase him a Waterman pen while at Newport News, Virginia. This is a memorandum which I made at the time of his call. He was led to believe that an A. A. Waterman pen was of our manufacture.

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XQ80. Who was led to believe? A. Mr. John Richardson.

XQ81. Who led him to believe that? A. Through his second engineer who purchased it as a Waterman pen.

XQ82. How do you know he did? A. From Mr. Richardson's statement.

XQ83. Then all you know is what Mr. Richardson told you about what another man told him? A. It is what Mr. Richardson told me.

XQ84. Yes, but he told you that another man told him that he supposed something or other? A. Mr. Richardson just told me the exact circumstances and how he came to obtain the A. A. Waterman pen when he thought he had a Waterman pen.

XQ85. What was the date of that? A. That was May 18th.

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XQ86. Over ten months ago? A. Yes.

XQ87. How long had you been collecting this material at that time? A. I stated before, about eight or ten months.

XQ88. And now you are willing to state that it was ten months or more? A. From my memorandum, that proves it.

XQ89. Then these three names as I understand it are the only ones concerning whom you have memoranda and the conversation? A. These are the three that were willing to give their names in connection with the circumstances.

XQ90. And all the others that you have testified to related merely to confusion that was apparent from the fact that they came into 173 Broadway to have an A. A. Waterman pen re-

paired; is that right? A. They of course thought it was of our manufacture and brought it to us for repair.

XQ91. You cannot give the conversation with any one of these except the first three, can you? A. I don't remember the conversation, no.

XQ92. Of any one of them? A. I wait on too many people a day to remember that.

XQ93. You did not take a memorandum of the conversation except with these three? A. No, I did not keep a memorandum because I did not have the name and address of the person who was given.

XQ94. And up to within a very short time it has been your 500
habit when anybody came to 173 Broadway with an A. A. Waterman pen to repair to tell them that you could not repair it? A. That we could not repair it.

XQ95. And up to a short time ago you told them that there was no such firm as A. A. Waterman & Co., did you not? A. No.

XQ96. Have you not written letters to that effect? A. No.

XQ97. When pens have come in by mail to be repaired? A. I have never received any.

XQ98. You never received any by mail? A. No.

XQ99. That is not under your department? A. No.

XQ100. Are you willing to swear that you have never told anybody that came in with an A. A. Waterman pen for repair, 501
that there was no such firm as A. A. Waterman? A. Yes.

XQ101. Do you know whether or not your employees have told customers that? A. I feel certain that they have not, because I have instructed them differently.

XQ102. What was the occasion of your instructing them differently from that? A. Whenever an A. A. Waterman pen was presented for repair and they wished to know where to have it repaired we might refer them to 22 Thames Street.

XQ103. How long have you been doing that? A. Some years back.

XQ104. You are sure of that? A. Yes.

502 *Robert C. Liddell*

XQ105. You told some of these people that you had no parts to supply so that you could not repair their pens? A. Yes.

XQ106. Does that refer to all A. A. Waterman pens? A. Yes.

XQ107. Can you not repair any of those pens just as well as your own, excepting the self-filler? A. Only in one part; that would be the cap.

XQ108. Can they not supply any part of any one of A. A. Waterman's make except the self-filler? A. No, sir.

XQ109. Are you sure of that? A. Yes, I am sure that they have not got parts to supply for it.

503 XQ110. You do not have anything to do with the repairing department, do you? A. Not outside of the repairs that are brought over the sales counter.

XQ111. Then you turn them over to some other people to be repaired? A. All pens received over the retail counter are repaired in the repair department.

XQ112. Where is that? A. In the rear of the store.

XQ113. Are you in charge of that too? A. Yes.

XQ114. Then you are the manager there? A. Yes.

XQ115. And all repairs that come into 173 Broadway are repaired on the premises? A. All but a few that have to have parts made specially.

XQ116. How many pens do you take in per day for repair, on an average? A. On an average, a hundred pens a day.

504 XQ117. How many of them are L. E. Waterman pens? A. All but a few; there are a very few outside of the L. E. Waterman Company pens that we receive for repair.

XQ118. Of those few how many would be A. A. Waterman pens, in a day? A. We would not receive any A. A. Waterman pens for repair.

XQ119. How many A. A. Waterman pens, on an average, are presented to you for repair each day? A. The amount varies. Possibly from five to a dozen pens.

XQ120. Every day? A. Yes.

XQ121. And five or twelve times a day you refer people to 22 Thames Street? A. No, we sometimes make exchanges

for Waterman Ideal pens. The others generally ask where they can have them repaired and it is only when a person requires that information and asks for it that we give it.

XQ122. And you make an exchange if you can? A. Whenever we can, because it is a help to them, they consider it such.

XQ123. And you do not consider it a help to yourself to make that exchange? A. Yes, we do. It creates a sale of L. E. Waterman pens.

XQ124. Every time anybody bring in an A. A. Waterman pen for repair you try to make an exchange? A. We offer them an exchange.

XQ125. Can you give the name of any one of these persons whom you have named who was angry when he brought in an A. A. Waterman pen? A. I cannot recall just now. 506

XQ126. You have no memorandum of the impatience or anger of any one of them? A. No, I have not.

XQ127. Mr. Kirkland was not in a rage, was he, when he came in with his pen? A. No.

XQ128. Or Mr. Loca? A. I don't know whether Mr. Loca was or not.

XQ129. Or Mr. Richardson? A. Mr Richardson, no

XQ130. When does the steamship Gloria de Larrinago come to this port; do you know? A. I do not know.

XQ131. Do you know how often it comes here? A. No.

XQ132. Do you know on what line it is? A. It is the Barber Company. I don't know the line. 507

XQ133. Where does it sail? A. I don't know.

XQ134. You cannot give us any information as to where we can find Mr. Richardson? A. Only from the address I have given.

XQ135. But that steamship is on the high seas most of the time? A. You could probably find it from the Barber Company.

XQ136. What is their address? A. I don't know their address.

XQ137. A great many of the people that come in with A. A. Waterman & Co. pens know all about the difference between the two firms, don't they? A. There are a few.

508 *Robert C. Liddell*

XQ138. And the man who had an A. A. Waterman pen would be very apt to call his pen a Waterman pen, wouldn't he? A. Yes.

XQ139. And the man who had an L. E. Waterman pen would call his pen a Waterman pen? A. Yes.

XQ140. Every man calls his own pen by any name he pleases, doesn't he? A. By the name it is known by, Waterman.

XQ141. Is not the A. A. Waterman pen known as a Waterman pen too? A. Yes.

XQ142. The A. A. Waterman pen has been openly sold and advertised on the market for twelve or thirteen years, has it
509 not? A. I cannot state how long and I cannot state how openly.

XQ143. You have known of this pen being sold for the whole period during which you have been manager of the retail department of the plaintiff, have you not? A. Yes.

XQ144. And it was always sold under the name of A. A. Waterman & Co. pen? A. Yes.

XQ145. Some of them are called Modern and some Lincoln? A. Yes.

XQ146. Just as some of the L. E. Waterman pens are called Ideal? A. Yes.

XQ147. And some of the L. E. Waterman pens are not called Ideal? A. Yes.

XQ148. What other names do you have? A. Waterman, and
510 Waterman's.

XQ149. Do you mean to say that you sell any pen that bears no name except the word Waterman or Waterman's on it? A. Yes.

XQ150. Without any other name? A. Yes.

XQ151. What do they sell for? A. They vary in price.

XQ152. From what to what? A. From $2.50 up.

XQ153. Up to what? A. To $10, that is, plain goods. Then we have them in mounted goods from $10 up to $100.

XQ154. Do you mean to say that I could today buy a pen from you that would cost $10 or upwards, that had merely the name of Waterman on it, and not L. E. Waterman and not Ideal? A. Yes.

XQ155. Just the bare name Waterman? A. Yes.

XQ156. How many of those pens do you sell? A. That I cannot say. They are mixed right in with the other goods.

XQ157. Then you have some pens that are marked Waterman's Ideal Fountain Pen? A. Yes.

XQ158. And some that are simply marked Waterman pens? A. Yes.

XQ159. On both the barrel and the pen point? A. On the barrel only.

XQ160. How are the pen points marked? A. Waterman's Ideal Fountain Pen.

XQ161. Always? A. Or Waterman's Ideal. 512

XQ162. That is on the gold pen point? A. Yes.

XQ163. There are no gold pen points that are not marked Ideal? A. No.

XQ164. But you say there are some barrels that have no name on them except Waterman? A. Yes.

XQ165. Without any initials? A. Yes.

XQ166. And without any qualifying word? A. Yes.

XQ167. Is that true of plain pens without the fancy mountings on the holder? A. Yes.

XQ168. You have them on the plain pens as well as on the fancy pens? A. Yes.

XQ169. Can you give the name of any man who said that he had been deceived in the purchase of his pen? A. I cannot state that the word deceived was used, but the three names that 513
I have given you, in the conversation with me, proved that they had been deceived or misled.

XQ170. How did they so prove? A. By their actions and remarks. I do not recollect whether they stated deceived or misled.

XQ171. What were the remarks that proved that they had been misled or deceived? A. "Is not that a Waterman? I bought it for such."

XQ172. Did they tell you in any instance what the salesman had said to them when he sold them the pen? A. They may have stated, but I do not just recollect.

XQ173. Then you are not prepared to say, from anything that these three people said to you, that when the pen was sold to them, it was not sold as an A. A. Waterman & Co. pen? A. Their remark was that they thought it was a Waterman pen.

XQ174. They did not tell you what made them think so? A. The name Waterman on the barrel.

XQ175. That was all? A. And knowing our pens by the name Waterman.

XQ176. They did not say what anybody had told them when the pen was sold? A. They stated that they told them that it
515 was a Waterman pen.

XQ177. Have you said that before in your testimony? A. No.

XQ178. Are you willing to swear that Mr. Kirkland told you that when he bought the pen, the man from whom he bought it described it as a Waterman pen? A. He did not describe it as a Waterman pen, other than when Mr. Kirkland asked for a Waterman pen he presented that to him, or handed it to him.

XQ179. He did not tell you what the salesman said? A. No.

XQ180. Would these be your answers to similar questions in relation to Otto Loca? A. Yes, they are on the same trend.

XQ181. And Mr. Richardson? A. No.

XQ182. What would be the difference in relation to Mr. Richardson? A. Because Mr. Richardson had his second en-
516 gineer purchase the pen for him and instructed him to get a Waterman pen.

XQ183. And he had no first-hand information at all? A. No.

XQ184. What are the names of the different pens sold by the L. E. Waterman Company? A. Waterman, Waterman's Ideal; Waterman's Ideal Fountain Pen; Ideal and Waterman's.

XQ185. Have you given all the names? A. All that I can recollect.

XQ186. Have you never heard of the Remex pen? A. Yes, we make the Remex pen.

XQ187. You sell it, don't you? A. Yes.

XQ188. Then why didn't you mention that? A. I did not understand that your question took in all those.

XQ189. Now, take in everything? A. Besides what I have stated, we manufacture the Pen and Ink.

XQ190. What else? A. The Edson. That is all.

XQ191. Do those have the name Waterman on them anywhere? A. No, sir.

XQ192. What is the retail price of these various pens? A. The Remex pen is $1.25; The Pen and Ink pen $1.50; that is in plain holders; the Edson pen, small size, $2.

XQ193. Large size? A. I think there is another size at $3.

XQ194. What do the pens sell for that are marked Waterman, in various ways, plain handles? A. They vary in price from $2.50 up to $10. 518

XQ195. You have a $10 pen that is absolutely plain holder? A. Yes.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ196. Did Mr. Kirkland indicate to you that he did not know that he had an A. A. Waterman & Co. pen until you informed him? A. Yes, he did not know it was not of our manufacture until I informed him.

RDQ197. He told you that, did he, in substance? A. Yes.

RDQ198. That is true of the other names that you have mentioned of people that have informed you that they were deceived? A. In each instance they did not know that it was not our manufacture until I had informed them. 519

RDQ199. They told you that? A. Yes.

RDQ200. All of this list of names that you have given of people that have been deceived, all have been handled in your department, under you? A. Yes, all in my department, under me.

RDQ201. And in some instances you did not have personal conversation as to all the details with the customers themselves? A. In some instances I did not have conversation.

520 *Robert C. Liddell*

RDQ202. The matter was referred to you personally by some one under you? A. Yes, the matter was referred to me.

RDQ203. When people have called an A. A. Waterman pen a "Waterman" pen, have you ever known any instance where they called it a Waterman pen knowing that it was an A. A. Waterman pen? A. I do not remember any one in particular that I could name, but such a thing has been stated, that when we told them it was not our manufacture they stated that this was another Waterman.

RDQ204. Have you any personal knowledge that the A. A.
521 Waterman & Co. pen has been sold on the market, except that they have been brought into the store? A. No, outside of seeing a few in some stores.

RDQ205. Have you ever purchased an A. A. Waterman pen anywhere? A. No, sir.

RDQ206. Have you ever examined any of these pens in any store? A. No, sir.

RDQ207. Your information comes from seeing signs on windows, in stores? A. Yes, from seeing signs on the stores.

RDQ208. Do you recall seeing a sign in any store of which I now show you a photograph (handing witness a photograph)? A. As far as I can make out from the photograph, it looks to me like a photograph of a window on Broadway.

RDQ209. Whose store was it? A. Carey's Fountain pen
522 place.

RDQ210. Where is that store located? A. On Broadway, between John and Fulton Street.

RDQ211. Do you remember when you saw that sign in Carey's window? A. I don't remember exactly. I think it was along towards the summer months; possibly in June.

RDQ212. 1910? A. 1910.

Mr. Watson: The photograph referred to by the witness is offered in evidence and the examiner is asked to mark it Complainant's Exhibit No. 29.

Mr. Bacon: Objected to as irrelevant, immaterial, incompetent, not properly proven; this witness does not

know anything except what he sees from the photograph itself; and Mr. Carey is in no way connected with the defendant; he is a dealer who sells all sorts of pens.

Photograph is marked Complainant's Exhibit No. 29, March 23, 1911, F. M. A., Exr.

RDQ213. You testified that the plaintiff sells fountain pens bearing the name of Waterman's; how long has this been the practice of the L. E. Waterman Company? A. I cannot state just exactly how long.

RDQ214. To your personal knowledge? A. Years back.

RDQ215. Has it not been a fact ever since you can remember anything about it? A. Yes, since I can remember anything about it they have been sold, marked "Waterman's."

RDQ216. Have you ever seen any other fountain pen except those made and sold by the plaintiff, at any time, that were marked "Waterman's," without any other initial or distingishing mark? A. No, sir; these are the only pens that I have ever seen marked with "Waterman's" only.

RDQ217. At any time, anywhere? A. Yes.

RDQ218. Have you at any time anywhere seen any other fountain pens than those made and sold by the plaintiff, which had the name "Waterman," without any other distinguishing initials? A. No.

RDQ219. How long has the plaintiff been making and selling fountain pens with the name "Waterman" alone on them? A. As far back as I can remember.

RDQ220. What year would that be? A. About fifteen years ago.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ221. How many pens of all names do you sell per day on an average, at 173 Broadway?

Mr. Watson: Objected to as entirely immaterial to any issue in this case.

A. From 75 to 100 pens outright.

RXQ222. How many any other way? A. 500 or so.

RXQ223. 500 a day? A. Yes.

RXQ224. What do you mean by otherwise than outright? A. A great many exchanges. You asked the question, I understand, how many we handled during the day. I referred to sales and exchanges.

RXQ225. Do you sell for cash a hundred a day on an average, and sell on exchange about 400 a day? A. No, sir.

RXQ226. What would be the figure? A. The exchange that I have reference to is the Waterman Ideal pen being exchanged
527 for one more suitable to the user; an even exchange, without any cash difference.

RXQ227. How many exchanged a day with a cash difference? A. That varies considerably. It is hard to draw an average. Say twelve to twenty.

RXQ228. Then you sell outright about 100 of all makes and exchange, with a cash difference, about twelve or twenty each day? A. Yes.

RXQ229. The rest of these exchanges are one kind of Waterman pen for another? A. Yes.

RXQ230. Because a pen does not suit the person? A. Yes.

RXQ231. Of those 112 or 120 per day, how many, on an average, would be marked Waterman or Waterman's, without any other name or initial? A. I could not say, because the
528 stock is mixed up. Those that are marked Waterman's are in with the Waterman's Ideal, that are marked as such.

RXQ232. Don't you know from the number that come into the store about what proportion of that kind are sold?

Mr. Watson: Objected to as entirely immaterial to any issue in this case.

A. No, I do not know, because we do not replenish our stock individually. They are brought into our stock, classed in with the others.

RXQ233. Is it not a fact that a very, very small percentage of the pens that you sell are marked Waterman or Waterman's,

without any other initial or qualifying word? A. It is small, yes.

RXQ234. Less than one per cent? A. I could not answer the percentage.

RXQ235. Not one in a hundred are there? A. Yes, there are.

RXQ236. As many as that? A. Yes, I would expect it.

RXQ237. Have you ever had a sign out in your window to the effect that you repair all makes of pens? A. No, sir.

RXQ238. Never? A. Unless it was included in what we term a Pen Doctor's Cabinet, and in this cabinet are small cards giving the description of the injury to a pen and what is required 530
to put it in shape.

RXQ239. You are sure you never have had a sign in your window that you repaired all makes of pens? A. Yes.

RXQ240. Of these names that you have given us today, how many of them did you speak to personally? A. Three.

RXQ241. And that is all? A. Yes.

RXQ242. All the rest came to you through the reports of other employees? A. Yes.

RXQ243. And those three were Kirkland, Loca and Richardson? A. Yes.

RXQ244. And all that you have testified to in relation to these others was what somebody else told you? A. Yes.

RE-DIRECT EXAMINATION by Mr. Watson: 531

RDQ245. When you refer to the 112 or 120 pens that you say you sold, you refer to the retail store only? A. The retail store only.

RDQ246. You have not anything to do with the wholesaling of these pens? A. No, nothing.

RDQ247. The wholesale department is upstairs in the same building? A. Yes, the wholesale department is upstairs on the second floor in the same building.

Deposition closed.

532 *Victor C. Cormier*

Counsel for complainant produces the two medals concerning which the witness, William I. Ferris, testified, and which he was unable to locate at the time of giving his testimony and which he said were missing from the medals which were then produced.

VICTOR C. CORMIER, a witness called on behalf of the complainant, being duly sworn, testified as follows:

Direct-examination by Mr. Watson:

533 Q1. Please state your name, place of residence and occupation? A. Victor C. Cormier; residence, 480 Devon Street, Arlington, New Jersey; lawyer, New York.

Q2. You are associated in the office of the counsel for the complainant in this action? A. Yes.

Q3. Did you visit the store of the Standard Drug Company in Cleveland in September, 1909? A. I did.

Q4. Will you please state what took place in that store in reference to your purchase of a fountain pen?

Mr. Bacon: Objected to as irrelevant, not connected in any way with the defendant and as hearsay.

534 A. I went into the store at 411 Euclid Avenue in the City of Cleveland, Ohio, of the Standard Drug Company. I went to the pen counter and asked the gentleman in charge for a Waterman's Ideal Fountain Pen. Several pens were shown me, but none of them were Waterman's Ideal Fountain Pen but bore the name A. A. Waterman. I asked the gentleman three times whether they were Waterman's Ideal Fountain Pens and he emphatically said yes. The lady behind the pen counter then waited on me, as the gentleman was engaged with other customers; there were quite a number of people in the store at the time, and at the pen counter and I asked her whether the pen that I had been shown was a Waterman's Ideal Fountain Pen. She said it was.

Q5. Did you purchase a pen from the store on that day? A. I did.

Q6. One of the pens that were shown you in answer to your inquiry for Waterman's Ideal Fountain Pen? A. Yes.

Q7. Will you produce that pen? (Witness produced a pen.)

The pen produced by the witness is offered in evidence and marked Complainant's Exhibit No. 30, March 23, 1911, F. M. A., Exr.

Q8. How much did you pay for that pen? A. $3.50.

Q9. When you made this inquiry for a Waterman's Ideal Fountain Pen did the man who waited on you tell you that there 536
was only one Waterman fountain pen or the Waterman fountain pen people made this pen only for them? A. That was in another store.

Q10. Where was that store? A. I think it was 2160 Prospect Avenue, Cleveland.

Q11. What was the sign on that store? A. Standard Drug Company.

Q12. That was not the store where you purchased the pen that you have produced here before us? A. No, it was not.

Q13. What were the signs that you saw on the store where you purchased the pen that you have produced here? A. Waterman's Fountain Pens $6 and $7. Middle joint; and Waterman Fountain Pens. That is as near as I can remember.

537

By Mr. Bacon:

Q14. Was this at Prospect Avenue? A. No, Euclid Avenue.

By Mr. Watson:

Q15. Of all the pens that were shown you in the Euclid Avenue store of the Standard Drug Company, Cleveland in answer to your inquiries for Waterman's Ideal Fountain Pen were any genuine Waterman's Ideal Fountain Pens shown you? A. No genuine Waterman's Ideal Fountain Pens were shown me.

538 *Victor C. Cormier*

CROSS-EXAMINATION by Mr. Bacon:

XQ16. When did you visit Cleveland on this errand? A. On the 20th of September, 1909.

XQ17. Do you know the names of the parties from whom you bought this pen? A. The Standard Drug Company, apparently.

XQ18. You do not know the name of the man that you talked to nor the name of the woman that you talked to? A. I do not.

XQ19. Is it a very large concern? A. Yes, I would consider
539 it fairly large.

XQ20. A great many clerks there? A. In the Drug Company Store?

XQ21. Yes? A. No, I did not take particular notice.

XQ22. Then what you have testified to relates to what was told to you by two persons whom you cannot identify in any way? A. I might identify them if I saw them.

XQ23. But you cannot describe them so that anybody could tell who they are? A. In a general way, yes.

XQ24. Did you buy of the woman or the man? A. The gentleman.

XQ25. Did you get a receipt? A. No, sir, I did not.

XQ26. Did not ask for any? A. No, sir.

XQ27. You went there for the purpose of getting this evi-
540 dence? A. Yes.

XQ28. And you are a lawyer? A. Yes.

XQ29. And you knew the desirability of corroborating your testimony? A. Yes.

XQ30. And yet you attempted to get no receipt? A. No, sir, I did not.

XQ31. And you did not ask for the names of the parties of whom you bought? A. No, I did not.

XQ32. And yet you as a lawyer went there for the express purpose of getting evidence in a suit? A. Yes.

XQ33. And did not take any precaution to corroborate what you have said? A. Yes, I did.

XQ34. What did you do? A. I went to the store No. 411 Euclid Avenue with one Alfred Burkhardt.

XQ35. Where does he live? A. He lives in Euclid, Ohio.

XQ36. Euclid is not Cleveland? A. No.

XQ37. Some other part of Ohio? A. It is a suburban town of Cleveland; it is near Cleveland.

XQ38. Did they have any signs of A. A. Waterman & Company pens out? A. None that I saw.

XQ40. You looked for them—you looked for signs? A. I did.

XQ41. What signs did you see? A. "Waterman's Fountain Pens, reduced" and "Waterman's Middle Joint Pens." That is as near as I can remember. 542

XQ42. When you went to Prospect Avenue what did you find there? A. In reference to what?

XQ43. In reference to the Waterman pens? A. Well, I asked him for a Waterman's Ideal Fountain Pen, the gentlemen in charge of the Standard Drug Company at Prospect Avenue, and he produced a Parker pen; and he made no representation as to that at all outside of the fact that it was a Parker pen. Then he produced a pen with the name of "Standard Drug Company" impressed on the barrel of the pen. I asked him if it was a Waterman Ideal Pen and he said "It is a Waterman." I asked him whether it was a Waterman Ideal Fountain Pen and he told me that there was only one Waterman; and I bought that pen. I paid $1.50 for it. I asked him whether it was a new pen or not. He said it was a new pen; and in conjunction with that he gave me a receipt guaranteeing the pen for one year and also guaranteeing it to be made by the Waterman people. 543

XQ44. Do you know who did actually make that pen? A. No, sir, I do not.

XQ45. Have you examined it so as to see if there is another name on it? A. Yes.

XQ46. There was nothing on it to indicate that it was made by the A. A. Waterman Company? A. I don't believe so, no, sir.

544 *Victor C. Cormier*

XQ47. Either on the pen point or the holder? A. I don't think so, no, sir.

XQ48. Did it have any other name there except "Standard Drug Company"? A. No, I don't believe it did. I can refresh my recollection by looking at the pen again. I have not seen the pen now for probably a year.

XQ49. You do not claim that that pen marked "Standard Drug Company" was ever manufactured by the A. A. Waterman Company, do you? A. I don't claim anything. I don't know.

XQ50. Did they tell you that that pen was made by the A. A. Waterman Company? A. No.

545 XQ51. Who did they say it was made by? A. By the Waterman "people" and that there was only one Waterman.

XQ52. Then the pen might have been made by the L. E. Waterman Company? A. It might for all I know, yes.

Deposition closed.

Signature waived.

Mr. Watson: Counsel for defendant has requested us to permit the examination of a witness on behalf of defendant on Monday, March 27th, 1911, and counsel for plaintiff has consented to this irregular proceeding on condition that the plaintiff's time to conclude its *prima facie*
546 evidence shall be extended for one day; it being understood that the witness to be examined by the defendant will only take one day.

Mr. Bacon: To this counsel for defendant agrees.

This examination is adjourned to Tuesday, March 28th, 1911, at the same place, at 11 o'clock in the forenoon.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.
} In Equity.

New York, March 28, 1911. 548

Testimony taken on behalf of the complainant at final hearing before Frederic M. Adams, an examiner of this Court, at the office of Watson & Raymond, 10 Wall Street, New York, the 28th day of March, 1911, at 11 o'clock in the forenoon, pursuant to notice hereto annexed.

Appearances:

Samuel S. Watson and W. B. Raymond, for Complainant.
Alexander S. Bacon, for Defendant.

EDWARD J. KASTNER, a witness of lawful age, called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Watson: 549

Q1. Please state your name, place of residence and occupation? A. Edward J. Kastner; residence, St. Lambert, Quebec; manager of the L. E. Waterman Company, Ltd.

Q2. Is that a Canadian corporation? A. It is.

Q3. Where is their place of business? A. Their head place of business is in Montreal.

Q4. What is their business? A. Manufacturers of fountain pens, and ink and selling pencils.

Q5. Do they sell fountain pens? A. Yes, they sell fountain pens.

Q6. And ink? A. And ink.

Q7. How long have you been connected with that company? A. Six years this spring.

Q8. What are your duties? A. I am the manager. I look after the selling of the pens and the selling force, and I handle correspondence, supervision, the inspection of the pens, the manufacturing of them.

Q9. What pens do you manufacture at the factory in Canada? A. We manufacture Waterman Ideal Fountain Pens; pens stamped Remex, Pen & Ink, and we make other pens under special brands for dealers.

551 Q10. Where is your store located in Montreal? A. 123 St. Francis Xavier Street.

Q11. You have charge of the store? A. I have charge of the store, yes. I am at the store most every day and have charge of it there.

Q12. Are you the head man there? A. Yes.

Q13. Prior to your connection with the L. E. Waterman Company, Ltd., with what concern were you connected? A. L. E. Waterman Company of New York.

Q14. How long were you connected with that store? A. Over twelve years.

Q15. So your connection with L. E. Waterman Company and the L. E. Waterman Company, Ltd., covers eighteen or nineteen years? A. Yes, that is right.

552 Q16. What were your duties while you were connected with L. E. Waterman Company, New York? A. I have worked in all the departments. My last duties were in the sales department. I started in assembling pens, repairing pens, and I worked under Mr. Ferris in adjusting pens, helping him in a general way.

Q17. You finally became Mr. Ferris' first assistant A. Yes.

Q18. What was Mr. Ferris' part of the business? A. Mr. Ferris had charge of the manufacture.

Q19. How long were you in the sales department of the L. E. Waterman Company? A. I suppose the last five or six years

that I was with the L. E. Waterman Company I was in the sales department. I used also to help Mr. Ferris then.

Q20. While in the sales department were you in the retail or in the wholesale department? A. I served in both retail and wholesale.

Q21. Were you at any time the manager of the wholesale department? A. I was.

Q22. When was that? A. The last few years that I was in New York with the L. E. Waterman Company.

Q23. Were you ever on the road as traveling salesman for the L. E. Waterman Company? A. Yes.

Q24. What period or periods were you on the road for the 545
L. E. Waterman Company? A. I made various trips, covering a number of years.

Q25. Did you make trips while you were manager of the wholesale department? A. Yes.

Q26. And prior to that? A. Yes.

Q27. What part of the country did you cover? A. I covered at different times most all of the United States, east of Denver.

Q28. Since you have been connected with the L. E. Waterman Company, Ltd., have you come in contact with the trade in other cities outside of Montreal? A. Yes.

Q29. What part of Canada have you traveled over as salesman for the L. E. Waterman Company, Ltd.? A. I have 555
traveled east of Toronto, taking in Ontario and Quebec. I have also been to the lower provinces, as far as Halifax.

Q30. Do you come in contact with dealers in Montreal? A. Yes.

Q31. Do you also wait on, or see, customers who come into the retail store in Montreal? A. Yes.

Q32. By what name do your customers, or the trade, usually call for Waterman Ideal Fountain Pens? A. Waterman, Waterman's, Ideal and Waterman's Ideal.

Q33. What is the name most commonly used in your experience? A. Waterman.

556 *Edward J. Kastner*

Q34. Does that apply to the retail trade, retail customers coming to the store? A. Yes.

Q35. By what name are these pens usually known among the trade so far as it has come to your knowledge? A. Waterman Fountain Pens.

Q36. How long has that been a fact? A. As long as I have been connected with the L. E. Waterman Company, or the L. E. Waterman Company, Ltd.

Q37. How long has it been a fact, or has it come to your personal knowledge, that customers purchasing at retail ask for these Waterman Ideal Fountain Pens as Waterman's pen or
557 Waterman pens? A. I can say for the full time I have been associated with the two companies.

Q38. The L. E. Waterman Company, Ltd., is a subsidiary company of the L. E. Waterman Company of New York? A. It is.

Q39. It transacts all the business connected with the manufacture and sale of Waterman's Ideal Fountain Pens in Canada? A. Yes.

Q40. Do you in your Canadian factory manufacture fountain pens complete? A. We do.

Q41. Do you manufacture the rubber that enters into the fountain pen? A. We buy the rubber on the mandrel.

Q42. What is a mandrel? A. A piece of metal. The mandrel is taken out. It is a tube like.

558 Q43. Where do the L. E. Waterman Company, Ltd., buy their rubber? A. Buy it from H. P. & E. Day, Seymour, Conn.

Q44. Do you know whether that is the same rubber or the same quality of rubber, from which the L. E. Waterman Company of New York, manufacture Waterman's Ideal Fountain Pens? A. Yes.

Q45. Do you receive this rubber in rough tubes? A. Yes, rough tubes, rods.

Q46 Rough tubes and rods? A. Yes.

Q47. And from the rough tubes and rods the fountain pen is made complete in the factory at St. Lambert? A. Yes.

Q48. Do you make gold pens in the factory at St. Lambert? A. We do.

X49. Do you adjust the parts in the factory ready for sale on the market? A. Yes.

Q50. How long have you been doing that? A. I think our factory has been in operation now about a year ago, January, when they finished it. It has been going about two years I think.

Q51. Where are these pens that you make at Montreal sold? A. They are sold throughout the Dominion of Canada. We sell some to foreign countries.

Q52. Do you sell any in the United States? A. No. 560

Q53. Who has the head charge of the manufacturing of these fountain pens in Canada? A. Mr. William I. Ferris.

Q54. And he is the same Mr. Ferris that has charge of the manufacturing of the fountain pens of the L. E. Waterman Company, New York? A. Yes.

Q55. How often does he come to the factory at Montreal? A. He comes up quite frequently, at least once a month; sometimes more often.

Q56. Do you know whether he has charge of the supervision of the manufacture of the rubber that goes into these pens? A. He has.

Q57. Do you have any evidences presented to you of confusion between the Waterman Ideal Fountain Pen and the fountain pens marked A. A. Waterman & Co., New York? A. I do. 561

Q58. And in what shape does that evidence come to your attention. A. I am often called to settle a dispute at the retail counter. Frequently a dealer will have an instance which comes to my attention. My salesmen will report regarding dealers that have purchased fountain pens stamped A. A. Waterman & Co., New York, Waterman's Ideal Fountain Pen.

Q59. Do you receive any correspondence showing confusion? A. I do.

Q60. Have you got any of that correspondence here that you can produce? A. I have.

562 *Edward J. Kastner*

Q61. Will you please produce it?

The witness produces paper.

Q62. The top letter, which I first take up of those you produce, is dated Port Hope, Canada, October 13, 1910, and addressed to L. E. Waterman Fountain Pen Co., Montreal, Quebec and purports to be signed by H. C. Wotherspoon.

Mr. Bacon: I object to all these letters as irrelevant.

Mr. Watson: I have not offered it in evidence.

Mr. Bacon: I object to putting on the record anything in relation to letters from third parties on the
563 ground that they are incompetent, irrelevant and immaterial, and in no way connected with the defendant.

Q62. (Continued.) And another letter signed by the same party addressed to L. E. Waterman Company, Ltd., Montreal, P. Q.?

Mr. Bacon: I make the same objection to putting on the record anything in relation to letters in Canada, as they do not relate to this plaintiff, the Canadian corporation being a different corporation.

Mr. Watson: Counsel for plaintiff calls the Court's attention to the irregular procedure on the part of defendant's counsel and desires to note on the record a
564 strong protest; that there is a proper time for objections on the record, and the middle of a question is not a proper time.

Q62. (Continued.) The second letter is dated Port Hope, Ontario, November 7th, 1910. Were these letters received by the L. E. Waterman Company, Ltd., in due course of mail and regular course of business? A. Yes.

Mr. Bacon: The same objections.

Q63. I note that the first letter referred to states that the writer is sending a fountain pen to you? A. Yes.

Q64. Did you receive the pen? A. Yes.

Mr. Bacon: I object to the question on the grounds already given, and I object to stating the contents of a letter not yet offered in evidence.

Q65. What kind of a fountain pen was it; what was the marking on the pen? A. Stamped A. A. Waterman & Co., New York.

The two letters produced by the witness are offered in evidence and marked Plaintiff's Exhibit 31.

Same objections.

Q66. The next letter that I take up is dated Melita, Man., August, 29, 1910, addressed to L. E. Waterman Company, Ltd., 566
and signed by L. S. Arnold; and annexed to the letter is a memoranda signed James Duncan. Did you receive this correspondence in due course of mail?

Same objections.

A. Yes.

Q67. What kind of a pen was sent in? A. The pen was stamped A. A. Waterman & Co., New York.

The letter and memoranda produced by the witness are offered in evidence and marked Plaintiff's Exhibit 32.

Mr. Bacon: Objected to as incompetent, irrelevant and immaterial, not binding on the defendant and relating to 567
an entirely different corporation from the plaintiff.

Q68. The next letter that I pick up of those that you produce is dated Lakefield, January 12, 1911, addressed to L. E. Waterman Company, Montreal, and signed A. M. Chalmers. Did you receive that letter in due course of mail? A. I did.

Q69. What kind of pens were they that were received with that letter? A. One of the pens was stamped A. A. Waterman & Co., New York; the other was stamped Waterman's Ideal Fountain Pen.

The letter produced by the witness is offered in evidence and marked Plaintiff's Exhibit 33.

568 *Edward J. Kastner*

Same objections.

Q70. The next letter that I pick up among those that you have produced is dated Hastings, September 20th, 1910, addressed to L. E. Waterman & Co., Ltd., Montreal, signed by Gibson & Huyck. Another letter from the same place has the same address signed by the same people dated November 11th, 1910. Another letter dated the same place November 29th, 1910, addressed to L. E. Waterman & Son, Montreal and signed by the same people. I ask you if you received those letters in due course of mail? A. We did.

Q71. What kind of pens were received in connection with
569 these letters? A. One pen was stamped A. A. Waterman & Co., New York and the other Waterman's Ideal.

The letters produced by the witness are offered in evidence and marked Plaintiff's Exhibit 34.

Same objections.

Q72. I show you a post card dated Louisberg, N. S., dated January 6th, 1911, signed Rev. John McKinnon, addressed to the L. E. Waterman Company, Ltd., and I ask you if you received that in due course of mail? A. I did.

The post card is offered in evidence and marked Plaintiff's Exhibit 35.

Same objections.

570

Q73. The next letter is one dated Wickham Quest, October 29th, 1909, addressed to L. E. Waterman Company, Montreal and signed F. Cormier? Did you receive that letter in due course of mail (handing witness paper)? A. Yes.

Q74. What was the pen that accompanied that letter? A. The pen was stamped A. A. Waterman & Co., New York.

Q75. Did you repair that pen? A. Yes.

Letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit 36.

Same objections.

Q76. The next letter is one dated Toronto, April 25, 1910, addressed to L. E. Waterman Company, Ltd., Montreal signed by R. J. Newton; I ask you if you received that letter in due course of mail (handing witness the paper)? A. Yes.

The letter identified by the witness is offered in evidence and the same is marked Plaintiff's Exhibit No. 37.

Same objections.

Q77. Was there anything in connection with that letter? A. A box was sent to me.

Q78. What kind of a box? A. A box stamped Waterman's Ideal Fountain Pens.

572

Q79. Will you produce the box that was sent you at the time? A. I will.

The Witness produces a box and the same is offered in evidence and marked Plaintiff's Exhibit No. 38.

Same objections.

Q80. Did this box bear the writing on it at the time you received it? A. It did.

Q81. Both on the top and the bottom? A. Yes.

Q82. The box bears on the top the words M. J. Bowden, Calgary, Ont., in writing? A. Yes.

Q83. And on the bottom "Wishing you all possible success, W. C. Bowden"? A. Yes.

Q84. You received the letter Plaintiff's Exhibit 37 and the box Plaintiff's Exhibit 38 through the mails in due course? A. Yes.

573

Q85. I show you a post card addressed to the Waterman Fountain Pen Co. of Montreal singed by the Neudorf Drug & Book Company. It is dated from Neudorf, Saskatchewan, February 25, 1911. Did you receive this post card in due course of mail? A. I did.

Q86. And the pen? A. Yes.

Q87. Is this the pen that you produce in connection with this post card (handing witness a pen)? A. Yes.

574 *Edward J. Kastner*

The post card is offered in evidence and marked Plaintiff's Exhibit 39.

Same objections.

The pen referred to is offered in evidence and marked Plaintiff's Exhibit 40.

Same objections.

Q88. What is the marking on the pen? A. A. A. Waterman & Co., New York.

Q89. The next letter is dated London, Ontario, December 28, 1909, addressed to L. E. Waterman, Montreal and signed Wilson D. Smyth. Did you receive that letter in due course? A.
575 Yes.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit 41.

Same objections.

Q90. I show you two letters, one dated September 15th, 1909, and the other dated September 27th, 1909, addressed to L. E. Waterman Company, Ltd., Montreal and signed by Rev. Edmond Carom. I ask you if you received those letters in due course of mail (handing witness papers)? A. I did.

The letters identified by the witness are offered in evidence and marked Plaintiff's Exhibit 42.

Same objections.

576

Q91. I show you a letter dated Winnepeg, January 9th, 1909, addressed to L. E. Waterman Company, Ltd., Montreal, signed W. R. & S. A. Campbell; also a post card dated Winnepeg, March 6th, 1909, addressed to L. E. Waterman & Co., Montreal, signed by W. R. & S. A. Campbell and ask you if you received those communications in due course of mail (handing witness papers)? A. I did.

Q92. Did you receive the pens mentioned in the letter of January 9th? A. I did.

Q93. How did you get them? A. I sent a messenger for them.

Q94. Where did you get them from? A. Granger Freres, Montreal.

Q95. In connection with the return of these pens did you receive a letter from Granger Freres? A. I did.

Q96. Is the letter that I now show you the letter that you received (handing witness the paper)? A. Yes.

Q97. Annexed to these letters I note a repair voucher. Is that the office memorandum regarding the transaction referred to in these letters? A. Yes.

The letter of January 9th and the post card of March 6th and the letter from Granger Freres and the repair voucher, are offered in evidence and marked Plaintiff's Exhibit No. 43. 578

Same objections.

Q98. Did you have any difficulty about receiving mail addressed to the Waterman Pen Company, Montreal from the post office in Montreal? A. Yes, we have had trouble.

Q99. Please relate the circumstances, what happened? A. We had customers complain of not receiving their orders, and through our travelers; attention called to the fact that repairs had not been returned. We made a complaint at the post office and the assistant postmaster at the post office in Montreal stated that he had received an order from Granger Freres & Co., authorizing them to get mail addressed "Waterman Company."

Q100. Who was that authorization from? 579

Mr. Bacon: That is objected to as hearsay and not binding on this defendant.

A. I was told the authoriaztion was from A. A. Waterman & Co., New York.

Q101. Did you finally succeed in getting certain letters that were addressed to the Waterman Fountain Pen Company and Waterman's Ideal Pen Company and Waterman Pen Company, and Waterman Company, etc., delivered to you? A. Yes, delivered to me.

580 *Edward J. Kastner*

Q102. Are these envelopes which you produce some of the letters that you were able to obtain under the circumstances you have just mentioned? A. Yes.

Bunch of envelopes produced by the witness is offered in evidence and marked Plaintiff's Exhibit 44A.

Same objections.

Q103. When did this transaction take place? A. Which transaction?

Q104. Referring to these envelopes that have been produced? A. The dates are on those envelopes there.

581 Mr. Bacon: 1909, all of them?

Q105. Some time during the year 1909? A. Yes.

Q106. Did you have satisfactory evidence that all those letters were intended for the L. E. Waterman Company, Ltd.?

Objected to.

A. Yes.

Q107. What was this? A. In some of the cases there were remittances for the account, that these parties owed us; and in other cases they had our own invoices inside.

Q108. Was there something in every case that tended to show that the correspondence was meant for your company? A. I had to show that before I got the letters.

Q109. To the satisfaction of the post office? A. Yes.

582 Q110. The letters were opened in the post office? A. Yes.

Q111. In these cases of the customers at the retail store who make statements to you that indicate confusion between a Waterman Ideal Fountain Pen and those stamped A. A. Waterman & Co., can you give us any instances where such confusion has come to your personal attention? A. Yes, there have been a good many instances. In quite a number of cases customers do not want to give their names.

Q112. Can you give any of the names of people who stated to you that they have been deceived or confused? A. Yes, I can give the name of J. H. Cantlin, St. Lambert, Canada; H. Bastien, employed at the Montreal Post Office; J. J. Nolan, 506 St. Paul Street, Montreal.

Q113. Are there any other persons whose names have been reported to you, that have been deceived? A. Yes, there have been a number of persons reported to me.

Q114. With whom you have not come in personal contact? A. Yes.

Q115. Give me some of these names and addresses?

Mr. Bacon: Objected to as not within the knowledge of this witness at all.

A. M. Langois, 314 St. Catherine Street, Montreal; Judge Delormier of Montreal, Court House; also a Mrs. Gratton of St. Catherine Street; Miss Dupreis, 957 St. Denis Street, Montreal. 584

Q116. Will you give Mrs. Gratton's address? A. 224 St. Catherine Street, West. There is another name here, M. Poulin, Bousecours Market. Also a Mr. Swan; M. S. Brown, Ltd., 53 St. Alexander Street, Montreal; Mr. Bouregois, Light, Heat and Power Company. That is address enough to find him. The office is on Craig Street.

Q117. Did you have any similar experiences when you were connected with the L. E. Waterman Company in New York? A. Yes.

Q118. What was their character? A. They were along the same line as these.

Q119. And all these people have some complaint to make about the pens marked A. A. Waterman & Co., New York which they bring in? A. Yes. 585

Q120. What is the general character of the complaint? A. That the pens do not write; that they leak.

Q121. Do you find in your experience any structural defect in any of these pens marked A. A. Waterman & Co., New York? A. They come in broken; the parties claim that they have had no hard usage; any pen that is made with a joint in the center, it makes it weak there, in a part that really should be strong; as anyone leaning up against a counter, the sharp point breaks off.

Q122. How about the fountain pens marked A. A. Waterman, New York, that have a rubber sack, the so called self-filling

586 *Edward J. Kastner*

pen? A. There are a good many come back. The little knob at the end is broken off and they complain that they screwed it off in attempting to fill it. Others have complained that it did not take up any ink; that when they turned the knob as directed the pen did not fill.

Q123. Did Mr. A. E. Bennett, whose address is given as 243 St. Elizabeth Street, Montreal, inform you respecting the exchanging of a pen? A. He called in the store while I was there and offered his pen for exchange.

Q124. Have you any memorandum that will refresh your recollection as to when that was? A. Yes.

587 Q125. When was it? A. February 15, 1911.

Q126. Did you have any conversation with Mr. Bennett at that time? A. Yes.

Q127. You were present when Mr. Bennett testified in Montreal, were you not? A. Yes.

Q128. Was the story that he told you when he called at your store February 15, 1911, substantially the same that he told as a witness in this case? A. It was.

Q129. Was this memoranda that you refreshed your recollection from made concurrently with the time Mr. Bennett called at your store for the exchange of the pen? A. Yes.

Q130. Did he bring with him the memorandum annexed to this slip which you have produced? A. Yes, he did.

588 Q131. Which is signed Granger Freres, Ltd.? A. He did.

The slip and memorandum signed Granger Freres, Ltd. produced by the witness is introduced in evidence and the same is marked Plaintiff's Exhibit 44.

Same objections; also it is not even claimed that it came from Granger Freres but from a third party; there is no proof that Granger Freres has any relation with this defendant.

Q132. Have you frequently received orders, memorandums from Granger Freres, Ltd. of Montreal? A. Yes.

Q133. Does the signature on the memorandum forming part of Plaintiff's Exhibit 44 correspond to the signature on these orders? A. It does.

Q134. Has any evidence come to your attention of the sale of the fountain pens marked A. A. Waterman & Co. in a manner which would tend to deceive or mislead the public into believing that the pens offered were Waterman's Ideal Fountain Pens or Waterman's pens?

Mr. Bacon: Objected to as leading and as a mere conclusion.

A. Yes.

Q135. Have any salesmen selling pens marked A. A. Waterman & Co. told you that they sold them as Waterman pens?

Mr. Bacon: Objected to as irrelevant and immaterial; 590
that there is no proof that the party named was actually a salesman of the defendant.

A. Yes.

Q136. Who were these salesmen connected with? A. Connected with Warwick Bros. & Rutter, Toronto.

Mr. Bacon: I move to strike that out on the ground that there is nothing to connect Warwick Bros. & Rutter with the defendant.

Q137. Have any advertisements come to your notice where pens marked A. A. Waterman have been advertised as Waterman pens?

Same objections. 591

A. Yes, I have had some newspaper advertisements.

Q138. Will you please produce one of them? A. The St. John Standard of October 21, 1910, the advertisement of Barnes & Co., Ltd.

Q139. Where are they located? A. St. Johns, New Brunswick.

Mr. Bacon: Objected to as immaterial and not connected in any way with the defendant.

592 *Edward J. Kastner*

The advertisement produced by the witness is offered in evidence and marked Plaintiff's Exhibit No. 45.

Same objections.

Q140. Do you know whether the L. E. Waterman Company of New York manufacture and sell fountain pens which are marked "Waterman"? A. Yes.

Q141. What kind of fountain pens are they? A. All styles.

Q142. How long, to your knowledge, have they made and sold such fountain pens, with such marking? A. As long as I have been connected with the Waterman Companies.

Q143. Both companies? A. Yes.

593 Q144. Does the L. E. Waterman Company manufacture and sell fountain pens marked Waterman's? A. Yes.

Q145. Without any initials or without the word Ideal? A. Yes.

Q146. These pens have gold pens in them bearing the words "Waterman's Ideal"? A. Yes, they have them bearing the words "Waterman's Ideal."

Q147. The name Waterman's is on the rubber part? A. Yes.

Q148. And is the same true of pens marked Waterman? A. Yes.

Q149. Are those pens both silver mounted goods and gold mounted goods and plain pens; I mean by plain pens, pens without any mounting? A. There are all kinds.

594 Q150. How long has that been the practice of the L. E. Waterman Company of New York? A. As long as I have been with them. That is all I know about it.

CROSS-EXAMINATION by Mr. Bacon:

XQ151. You do not claim that any act of anybody connected with the Modern Pen Company or with A. A. Waterman & Co. has in any way tended to increase any confusion that would arise from the similarity between the names of L. E. Waterman Company and A. A. Waterman & Co., do you? A. I have understood that their salesmen left that for the dealers to do.

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Mr. Watson: Will counsel for defendant, in view of his last question, admit that there is confusion between the goods manufactured and sold by the L. E. Waterman Company and those marked A. A. Waterman & Co., New York?

Mr. Bacon: Counsel for defendant admits and alleges that there is confusion arising from the similarity of the names; and alleges further that this admission and allegation was made in open court and on briefs in the action now pending in the New York State Court of Chapman against L. E. Waterman Company, before the beginning of this action; but alleges that such confusion arises from no act of the defendant, the A. A. Waterman & Co., but arises purely from the fact that there are two Watermans in existence, one named A. A. Waterman & Co. and the other L. E. Waterman Company and this fact of confusion was admitted in open court the first time of any conflict between these parties, or their privies, in the year 1910 and there has never at any time been any claim that there was not confusion arising from the fact of the similarity of the names; but counsel also alleges that the confusion is very slight; that nearly all intelligent people know the difference and especially all those who have any knowledge of the manufacture and sale of pens, and of the different varieties of pens on the market.

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XQ152. (The question is repeated)? A. I would not want to change it. I don't see anything different from what I have said.

XQ153. Have you ever had any conversation along this point with anybody connected with the Modern Pen Company? A. Anyone that is now connected with the Modern Pen Company?

XQ154. Yes? A. As to whether the A. A. Waterman & Co. will you read the question again?

XQ155. (Question repeated)? A. No.

XQ156. Anybody at any time connected with the Modern Pen Company? A. No.

XQ157. Then you have no personal knowledge attained by conversation with anybody, now or at any time connected with

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the Modern Pen Company, that would throw any light upon whether or not there was any confusion other than that which arises from the fact of the similarity of the names? A. I have not had any conversation with anybody connected with the Modern Pen Company.

XQ158. Have you had any conversation with anybody connected with A. A. Waterman & Co.? A. Not that I know of. If you will tell me who they are, maybe I can answer.

XQ159. Then all of your testimony in relation to confusion arising from the similarity of names, or otherwise, is what somebody has told you or written you, that somebody not being con-
599 nected with the defendant? A. I have no way of knowing whether they are connected other than they represent themselves as being agents.

XQ160. Whom have you ever talked with who represented himself as being an agent? A. Your other question was a little different; if you will go back to that other question. This last question is whether I had any conversation with anyone. The other question was whether I had any correspondence or conversation with any one who represented themselves as an agent. You want to know whether I had any conversation, now?

XQ161. Let the question be repeated (question repeated)? A. I have not talked with any one excepting a salesman who represented himself as agent for Warwick Bros. & Rutter, who advertise themselves as agents of A. A. Waterman & Co.

600 XQ162. Have you such an advertisement? A. I think I can find one here. There was one up in Montreal of Warwick Bros. & Rutter.

XQ163. Then you refer to the advertisement introduced in evidence in Toronto while you were present, when the testimony was taken? A. If I could see a copy of the book-seller and stationer, Toronto, I could tell. There were several copies. This is marked 23.

XQ164. It is the same exhibit that was introduced in evidence in Toronto? A. It is the one dated October, 1910.

XQ165. And you heard the testimony of the representative of Warwick Bros. & Rutter given in Toronto, didn't you? A. Yes.

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XQ166. And you heard him say they were not agents in any way except that they bought pens and sold them just as they did of other makes? A. I don't remember whether I heard him say so or not.

XQ167. And you also know that he produced a letter which purported to have been the only relation existing between the Modern Pen Company and Warwick Bros. & Rutter? A. No, I heard you ask for such letters, or somebody and I left the room then and went down to the hotel.

XQ168. How do you mark pens that are manufactured in Canada? A. We mark some of them Waterman's some of them Waterman and others Waterman's Ideal, others Remex; others Pen & Ink; others Elf and Acme; and we have marked under 602
different dealers' own imprint.

XQ169. How many pens have you manufactured up there during the year 1910, say? A. I could not say offhand.

XQ170. Approximately? A. It is very hard to say. Probably one hundred thousand.

XQ171. How many of those one hundred thousand have been marked Waterman or Waterman's alone? A. That is hard for me to say because they are marked in different ways and I could not give an exact percentage of them, but a good many of them go through that way.

XQ172. You knew that you would be examined on this question before you came down, didn't you? A. No.

XQ173. Is it not a fact that a very minute percentage are 603
marked Waterman or Waterman's alone? A. I would not say so, no.

XQ174. Are you willing to swear that as much as one per cent or 1,000 are marked that way? A. One thousand a year.

XQ175. Yes? A. It is hard for me to say without going over the figures about what we do. We have a big pen business. There are lots of them imprinted. It is hard for me to say offhand.

XQ176. You are not willing to swear that even one per cent are marked that way? A. I would say a good percentage were marked that way.

XQ177. Are you willing to swear that as much as one per cent are marked that way? A. If one per cent was a "good percentage," yes.

XQ178. What is your idea of a good percentage? A. It would be hard for me to state that, the percentage.

XQ179. Are you familiar with the stocks of the plaintiff's goods at 173 Broadway? A. I was when I worked there.

XQ180. Are you now? A. I have seen the goods.

XQ181. Can any man go into that store today and find on the ground floor one single pen marked Waterman or Waterman's alone? A. Yes, he can.

605 XQ182. Where would he find it? A. I think he would find it right in the retail department; I would say so.

XQ183. You have not tried it? A. Myself?

XQ184. Yes? A. No, I have not tried it; I have had no occasion to try it.

XQ185. If I should tell you that others had tried it and they could not find them you would not want to dispute them, would you? A. I would go and find one.

XQ186. They would have to send upstairs or in the cellar to find one, wouldn't they? A. No.

XQ187. Are any pen points, or what are usually called gold pens marked Waterman or Waterman's alone? A. You are speaking now of what we manufacture in Canada?

XQ188. Yes? A. They are stamped Waterman's Ideal.

606 XQ189. You have had instructions for some time to collect any evidence along the points concerning which you have testified today, have you not? A. No.

XQ190. You have been on the lookout for advertisements that might not be what you thought were just right? A. I have looked for those things, after I had complaints. I have had so many complaints that I have collected them here and there.

XQ191. Have you ever seen an advertisement that you thought was not right excepting the one introduced in evidence today and the one introduced in evidence in Toronto? A. I have seen other advertisements with the name Waterman, so as to indicate that they were sold by the name of Waterman.

XQ192. Did they indicate whose pens were being sold? A. The cut of the pen showed on the side A. A. Waterman & Co., New York.

XQ193. Can you produce any such other advertisement that has been found anywhere? A. I don't know now. They come in from the clipping bureau and go through the regular ads.

XQ194. And you knew that it was desirable to find them, didn't you? A. No, not necessarily so.

XQ195. How did you get this Barnes advertisement of St. John, New Brunswick? A. It came in in our regular advertisement department where all the newspapers come.

XQ196. That was October 21, 1910? A. Yes. 608

XQ197. And then you were looking for such things, were you not? A. Yes, we look through all the papers for all ads.

XQ198. Is this the only one you found? A. No.

XQ199. Why didn't you produce the others? A. That is the one I had. I had another complete paper. I have lost it in my papers.

XQ200. Have you any other advertisements besides this? A. That same ad?

XQ201. Yes? A. Yes.

XQ202. Have you any other similar advertisements from other papers? A. Yes, there was an advertisement in Fredericton. I don't remember the name of the paper but I think you will find the advertisement in the book there; I don't know what you call it. 609

XQ203. You have found it very rare that anybody advertised a Waterman pen and had a picture of an A. A. Waterman pen on it? A. Most all the Waterman advertisements that I see are advertising our fountain pen.

XQ204. Did you ever see another advertisement, advertising Waterman pens, and which had a picture of an A. A. Waterman pen, except that one in evidence? A. Yes, I have seen them.

XQ205. When? A. I could not tell the dates.

XQ206. You have frequently observed them? A. No.

XQ207. Very rarely I suppose? A. We keep files of ads in all papers. It is our business to keep track of everybody.

XQ208. You have not produced any but this? A. That is a recent one.

XQ209. Have you found none since October 21, 1910? A. I have found none.

XQ210. You do not make any claims that the Modern Pen Company or anybody connected with it had anything to do with this advertisement or knew anything about it? A. I don't know.

XQ211. Where is the retail business of Granger Freres? A. It is on Notre Dame Street on the corner of the Square, Place D'Arms.

XQ212. They have there a large store about seventy-five feet
611 front by sixty feet deep, have they not? A. It is a good sized store. It takes in the corner.

XQ213. And are those figures approximately right? A. I would say so, yes.

XQ214. It is four stories high and a basement? A. I don't remember the exact height but I should say from three to four stories.

XQ215. And it is all occupied by the retail department? A. No, I don't think so. If it is it is only recent. His office is upstairs.

XQ216. You have been upstairs in his office? A. Not to his office, no.

XQ217. Is it not a fact that the only office in the building relates to the retail business itself and it is a very small room
612 on the second floor? A. I don't think so. I think there are two numbers. Perhaps one of the buildings goes all the way up but on the corner there was an entrance on Place D'Arms. If I recollect there is a sign there.

XQ218. Is it not a fact that Granger Freres at the retail place employ over fifty employees? A. I have no knowledge.

XQ219. You have seen a good many there, have you not? A. No.

XQ220. Granger Freres sell Waterman's Ideal Fountain Pens? A. Yes, they sell L. E. Waterman's Ideal Fountain Pens.

XQ221. And they also sell A. A. Waterman's? A. Yes.

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XQ222. And they also sell other makes, not made by either plaintiff or defendant? A. I think so.

XQ223. That is to say, they sell all makes that they buy? A. I don't know whether they sell them or give them away or what they do.

XQ224. You have never had any suggestion that they are in business for their health? A. They might be. I have known some people to be in business for their health.

XQ225. As you go into their store, on the right of the door there is a very large case for the sale of fountain pens? A. Yes.

XQ226. And in that case they sell various makes? A. I never looked closely. The first time that I noticed the case strong was when I took you in there, went up with you to show you where Granger Freres was.

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XQ227. Then you saw that case? A. I saw a case.

XQ228. And you knew they were selling L. E. Waterman's pens in that store? A. I knew they were selling L. E. Waterman pens.

XQ229. How did it happen that he should have asked the Post Office Department to deliver Waterman's mail to them; have you any idea? A. I have not the slightest idea excepting the assistant postmaster told me they brought an order from A. A. Waterman & Co.

XQ230. Mr. Geyer says that is the first time he ever heard of it?

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Mr. Watson: I object to that and move to strike it out.

XQ231. Are you sure that the order was from the A. A. Waterman & Co.? A. I only have the word of the Assistant Postmaster and I have also a letter in which the Postmaster refers to something to that effect.

XQ232. Do you produce that letter? A. I can.

XQ233. You do not claim that Granger Freres have anything more to do with these defendants than any other people who sell their goods? A. It is understood that they are agents for A. A. Waterman & Co. there.

XQ234. It is also understood that they are agents for L. E. Waterman Company? A. No.

XQ235. They sell both kinds of pens, don't they? A. Yes, they are dealers in L. E. Waterman pens.

XQ236. What is your idea of the difference between an agent and a dealer? A. One who holds himself responsible for the company, to take care of them and look after them and act for them.

XQ237. Would Granger Freres look out for and take care of your goods if they sold them, the same as they would any one else? A. They would probably refer anybody to us if there was
617 anything out of the ordinary, or if a man purchased at some other place. If they had not handled the transaction they would probably send him away.

XQ238. Would they not also send to A. A. Waterman & Co. if anybody happened to have one of their pens? A. I have no knowledge. I understood that a man in their employ had come down to A. A. Waterman & Co., in New York to be trained to do their repairing.

XQ239. Does it take any special training to do repairing? A. I would say so, yes; decidedly so.

XQ240. You said that Mr. A. E. Bennett came to you and told you the same story that he testified to in Ontario; what did he tell you? A. I said I was in the store when Mr. Bennett came in and he brought a slip of paper or an order from Granger
618 Freres in regard to an exchange of a pen that he had, one of ours, and in selecting his pen he explained to the young lady what a difficult time he had had to secure what he wanted to buy and he called me out, so I spoke to Mr. Bennett and Mr. Bennett told me practically what he testified up there.

XQ241. What did he tell you? A. He started by telling me that he first went to Granger Freres and purchased a Sterling fountain pen, which he had used for some little while and found that it was unsatisfactory and also explained that he had been in the hospital for some time, sick, and after he got out he took it back to Granger Freres and told them that he would like to exchange it for a Waterman fountain pen and they handed him

out a pen stamped A. A. Waterman & Co., New York and began to explain to him the merits of the pen and he said it was not the same kind that he had been acquainted with in England and he further stated to me that he had written to England to see just what that pen was and found it was a Waterman Ideal and he insisted on getting one stamped Waterman Ideal. Then he asked them why there were two pens stamped Waterman and the young man in charge told him that there was no difference in the companies they were both the same company but that one was sold in Canada under Waterman Ideal and manufactured there and the other was sold in the United States as A. A. Waterman & Co. That is as I remember it.

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XQ242. He did not tell you the name or the description of the young man who had told him that? A. Yes, he told me the name and description of the young man.

XQ243. Can you give it? A. I can easily refresh my memory as to his name by looking at the signature of the order. I can give you a description of the young man. He is the same young man that I introduced you to.

XQ244. Did he give you the name? A. Yes, he gave me the name. No, he did not give the name; he gave me a description of the young man and told me it was the young man who was in charge of the pen counter.

XQ245. He did not give you any name? A. No.

XQ246. Then you could not distinguish this young man by his name, if he did not give you the name? A. He is the only 621 one who has charge of the pens there.

XQ247. How do you know that? A. He stated so.

XQ248. Who stated so? A. The young man at the pen counter.

XQ249. How many pens do you take in for repair on an average per day? A. I could not give the estimate. A good many repairs come in. There is a whole lot of repairs come in.

XQ250. How many in a week? A. If I knew the day I could easily multiply by the week.

XQ251. You don't take A. A. Waterman pens for repair do you? A. We repair them

XQ252. How many? A. Quite a number.

XQ253. How many a day? A. It would be hard to estimate. There may be one or two; there may be three or four.

XQ254. There might be none? A. There is more than none. There could not be one, two or three and none.

XQ255. Wouldn't there be a good many days when there would not be any? A. You asked for the average.

XQ256. Yes? A. I cannot give an average if there are certain days when there are none. I say there may be two, three or four on an average in a day.

XQ257. And there might be a great many days when there would not be any? A. There might be some days when there
623 would not be any.

XQ258. Weeks at a time? A. No, I would not say weeks at a time.

XQ259. But it is a very minute proportion of A. A. Waterman pens that come in to be repaired? A. No, I would not say that, counting those who come in and think they have our pens, and those who come in for repair.

XQ260. The repairs to the A. A. Waterman pens do not vary from the repairs to the L. E. Waterman pens, do they? A. If you count complaints repairs.

XQ261. Why should a complaint be called a repair? A. I said if you count complaints repairs. I would call a repair a pen that had been worn out, needed a new point, an accident had
624 occurred to it. A complaint would be those that are defective or had some weakness in the construction or no iridium on the point or leaked.

XQ262. That same kind of complaint comes in about L. E. Waterman's pens? A. Yes, but not weakness of construction or that they do not write.

XQ263. Did you ever see with your own eyes a middle joint A. A. Waterman pen that had been broken at the middle joint? A. Yes.

XQ264. How many? A. I have seen a number in my time.

XQ265. How many? A. You are speaking now of Canada or the United States?

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XQ266. Well, confine it to Canada? A. I could not say how many but there have been numerous cases. They come frequently. I have no occasion to keep track of those.

XQ267. Once a month? A. It might be more than once a month; it might be once a month.

XQ268. How many have you ever seen with your own eyes with the knob broken off the end? A. I have seen quite a number.

XQ269. What do you mean by quite a number? A. There might be one a day there might be three a day. I have no recollection. I keep no track. They are not our pens.

XQ270. You have no personal recollection of two pens, A. A. Waterman pens, coming in in a day for repair? A. I could not cite the day but I would be willing to say that there have been days when two came to me. 626

XQ271. Any number of L. E. Waterman pens come in broken all sorts of ways, don't they? A. Pens are brought to us for repair that have been broken through accident. You might put them through a threshing machine, as you said once before. But they do not become broken from weakness of construction.

XQ272. But the caps are frequently broken? A. The caps are sometimes broken by being dropped and stepped on.

XQ273. And the pen points are frequently out of order? A. Yes, the pen points are broken sometimes.

XQ274. And the iridium gets off for the same reason? A. What do you mean by the same reason? 627

XQ275. Accident? A. Yes, accidents may break them.

XQ276. And any pen that is neglected will get dirty and simply want washing? A. Any pen may be neglected. You mean they get filled up?

XQ277. Get dirty? A. How should it get dirty. What do you mean by dirty?

XQ278. For instance if a man carried it in Pittsburg you would not ask me that question? A. It would not get dirty in Pittsburg if the cap was on right. I don't know what you mean by dirty.

XQ279. Don't you often have to wash pens, put them in water? They are clogged up for that reason? A. For the reason that they were dirty.

XQ280. Yes, thick or dirty ink? A. Yes, we clean them out.

XQ281. A great many of the so-called repairs consist merely in getting rid of the clogged or dirty ink which they use? A. Whose repairs are you speaking of—ours?

XQ282. Yes, L. E. Waterman pens, all sorts? A. All sorts of pens?

XQ283. They are just the same aren't they; they have to be cleaned out? A. No, it needs more than that to make some of them write.

629 XQ284. You have a great many so-called repairs that consist of merely clogging from dirty ink, don't you? A. We have some repairs that way. I would not say we had a great many.

XQ285. What is the matter with a pen when it will not write, as you have testified? A. There may be various reasons. The pen may not be made right in the first instance.

XQ286. You find a great many L. E. Waterman pens that are made that way? A. Not made right?

XQ286½. That will not write at all, and will leak? A. That is only when some accident occurs to them.

XQ287. Then if a pen of any make comes in to you and it does not write, you look for some accident, don't you? A. We look for something like that, yes.

630 XQ288. And that relates to all makes of pens? A. No, not necessarily.

XQ289. You do not claim for a minute that an L. E. Waterman is essentially different in its construction from any other pen, do you? A. I do. I claim the way we adjust them, the way we put them together makes them sure and they write.

XQ290. You do not claim that those "sure" pens that will write do not have to come back to you for readjusting and repairs every little while? A. Except that somebody has taken it out or interfered with it or it has met with an accident.

XQ291. Are there not thousands of cases where people come to you with an L. E. Waterman pen and tell you that it don't

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work, and that they have not met with any accident and they don't know the reason for it? A. I would not say there were thousands of cases.

XQ292. A great many of them? A. No, I would not say a great many. You would say "Thousands" and "a great many" might mean the same.

XQ293. Hundreds of them? A. No.

XQ294. How many? A. There might be plenty of days that there are none.

XQ295. One of the employees of the New York Company testified the other day as my memory goes, that they sold for cash about one hundred a day and exchanged about four hundred a day? A. That is in New York?

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XQ296. In New York? A. I am talking of Canada.

XQ297. Do you claim that you make a better pen in Canada than they do in New York? A. Not necessarily.

XQ298. You exchange a great many pens in Canada don't you? A. No, I would answer that this way, that we are closer to them there and sell them what they want in the first place.

XQ299. You now refer to exchanging points which suit their hand? A. We can get closer to them and serve them with the pens that they want first.

XQ300. But comparatively few buy at the factory? A. We train the dealers and make investigation and give careful attention to them.

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XQ301. Is it a fact that about four times as many are exchanged as are sold for cash? A. Where do you mean, for cash? Our principal business is wholesale in Canada. We have a store; but Montreal cannot be compared with New York?

XQ302. You do not do very much repairing then at your factory? A. Yes, we repair at the factory.

XQ303. But that is only local? A. For all Canada.

XQ304. Do they send in from all Canada to the factory to be repaired? A. Yes.

XQ305. You have given us here a large number of names that you say have complained of confusion. How many ever came to

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you personally with these complaints? A. Which list do you refer to? If you will read the names I can tell you.

XQ306. There is one here from Gratton? A. How many names are there there altogether?

XQ307. About a dozen or more? A. Well, the way I would meet those people, would be they would come into the store and the clerk would call me.

XQ308. How many names can you give where you personally saw any party who made the complaint? A. How many names?

XQ309. Yes? A. I guess I have got them. There have been a great many come to me. It is hard for me to remember the
635 names. I can remember and name now at least four.

XQ310. Give them again. You have them there on a paper? A. J. H. Cantin, H. Bastien, J. J. Nolan and there is another French name there Bousecours.

XQ311. Those are the only four that you had any personal communication with? A. Those are not the only four that I had personal communication with. They are the only four I can recollect just this minute.

XQ312. All of those except Mr. Nolan were French, were they not? A. You cannot go by the names there. There is a large percentage of French. Our population in Montreal is two-thirds French.

XQ313. Did they speak English well? A. Yes.

XQ314. What did Mr. Cantin complain of? A. Mr. Cantin
636 told me that he purchased the fountain pen from Carsley & Co. with whom he was employed and he purchased the pen as a Waterman fountain pen and he presumed he had ours and he met me and complained of the pen not working satisfactorily and wanted to know if I could not put it in order for him.

XQ315. Carsley & Co.—what is their busines? A. A department store in Montreal. They have since been succeeded by A. E. Ray & Co.

XQ316. How long ago was this conversation with Mr. Cantin? A. I would say it was back perhaps a month ago or six weeks ago.

XQ317. What did Mr. Bastien tell you? A. I had to go to the Post Office with reference to customs duties and he was a clerk there at the counter and he told me that he had a fountain pen that was not right and wanted to know if I could put it in order for him and he showed me a pen stamped A. A. Waterman & Co., New York.

XQ318. Where did he get it? A. Granger Freres.

XQ319. What did he say they had told him? A. They told him it was a Waterman fountain pen and he presumed he had one of ours.

XQ320. And what did Mr. Nolan tell you? A. Mr. Nolan told me that he had purchased a Waterman Ideal Fountain Pen a good many years ago and he used it with entire satisfaction and 638
lost it, or something to that effect, and he tried to buy a new one. Formerly our retail store was at 136 St. James Street, Montreal, which street continues into the Square, on which Granger Freres store is situated. He remembered that and came back to the store on St. James Street, having seen our sign there; and in the meantime that building had been torn down and we moved to 123 St. Francis Xavier Street and he continued right on until he came to Granger Freres store where he saw the fountain pens displayed and went in to purchase, called for a Waterman fountain pen, as he states to me, and purchased the pen, that he now has, which was stamped A. A. Waterman & Co., New York. The pen was not satisfactory and he looked in the telephone book and found our advertisement on the first 639
page and he came up to our store.

XQ321. What is the name of the fourth man? A. Poulin, I think.

XQ322. What did he say to you? A. He brought a pen into the store claiming that the pen was not satisfactory and wanted us to put it in order for him.

XQ323. Where did he say he bought it? A. He did not say where he bought it.

XQ324. Did he say that he thought it was an Ideal? A. He said he thought it was one of our pens, pens made by us.

XQ325. That is all that he did say? A. Yes.

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XQ326. You have four there covered by these four incidents, Cantin, Bastien, Nolan and Poulin? A. Those were recent occurrences.

XQ327. No one of these with whom you had personal conversations had had any business relations with the Modern Pen Company or A. A. Waterman & Co. so far as you know? A. I don't know anything about that.

XQ328. When Mr. Ferris came over to Montreal to look after the factory, about once a month, how long did he stay each time? A. He stays various times; sometimes he will stay a day, sometimes two days, sometimes four days.

641 XQ329. The L. E. Waterman Company, Ltd., is an entirely different corporation from the L. E. Waterman Company? A. It is a Canadian incorporated company.

XQ330. They are entirely different? A. They are incorporated in Canada although some of the same officers of the L. E. Waterman Company are officers in that company.

XQ331. The L. E. Waterman Company is a New York corporation? A. Yes.

XQ332. Who are the officers of the Canadian corporation? A. Mr. F. D. Waterman is president and treasurer; the secretary is E. J. Kastner.

XQ333. Yourself? A. Yes.

XQ334. Who are the Board of Directors? A. The Board of Directors are F. D. Waterman, Walter Randall, F. S. Waterman,
642 William I. Ferris and E. J. Kastner.

XQ335. How many of those reside in Canada? A. I reside in Canada.

XQ336. You are the only one? A. Yes.

XQ337. Do you know anything about the stock holdings? A. I know that the L. E. Waterman Company owns a majority of the stock.

XQ338. Do they own it as a corporation? A. It is in their name.

XQ339. All but qualifying shares? A. Yes.

XQ340. How many shares do you own? A. Ten shares.

XQ341. Just enough to qualify you under the Canadian law? A. No, I think one share would qualify me under the Canadian law.

XQ342. Do the other directors each hold ten shares? A. Yes.

XQ343. And all the rest is held by the L. E. Waterman Company? A. Yes.

XQ344. Then there are a great many people in Canada according to your testimony who, when they have an A. A. Waterman pen, think they have a Waterman pen; is that right? A. There are a great many people think they have a pen of our manufacture.

XQ345. Have you any information that would indicate that those who have A. A. Waterman pens call them Waterman pens? 644
A. Well, they come to us with their complaints.

XQ346. And they call them Waterman pens do they? A. Yes.

XQ347. And they think that the pen they have is a Waterman pen? A. They think the pen is made by us.

XQ348. Will you answer yes or no? A. Yes, they think it is a Waterman pen.

XQ349. And if a man has an A. A. Waterman pen he is very apt to call it a Waterman pen? A. Yes.

XQ350. And if it is an L. E. Waterman pen he is very apt to call it a Waterman pen? A. They call our pens generally Waterman pens.

XQ351. But where they deal in A. A. Waterman pens they also call them Waterman pens, don't they? A. You mean now 645
that the dealer calls them Waterman pens?

XQ352. (Last question repeated)? A. Yes, they sell them as Waterman fountain pens.

XQ353. Do people who own pens, or call for pens, when they go into a Waterman pen place and know that they are selling A. A. Waterman pens, from the sign—do they call them Waterman pens? A. There are very few signs. I don't remember seeing signs in Montreal in the windows that said A. A. Waterman & Co.

XQ354. There are a number of places in Montreal where they sell A. A. Waterman pens? A. There are some places.

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XQ355. At Granger Freres they have got a very big sign outside of their case, "A. A. Waterman & Co. Pens"? A. I spoke of the window. I saw the case for the first time when I went with you.

XQ356. You saw a great big sign "A. A. Waterman & Co." didn't you? A. I could not say whether it was A. A. Waterman & Co. or what it was. I saw the case.

XQ357. You did not see the sign? A. I did not see the sign.

XQ358. Was not the sign six feet long? A. They might have ten thousand signs.

XQ359. If a man, an individual, not a dealer is getting an
647 A. A. Waterman & Co. pen wouldn't he call for a Waterman pen? A. I would not know what they called for. I only know what they call for when they bring them to me.

XQ360. You have never dealt in A. A. Waterman pens in your life, have you? A. No.

XQ361. Never have been with any concern that sold them? A. No.

XQ362. Never had any connection with any concerns that sold them? A. No.

XQ363. All your business experience has been devoted to the L. E. Waterman pens? A. All my business experience?

XQ364. Yes? A. No, I have worked for other people.

XQ365. How many years ago? A. Quite a number of years ago. It is back before I came with Waterman.

648 XQ366. During the last fifteen years you have had no business relations with anybody selling A. A. Waterman pens? A. No, excepting dealers that I sold our goods to.

XQ367. And as far as you know, where dealers sold A. A. Waterman pens their customers would come in and ask for Waterman pens didn't they? A. Where they sold them exclusively?

XQ368. Yes? A. I would not know what they came in and called for.

XQ369. Then all you know about it is what you have heard in connection with those firms that sell L. E. Waterman pens; is not that so? A. No, people come to me and I have had letters

of all kinds, showing that where they sold the other pens they have sold them as pens manufactured by L. E. Waterman.

XQ370. How many letters do you get a day in the Montreal office? A. A good sized package of letters; perhaps seventy-five or one hundred letters more or less.

XQ371. And these that you put in evidence today were the only ones that you could pick out where there had been mistake and confusion? A. No.

XQ372. Why didn't you bring the others? A. I took them at random.

XQ373. You have been saving them for a long time? A. No; I have not, the dates will show. Most of them are recent.

XQ374. And there is not on any one of these letters anything, any memorandum that would tell you what pen came in in connection with the letter? A. Yes. 650

XQ375. You did not put any memorandum on the letter itself? A. I took a memorandum off of the letter.

XQ376. Have you those memoranda? A. No, just little slips. I had no particular memorandum other than the repair slip. There is one attached there.

XQ377. This exhibit relating to A. E. Bennett shows nothing except that Granger Freres sent in a pen of his to be exchanged, is that it? A. I think there is some reference to a number on that other slip (looking at the slip). No, but I remember the pen.

XQ378. You do not claim that the pen that he brought in to be exchanged was an A. A. Waterman pen, do you? A. No, it was a Waterman Ideal. 651

XQ379. What was the object of producing this correspondence? A. What did I produce it for?

XQ380. Yes? A. Don't ask me that.

XQ381. What is it for? A. A. E. Bennett came in and exchanged a pen and told me what he has testified to.

XQ382. Then it is simply to confirm the fact that Mr. Bennett came to see you; is that it? A. He came in to see me, yes.

XQ383. This exhibit did not have anything to do with the A. A. Waterman pens? A. With a pen stamped A. A. Waterman & Co.?

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XQ384. Yes? A. Only what Mr. Bennett repeated to me, as to what pen was offered to him and the story that was told in connection with it

XQ385. Referring to Exhibit 43 W. R. & S. A. Campbell to L. E. Waterman & Co., a postal card dated in Winnepeg. It refers to two pens in a box. What kind of pens were those? A. I think one of them was a Parker pen and I think the other was stamped A. A. Waterman & Co., New York. I am not so sure. I can tell you from the memorandum there (looking at memorandum). One was Waterman's Ideal—two of them were Waterman's Ideal.

653 XQ386. Those do not relate to A. A. Waterman at all? A. No.

XQ387. But simply relate to that controversy that you had with Granger Freres about the Post Office; is that it? A. I had a controversy with the Postmaster.

XQ388. Referring to Exhibit 42, Rev. Carom, to L. E. Waterman Company, September 15, 1909, a year and a half ago. There the man had a present of a pen that he thought was an Ideal and it was an A. A. Waterman; he did not give you to understand that anybody connected with the Modern Pen Company or A. A. Waterman & Co. had deceived him in any way, did he? A. His letter explains that he received a pen as a present in one of our boxes stamped Waterman's Ideal Fountain Pens.

XQ389. You don't know what dealer had sold him an A. A.
654 Waterman pen in an L. E. Waterman box? A. I think he mentions the name of the dealer there. I think it was Carsley & Co.

XQ390. And you never heard of another instance similar to that, did you? A. Of people securing a pen as a present in one of our boxes?

XQ391. No, selling A. A. Waterman pens in an L. E. Waterman box? A. Yes.

XQ392. How often? A. Quite frequently.

XQ393. Who does it? A. Different dealers.

XQ394. Name them? A. I could not give the names. An instance not long ago was called to my attention.

XQ395. You have no personal knowledge? A. Excepting I have people who come into the store. I can give you an instance, about two years ago at Christmas time a gentleman came down by the store rather late in the evening and stopped at the window and looked at the pens and came in and said, "I have just purchased this pen at Carsley's Department Store. I would like to exchange it."

XQ396. Carsley sells L. E. Waterman's pens too don't he? A. Carsley is out of business now.

XQ397. When he was in business? A. Not at that time. I don't think he sold ours at that time.

XQ398. He had been selling your pens? A. He had purchased a long time back a few pens. 656

XQ399. What pens generally did he sell? A. I don't know.

XQ400. He did not sell many A. A. Waterman pens, did he? A. I don't know how many he sold.

XQ401. Do you know that he sold any? A. If you will let me finish that story about that man I will tell you. He brought this pen in and wanted to exchange it. It was in one of our boxes. We told him that it was not our pen and that he had better take it back to where he bought it and have it exchanged and he went back there and demanded his money back and he came back to our store.

XQ402. At that time was Carsley selling L. E. Waterman pens as well as A. A. Waterman pens? A. I think so.

XQ403. Are you sure? A. I am not sure whether he was selling them just at that time 657

XQ404. It is a very easy thing for a man who sells both kinds of pens to occasionally make a mistake about a box? A. I would not say so.

XQ405. You never make mistakes in your facory? A. I never make mistakes in the factory?

XQ406. Yes? A. I may have made mistakes but I certainly do not make a mistake on boxes.

XQ407. You don't have but one kind of box, do you? A. Yes.

XQ408. All your boxes are marked L. E. Waterman? A. All our boxes are marked Waterman's Ideal.

XQ409. Then you could not make a mistake and get an A. A. Waterman box? A. You ask me if I ever made a mistake in the factory.

XQ410. What is your answer to that? A. Certainly I make a mistake in the factory. I wouldn't do anything if I did not.

XQ411. I call your attention to Exhibit 41, Smyth to Waterman Co and ask you if there is anything in that letter or any memorandum on it to indicate that it refers to an A. A. Waterman pen? A. There is no memorandum on that letter.

659 XQ412. And nothing in the letter? A. Nothing in the letter that refers to that.

XQ413. It might just as well refer to L. E. Waterman pens as A. A. Waterman? A. In this case it refers to a pen stamped L. E. Waterman.

XQ414. What is the date? A. December 28, 1909.

XQ415. That is over a year ago? A. Yes.

XQ416. And you have been saving it carefuly all this time? A. No, I have not been saving it carefully all this time. This is one of the letters that is in the book. It was some time back.

XQ417. And you have a very distinct recollection notwithstanding the fact that there is nothing in the letter or on the letter to substantiate it, that that was an A. A. Waterman pen and not an L. E. Waterman pen? A. Yes, I remember it.

660 XQ418. Did you put the letter aside as soon as you received it, for the purposes of evidence? A. No, I cannot say that I put it aside. I am pretty familiar with all the correspondence that goes through.

XQ419. These letters that you have produced here today are all the letters along this line of testimony, are they? A. No, there are no doubt lots of other letters.

XQ420. You cannot think of any others? A. I would be a wonder if I could think of all the letters.

XQ421. Do you think of any other letter wherein an A. A. Waterman pen has been returned to you with the statement that they thought it was an L. E. Waterman pen? A I think there are some more there.

XQ422. Outside of this bunch? A. I have no doubt I could find some.

XQ423. I call your attention to Exhibit 39 and ask you if there is anything in that postal card or any memorandum on it that would indicate that it refers to an A. A. Waterman pen? A. No, he thought he sent us a Waterman Ideal fountain pen.

XQ424. How do you know that he did? A. He gives us our number.

XQ425. Gives what? A. He gives our number.

XQ426. What about the number? A. It is number 12.

XQ427. Don't every pen maker have No. 12? A. I have never seen them.

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XQ428. That is the only thing that makes you know that that refers to an A. A. Waterman pen? A. No, that refers to a Waterman Ideal Fountain Pen.

XQ429. This postal card? A. Yes, but he sent in an A. A. Waterman.

XQ430. Was the A. A. Waterman that he sent in a No. 12? A. No, it is right there in the envelope.

XQ431. Then where did he get any No. 12? A. Because he was buying pens from us.

XQ432. He is a dealer? A. Yes.

XQ433. May that not be a pure accident? A. I don't think so. I think he was simply taking in in exchange for a Waterman Ideal—giving a man a Waterman Ideal.

XQ434. He dealt in the pen? A. Very recently. 663

XQ435. How long has he been dealing in the pens? A. If you will give me that postal card (referring to postal card). Not more than thirty days before that.

XQ436. And when he received an A. A. Waterman pen he thought it was an L. E. Waterman pen? A. He sent us that pen as one of ours for exchange.

XQ437. You do not claim that anybody deceived him in regard to this? A. I don't know whether anybody deceived him or not. All I know is that he sent that in as one of our pens.

XQ438. You do not claim that he did not know that there were two firms? A. It is quite evident that he did not know or he would not have done it.

XQ439. That is your inference from the card? A. No, that is not all. There is another card?

XQ440. Where is it? A. I think I can find it (the witness looks for a card).

XQ441. You do not find the postal card? A. No.

XQ442. Referring to Exhibit 37, where Mr. Newton says that Mr. Bowden gave him a pen, an A. A. Waterman pen, in an L. E. Waterman box. Do you have any information except such as is contained in this letter? A. No.

XQ443. The box is very old, much worn; is not that true—apparently a second hand box? A. The box looks as if it had some use.

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XQ444. Very much blotted with ink as if it had lain around the office? A. Does he say there what date he got that pen?

XQ445. "Last week," he says it was bought and presented to the Tecumseh Hotel last July—and this is dated in April? A. He had it probably a year.

XQ446. You have no information where Mr. Bowden got that pen? A. No.

XQ447. Or whether he bought the pen in one place and the box in another? A. Mr. Bowden simply said that he had a present.

XQ448. Mr. Newton says he got it as a present? A. No, I have no information.

XQ449. You have no information where Mr. Bowden got it?

666 A. No.

XQ450. Referring to the letter of Cormier to L. E. Waterman Company wherein he says, "Pen slides on paper without writing; ink bubbling in tube, to prevent flow of ink." What was the matter with that pen? A. Let me see the letter (referring to letter) I would say it was made wrong.

XQ451. In what way? A. I am not telling how to make fountain pens here.

XQ452. What was defective in it? A. He tells you the defect right here, that it did not write.

XQ453. What was the matter with it that it did not write? A. Because it was not made right.

XQ454. Can you tell in what manner it was not made right? A. I am not telling how to make fountain pens.

XQ455. Might it not have been merely from the fact that the pen was too stiff for the man? A. I would not say so. That would not be my impression, no. I could not explain to you how to re-make that pen and make it write.

XQ456. Are there not hundreds of people that come back to you and say that pens do not suit their hand and they want another? A. But they don't say it does not write, if it does not suit their hand.

XQ457. Are there not a great many pens that do not write, from one defect and another, where that is very easily adjusted? A. Speaking of fountain pens in general? 668

XQ458. Yes? A. A good many of those that come back are not made right.

XQ459. Does that refer to the pen point or to the pen? A. It might refer to both.

XQ460. And it is common to all makes? A. No, I would not say that it is common to all makes. Our pens write.

XQ461. Don't any of them come back and they complain of their not writing? A. Not unless there is an accident they do not.

XQ462. May an accident have occurred to this man's pen? A. No, he tells you right there; he gives you some idea of the trouble he has.

XQ463. But it may have been an accident so far as you know may it not? A. I couldn't tell you that. 669

XQ464. The pen might have got a little twist in some way that is very easily fixed? A. No, I would not say that he could fix it.

XQ465. You don't remember that particular pen or what was the trouble with it, do you? A. I have been having pens stamped A. A. Waterman & Co. that come back to us and they do not write and they do not give satisfaction.

XQ466. You do not remember this particular pen at all? A. Yes, I do remember that particular pen.

XQ467. What did you do with the pen—sent it back to the man to fix it? A. No, told him to take it back to the people he bought it from.

XQ468. Do you know from whom he bought it? A. No.

XQ469. Referring to Exhibit 34 where two pens were sent by Gibson & Huyck to you; one of them was an Ideal and one was an A. A. Waterman, was it? A. If you will give me the letter (referring to the letter) yes.

XQ470. Is there anything in the letter or on the letter to indicate that an A. A. Waterman pen was sent to you at all? A. There is nothing on the letter there but I remember the
671 circumstance because of the complaint that the man made afterwards.

XQ471. Do you remember what was the matter with the A. A. Waterman pen? A. Yes, we supplied him a gold pen.

XQ472. What was the matter with the L. E. Waterman pen? A. I don't recollect just what was the trouble. I think he simply exchanged or something to that effect. I don't remember.

XQ473. The letters say "to be repaired"? A. That might be.

XQ474. The repairs of the L. E. Waterman pen are apt to be about the same as the A. A. Waterman pens? A. No.

XQ475. What is the difference? A. The difference comes in the repairs, and the defects.

XQ476. In what way are the A. A. Waterman pens defective as compared with the L. E. Waterman pens? A. The customers
672 complain that they do not write, and give trouble, as I have testified farther back.

XQ477. That is all that you can say? A. What?

XQ478. You cannot point out in what manner the A. A. Waterman pens are defective as compared with the L. E. Waterman pens? A. I could point out.

XQ479. Name them? A. I am not making A. A. Waterman & Co. pens.

XQ480. But you say in one breath they are defective and when I ask you to say how they are defective you don't seem to be able to tell? A. I base it on the complaints that customers make that they do not write.

XQ481. You have examined the A. A. Waterman pens and as an expert ought to know how they are defective? A. I say the pens do not write.

XQ482. Can you explain in what way an A. A. Waterman pen is defective as compared with an L. E. Waterman pen? A. The people that buy them complain that they do not write and give them satisfaction.

XQ483. That is all that you can say is it upon an examination of the pen; you cannot point out any difference? A. They are not made right.

XQ484. Where one is defective as compared with the other? A. There is no accuracy about the flow in the pen.

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XQ485. How many have you ever examined? A. I have examined a good many.

XQ486. And those were all those that had been sent in for repair? A. No, I have examined them in dealers' stock.

XQ487. How many have you ever examined in dealers' stock? A. I could not tell the exact number but quite a number.

XQ488. How many is quite a number? A. There might be four or five; there might be a dozen.

XQ489. In your whole life? A. No, you are speaking of Canada now I understand.

XQ490. Either one? A. I have examined quite a number.

XQ491. How many do you mean by quite a number? A. I could not give the exact number but a good many.

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XQ492. How many new A. A. Waterman pens have you ever examined? A. New ones?

XQ493. Yes? A. I have examined a good many hundred.

XQ494. What defects did you find in those "A good many hundred"? A. I am not telling them how to make their fountain pens.

XQ495. What defects did you find in those that you examined? A. In my opinion they will not feed properly and they do not write right.

XQ496. That is all that you can say is it? A. From my knowledge in dealing in fountain pens and making fountain pens and repairing them they are made so that they cannot be depended upon.

676 *Edward J. Kastner*

XQ497. And your judgment is basd on the very few that you examined? A. No, I understand that they are all alike.

XQ498. Are all the L. E. Waterman pens alike? A. No.

XQ499. You know well enough that L. E. Waterman pens of New York, are made by different people, and simply assembled here, don't you? A. That they are made by different people?

XQ500. Yes? A. No, I don't know that.

XQ501. You know in New York they do not make the holders at all? A. I know that they make their holders at Seymour and that Mr. Ferris has the supervision of the manufacture of the holders at Seymour.

677 XQ502. You know the L. E. Waterman Company have no particular interest in the Seymour factory except to purchase their products? A. No, I don't know anything about that.

XQ503. You know they do not manufacture all their pen points here in New York? A. I don't know whether they do.

XQ504. Do you know when you were here in New York five or six years ago and ten years before that, that they did make their own pen points? A. I knew they made their own pen points a good many years.

XQ505. And that they bought a good many? A. I think they bought some.

XQ506. And they bought from a good many manufacturers? A. I don't know how many manufacturers.

XQ507. But a large number? A. I would not state that.

678 XQ508. But they did not pretend to manufacture the whole pen themselves? A. Yes, I would say they manufactured them because every part and every piece that was made, was made under Ferris' supervision.

XQ509. If they bought a pen point in Massachusetts and a holder in Connecticut and simply put them together in New York would you say they manufactured the pen? A. If they had the parts made for them, the same as a man might buy wood to make a cabinet or a show case and they are made of wood and glass.

XQ510. You consider the complete pen point and complete holder as not a manufactured product but a crude primary pro-

duct? A. As far as the fountain pen is concerned it has to be assembled.

XQ511. Then your idea of the manufacture of a pen is simply to put the parts together? A. Not necessarily so. We make the complete pen in Canada.

XQ512. But they do not in the United States? A. As far as I know they do.

XQ513. As far as you know they did not when you were with them here? A. They made their own gold pens. They have made them for a long time and Mr. Ferris was at the factory right along, and having holders made—the same thing.

XQ514. He would be up there one day in a month in Connecticut? A. It would be about the same as he comes to Canada, once a month, sometimes more frequently. 680

XQ515. Then you would call it that one day in a month in Canada he is supervising the manufacture of everything up there? A. He is looking over it.

XQ516. I call your attention to this Exhibit (of Chalmers to L. E. Waterman, Exhibit 33 and I ask you if there is anything in that letter or on that letter to indicate that there was an A. A. Waterman pen forwarded with it? A. No.

XQ517. Is there anything in the letter or on the letter to indicate what was the matter with that particular pen that was sent on? The letter says "One requires a new cap and the other to substitute a new hard fine pointed nib?" A. No, excepting what is called for there. 681

XQ518. Do you think one of them was an A. A. Waterman pen? A. I know one of them was an A. A. Waterman pen.

XQ519. How do you know it? A. I remember the circumstance.

XQ520. What did the A. A. Waterman pen want—a new cap or a finer nib? A. It needed a new cap.

XQ521. You do not claim that any pen is defective because a cap has to be renewed? A. No.

XQ522. I call your attention to this Exhibit 32 and ask you if there is anything in that letter or on that letter to indicate that

it was related to an A. A. Waterman pen? A. No, he speaks of a Waterman Fountain Pen.

XQ523. How do you know what pen came with it? A. I remember the pen.

XQ524. What he complains of there was simply that it did not happen to suit his hand; is not that about right? It did not feed quite freely enough? A. He says when he wants to write fast it does not let the ink down.

XQ525. What was the matter with the pen? A. I would say its construction.

XQ526. In what manner was the construction bad? A. The
683 feed could not be depended upon.

XQ527. It seems that it wrote all right when he wrote slowly but not all right when he wrote very fast? A. That is easy. If the depth of the feed was not sufficient or was not made right, it would not write fast.

XQ528. Don't you know that could be adjusted in one minute? A. No.

XQ529. And yet you claim to have been connected with the manufacture of pens yourself? A. Yes.

XQ530. If the pen had been a little bit too stiff might not that account for it? A. If it was too stiff why would it write when he wrote slowly?

XQ531. Don't you know that when a man writes slowly and presses down hard the pen may write and not write when he
684 writes very fast and presses less hard? A. No, some men write faster and press harder.

XQ532. Here is one of Wotherspoon's, two of them, Exhibit 31, wherein Mr. Wotherspoon says, "The pen seems to be clogged up. I would be obliged if you would clean it and return it to me." Do you consider that a very unusual or a very serious defect in a pen, that it is clogged? A. The man might not know what was the matter with it.

XQ533. Do you remember this particular pen? A. Yes.

XQ534. Do you know whether it was clogged up or not? A. It was not clogged up.

XQ535. Any pen can be clogged up with dirty ink and you simply wash it, soak it a little? A. Yes.

XQ536. What was the matter with this particular pen? A. It was the same as the rest of those pens. It simply would not work for him.

XQ537. And you cannot explain what was the matter? A. It did not suit him. It did not write.

XQ538. You cannot tell what was the matter with that pen? A. With that particular pen?

XQ539. Yes? A. It was made wrong.

XQ540. How was it made wrong? A. There the man tells you how it will not work.

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XQ541. How was it made wrong? A. Evidently it did not feed right.

XQ542. You don't remember particularly from your own personal knowledge what was the matter with it? A. I remember it was a pen of the same construction as those others that came in.

XQ543. Do you know what you did with that pen? A. Yes, we sent it back.

XQ544. Did you fix it? A. No.

XQ545. You would not fix it? A. I sent it back and told him to send it to the one that he secured it from.

XQ546. That was your habit, whenever you got an A. A. Waterman pen, to send it back? A. No.

XQ547. Is there anything in these letters or on them to indicate that there was an A. A. Waterman pen accompanying it? 687
A. No, but I remember.

XQ548. You have to depend in each instance upon your unaided memory, do you? A. No, I can get the repair slips of them all.

XQ549. When did you look at those repair slips? A. Not long ago.

XQ550. How long ago? A. A few days ago.

XQ551. How many days ago? A. Some of them I looked at —the last one, with that postal card that we have missed—about ten days ago.

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XQ552. When did you look at the repair slip relating to the pen indicated in Exhibit 31? A. I think it was last week; Thursday or Friday, something like that.

XQ553. Did you take it out on purpose to testify? A. No, I worked that night and went over the files, different things.

XQ554. This letter is dated November 7, 1910. You got out that old repair slip just before you came down? A. We have all the repair slips filed away, so it is not a difficult task to get them.

XQ555. And you got this particular one out before you came down? A. Yes, to refresh my memory.

689 XQ556. And you did not bring it? A. No, I did not think it necessary.

XQ557. Having refreshed your recollection so recently will you tell us what was the matter with this particular pen? A. Just what the man said.

XQ558. What did the man say? A. The man said it did not work right.

XQ559. What was the matter with the pen that it did not work right? A. It might not work right for a dozen different reasons. I would say it was not made to work right.

XQ560. In what respect was it not made to work right? A. The feed could not be depended upon, just as he says.

XQ561. Do you have a repair slip when you do not repair? A. Yes, we make a slip out as to what we have done.

690 XQ562. Are you sure of that? A. Positive.

XQ563. Can you produce any repair slips where you did not do the repairs? A. Everything as it comes in is put on a green sheet. That is the first thing we do; the man's name and all about it. That record is never thrown away. If the pen is returned without repair it is so stated.

XQ564. Why do you go through the pen and find out what was the matter when you have no intention of repairing it? A. I would not say we had no intention of repairing it.

XQ565. But you did send it back without repair? A. Yes. Our trouble is that when we adjust a pen and send it back the

man holds us responsible for working satisfactorily and if it is not made right we don't want to be held responsible for it.

XQ566. And yet you keep a repair slip of pens that you do not repair? A. We keep a record slip. It is marked "Repair slip."

XQ567. What do dealers in A. A. Waterman goods usually call those pens? A. In the instances that I have referred to, they call them Waterman fountain pens.

XQ568. How long has that been the case—since you can remember? A. I have known instances where they called them Waterman fountain pens and thought they were ours.

XQ569. (Question repeated)? A. I should think it was within the last five or six years, where I have come in contact with them. 692

XQ570. Didn't you come in contact with them many more years ago than that? A. Oh, yes.

XQ571. Is it not a fact that if a man way back ten or twelve or fifteen years ago was dealing in A. A. Waterman pens that he would usually call them Waterman pens? A. No, I could not say.

XQ572. Have you not known of such instances? A. I have known of people who have purchased pens believing they were buying Waterman Ideal Fountain Pens.

XQ573. Back ten or fifteen years ago when a man was selling A. A. Waterman pens exclusively what did he call them? A. I don't know when he was selling them exclusively. 693

XQ574. Then you don't know what dealers in A. A. Waterman pens called them? A. I said within the last six years these dealers—it has come to my attention of people who have purchased them, purchased them as Waterman pens and dealers who have sold them at Waterman pens referring to our advertisement and as pens made by us.

XQ575. But you do not give any special instances. Give an instance? A. Where a customer has purchased them?

XQ576. Yes? A. Mrs. Gratton.

XQ577. July 4th? A. No, that is another one.

694 *Edward J. Kastner*

XQ578. You said you did not see it personally and see her personally? A. No, I did not see her personally.

XQ579. Then how can you say that you knew it? A. I knew Mrs. Gratton said so.

XQ580. How do you know it? A. From a report that I had.

XQ581. That is the only way, what somebody else told you? A. No, I had it where I saw it.

XQ582. In relation to Mrs. Gratton it was what somebody else told you, was it not? A. Yes.

XQ583. When was the factory established in Montreal? A. We have been assembling goods there a long time, all my time
695 there but the actual building, where we are now, that part of the factory, I think it was over two years.

XQ584. Before that you merely assembled parts? A. We assembled parts, yes.

XQ585. Where did you get your holders? A. We got some holders from H. P. & E. Day.

XQ586. Where did you get your pen points? A. L. E. Waterman Company.

XQ587. Then it is only within the last two years that you have been manufacturing everything in Canada? A. It may be over two years.

XQ588. When the new factory was established? A. When the new factory was established. We have made parts.

XQ589. Before that you were assembling? A. We assembled
696 the parts.

XQ590. You got your pen points from L. E. Waterman Company, New York? A. Yes.

XQ591. You don't know where they got them? A. No, not those particular pen points.

XQ592. Did you ever Exhibit any pens for medals in Canada? A. Yes.

XQ593. When? A. In Halifax. I don't remember the year.

XQ594. When was it? A. Two years ago.

XQ595. Where did you get the pens to exhibit? A. We had them there.

XQ596. You had them in Montreal? A. Yes.

XQ597. From whom did you buy the holders? A. We had a stock of pens which L. E. Waterman Company had there.

XQ598. Those pens were exhibited in Halifax? A. Yes.

XQ599. You don't know who made the holders? A. Yes, H. P. & E. Day made the holders.

XQ600. Who made the pen points? A. I don't know.

Mr. Bacon: I move to strike out all of the exhibits offered in evidence today on the ground that they are incompetent, irrelevant and immaterial and have no relation whatever to this defendant. And for the same reason I move to strike out all of this witness' testimony on 698
the ground that none of it relates to any transaction with the defendant; and especially to strike out all that part of the testimony which relates to conversations with other people.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ601. Can you by looking at this slip refresh your recollection as to the name of the pen clerk at Granger Freres that you have referred to (handing witness the paper)? A. Yes.

RDQ602. Please state it on the record? A. J. Pineaut.

RDQ603. This is the pen clerk of Granger Freres that you referred to as in charge of the sale of their fountain pens? A. 699
Yes.

RDQ604. You have stated in your cross-examination in answer to questions by defendant's counsel that there was a letter from the Postmaster regarding the mixing up of mails. Is the letter that I show you the one that you referred to in your cross-examination (showing witness a paper)? A. Yes.

RDQ605. It is addressed to Messrs. Davidson & Wainwright, Advocates, Montreal. Who are they? A. They are the L. E. Waterman, Ltd. lawyers.

RDQ606. Have you the other communications referred to in this letter? A. I have not them here.

700 *Edward J. Kastner*

The letter referred to by the witness is offered in evidence and marked Plaintiff's Exhibit No. 46.

Mr. Bacon: Objected to as incompetent, irrelevant and immaterial and not related to the defendant.

Mr. Watson: Counsel for plaintiff calls the attention of the Court to the fact that defendant's counsel asked for this letter.

RDQ607. In your experience with pens marked A. A. Waterman & Co. have you found that these pens have defective feeds or defective feeding devices? A. Yes.

RDQ608. Have you found that they have leaky joints? A.
701 Yes.

RDQ609. Is it not a fact that a large proportion of the A. A. Waterman & Co. pens marked A. A. Waterman & Co. which you have seen, have a joint near the nozzle? A. Yes.

RDQ610. That is about half an inch or about that, from the lower end of the holder? A. The pen point of the holder, yes.

RDQ611. Do you have complaints about the defective feeds and leaky joints? A. Yes.

RDQ612. The feeding device is a very important part of a fountain pen? A. Yes.

RDQ613. The adjustment of the parts is a very essential element in their manufacture is it not? A. Yes.

RDQ614. What do you mean by adjustment? A. I mean by
702 adjustment that the set of the pen is made to conform to the feed bar, and the feed bar shaped, so that it lies alongside the gold pen, so as not to stand away from it. The adjustment of the feed from the point of the gold pen should be put in a certain position so as to assure a steady flow and respond to the opening of the gold pen.

RDQ615. In the pens marked A. A. Waterman & Co., New York, which you have examined, have you found this adjustment was proper? A. The pens that I have examined do not seem to be adjusted carefully and there does not seem to be any regular place for the feed to be put.

RDQ616. Did you ever know at any time, any where, any person to ask for a Waterman pen and give you any information or indication that he expected to buy or purchase or receive a pen marked A. A. Waterman & Co.? A. No.

RDQ617. And when people call for pens marked A. A. Waterman & Co. do they in all cases come to your attention and give you to understand that they were referring to pens of the plaintiff's manufacture? A. Yes.

RDQ618. Did you ever see anywhere at any time a fountain pen marked Waterman without other distinguishing marks or initials? A. Yes.

RDQ619. Except those manufactured by the plaintiff? A. No. 704

RDQ620. Or the L. E. Waterman Company, Ltd.? A. No.

RDQ621. Did you ever see at any time or any where a fountain pen, except those manufactured by the plaintiff and the L. E. Waterman Company, Ltd., that were marked Waterman's without other distinguishing initials or marks? A. No.

RDQ622. While you were connected with the L. E. Waterman Company of New York did you have any familiarity with the so called middle joint pen marked A. A. Waterman & Co.? A. Do you mean did I ever come in contact with them?

RDQ623. Yes? A. Yes.

RDQ624. Did you find, or even see, these pens broken at the middle joint?

705

Mr. Bacon: Objected to as it relates to a period before the organization of the defendant.

A. Yes.

RDQ625. How many of these did you see? A. I have seen a good many.

RDQ626. Tens or hundreds or thousands? A. Within the hundreds, easy enough, I have seen in my time.

706 *Edward J. Kastner*

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ627. Where did you see hundreds of Waterman pens broken at the middle joint? A. In my time I have seen hundreds.

RXQ628. Have you ever seen an L. E. Waterman pen broken at the joint under the finger? A. Yes.

RXQ629. And hundreds of them? A. In my time, yes.

RXQ630. And you have known of a great many complaints of people, as to the joint under the finger, because it leaked and got the finger dirty? A. I have known complaints that the people had of the pens leaking.

707 RXQ631. It is not confined to any one pen, that it leaks, is it? A. Some of them leak much more than others.

RXQ632. The feed is a part of the holder is it not? A. The feed is made of rubber.

RXQ633. And is manufactured by Day of Connecticut? A. The rubber parts are all made by Day.

RXQ634. And not by the L. E. Waterman Company? A. The L. E. Waterman Company, Ltd. manufacture their feed.

RXQ635. But not the L. E. Waterman Company of New York? A. I don't know what they are doing there.

RXQ636. Can you give the name of any person who ever complained to you about a defective feed of an A. A. Waterman pen? A. I have got letters there that they complained about it.

708 RXQ637. What was the name of any man who made such a complaint? A. There are letters there now that people said they did not write.

RXQ638. Can you give the name of any person who has made that complaint? A. This man Wotherspoon speaks of the pen not writing.

RXQ639. Are you prepared to say that came from a defective feed? A. I would say in my opinion the feed was not made so that it could be depended upon.

RXQ640. Are you willing to swear that it came from a defective feed? A. I am willing to swear that in my opinion the feed is not made so that it can be depended upon.

RXQ641. That is not an answer (last question repeated)? A. I am willing to swear that my opinion is that it came from that.

RXQ642. Then it was not from the fact that the pen point was not right? A. No, I would not say it was the pen point.

RXQ643. Can you give the name of any man who made a complaint that an A. A. Waterman pen had a leaky joint? A. Yes, some of those letters refer to it.

RXQ644. Give the name of one? A. I cannot remember without looking at the letter.

RXQ645. Are you sure that any of the letters refer to a leaky joint? A. Yes, I think a man complained of a pen leaking.

710

RXQ646. Can you give the name of any man, outside of the letters, who ever complained of a leaky feed or a leaky joint? A. I have no occasion to remember those names.

RXQ647. The feed depends on a certain position, as you stated, of certain parts of the pen, the L. E. Waterman pen. Is not that true of the A. A. Waterman pen? A. It might be to some extent but if the feed is not made right it would not write any way.

RXQ648. Every feed has to be adjusted does it not? A. The feed should be adjusted, if it is intended to write.

RXQ649. In the manufacture of pens do you adjust the parts by hand or do you have a gauge? A. We shape it by heating it.

RXQ650. Do you adjust the feed by heating? A. Yes, to the gold pen.

711

RXQ651. What is your description of the feed? A. It is the part, the rubber part, that the ink goes through, that lies on the underside of the gold pen.

RXQ652. It is a rubber tongue? A. Ours is not a tongue.

RXQ653. A rubber round bar? A. A groove, a fissure.

RXQ654. You have to have an experienced man to put in the feed bar? A. We do have experienced men for that.

RXQ655. And if it is not just right, then they shape it so as to get it in the right position? A. They shape it to the gold pen.

RXQ656. They do not heat it in every instance? A. Yes.

RXQ657. The adjustment of the feed is done by hand is it not? A. Yes.

RXQ658. And every man has to depend upon his eye in the adjustment of the feed? A. He uses a magnifying glass.

RXQ659. He uses his own judgment and determines just when it is in the right place? A. No, he has a place to put it; there is a regular place to put it, just as a gold pen is shaped.

RXQ660. It depends on the skill of the man that puts it in? A. Yes. It depends on the skill of the man.

RXQ661. That is all? A. It is a skilled man that assembles it.

RXQ662. It does not depend on the feed itself? A. Yes it
713 does.

RXQ663. Is there any difference between the feed of the L. E. Waterman and the A. A. Waterman? A. Yes.

RXQ664. What is the difference? A. The difference is that the L. E. Waterman feed is made with a groove or fissure, but some of the A. A. Waterman pens that I have examined, there is a round piece of rubber lying in the bottom. In others there is a very shallow groove or fissure that would hardly be called a fissure.

RXQ665. How many A. A. Waterman pens have you examined in the last six years? A. I could not tell the exact number. It has been about on the same basis as I have testified to.

RXQ666. How many new A. A. Waterman pens have you examined in the last six years? A. I have examined, in some in-
714 stances, as many as a dozen, in a dealer's stock.

RXQ667. What dealer's stock? A. O. W. Barwick's stock, in Montreal.

RXQ668. Did you examine each pen? A. Yes.

RXQ669. What did you do to each pen as you examined it? A. I took it apart.

RXQ670. Took it all apart, took the feed out? A. Yes.

RXQ671. How many? A. I should say perhaps a dozen.

RXQ672. When? A. At different times. I could not give you the exact date. I have called on Barwicks quite frequently.

RXQ673. How many did you ever do at one time? A. It might be a dozen.

RXQ674. A dozen in one day? A. Yes, in one day.

RXQ675. How many have you ever examined in all from his stock? A. I don't know; I could not tell the exact amount.

RXQ676. About how many? A. I might examine two or three, at different times, as I would go in there.

RXQ677. Are you sure you have examined a dozen at one time? A. Oh, yes.

RXQ678. Why did you make this examination? A. I wanted to see whether there was any difference in the feeds.

RXQ679. When did you do this? A. I could not give you the exact date.

RXQ680. About when? A. I don't remember just about 716
when. I am back and forth by his place there.

RXQ681. Within a year? A. Yes.

RXQ682. Before a year? A. No, within a year.

RXQ683. Does he sell the L. E. Waterman pen? A. Yes.

RXQ684. What kind of A. A. Waterman pens does he sell? A. Those that I examined were Safety—self-filling Safety pens.

RXQ685. The self-fillers with a sack? A. Yes, they have a sack, sure.

RXQ686. That was the only kind that you examined at that time? A. No.

RXQ687. What other kinds have you examined? A. I have examined the different kinds that I have seen there.

RXQ688. What different kinds? A. I have seen the middle
joint. I have seen the joint near the pen point. 717

RXQ689. And the Lincoln pens? A. I have not examined Lincoln pens. I have seen Lincoln pens come and examined them that way; not with a dealer's stock.

RXQ690. You stated as I take it from my notes, that there was no regular place for the feed to be put. What did you mean by that? A. I did not state that.

RXQ691. When the holders come from Connecticut are the feeds separate from the body of the holder? A. They were not when I was here.

RXQ692. They were all in place? A. They were all in place.

RXQ693. You did not take the feed out? A. Yes, I took it out.

718 *Edward J. Kastner*

RXQ694. And put it in again? A. Put it in again.

RXQ695. When you put in the gold pen? A. Before.

RXQ696. Before you put in the gold pen? A. We examined it, yes.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ697. Is it a fact that you have come across a great many pens marked A. A. Waterman & Co. that had leaky joints? A. Yes.

RDQ698. How long has this defect come to your attention?
719 A. It has come to my attention frequently, right along.

RDQ699. You testify that the rubber parts of pens made by the L. E. Waterman Company of New York, are made in Seymour. Under whose direction and supervision are those rubber parts made? A. When I was here they were made under Mr. Ferris' supervision.

RDQ700. When you were here in New York under whose supervision or instruction were any gold pen nibs that were purchased of other makers, made? A. Under Mr. Ferris'.

RDQ701. Did you ever know of any gold pen nibs made for the L. E. Waterman Company, New York, which they used in Waterman's Ideal Fountain Pens, that were made without his supervision? A. No.

720 *RE-CROSS EXAMINATION by Mr. Bacon:*

RXQ702. How do you know that he supervised the making of these gold nibs? A. Because I have gone with him.

RXQ703. How often? A. How often did I go with him?

RXQ704. Yes. A. Only once in a while.

RXQ705. What do you mean by once in a while? A. Perhaps once in a month.

RXQ706. He swore that he only went to Connecticut once a month? A. This is gold pens you are talking about.

RXQ707. Where were gold pens made? A. I went with him in New York.

RXQ708. Where? A. Mabie Todd.

RXQ709. Where else? A. Armeny and Marion and Fairchild.

RXQ710. Who else? A. Those are the places I went with him.

RXQ711. How often did you go to each place? A. I did not go very frequently. I went every now and then just as I stated.

RXQ712. How long did you stay? A. Sometimes it would take a couple of hours before we would get through.

RXQ713. What were you doing when you were there? A. We were examining the pens, the way they were made, and Mr. Ferris was giving instructions how to make them, how to grind 722
them, how to look after the slits in the pens.

RXQ714. You did not stay to see those workmen do those things? A. Yes.

RXQ715. You would stay an hour? A. We would stay in some cases two hours. Mr. Ferris used to go there.

RXQ716. You don't know where he went except what he told you? A. That is all.

RXQ717. How often did you go to Connecticut on the rubber business? A. I went to Connecticut a few times. I don't remember how many times.

RXQ718. How long did you stay? A. I would stay the day.

RXQ719. What did you do when you were there? A. Went to see how the holders were turned, instructed them how to turn
the joints and make the feeds. 723

RXQ720. And you presumed to give instructions to those people who were making those things all the time for yourself and other parties? A. Certainly.

RXQ721. You have just said that you noticed a great many leaky joints in the A. A. Waterman pens. How many is "A great many"? A. I would say, of those pens that came back with the joint at the shoulder, that three quarters of them leaked at the joint.

RXQ722. That is under the finger? A. Yes.

RXQ723. How about the middle joint? A. The middle joint broke.

724 *Edward J. Kastner*

RXQ724. How many broken middle joints have you ever seen in your life? A. I have seen a good many hundred.

RXQ725. How many in the last six years? A. I could not tell you the exact amount.

RXQ726. How many? A. I could not give you the exact figure.

RXQ727. Can you give me any idea whatever? A. I can give you an idea in this way, that a big percentage of the middle joint pens that come to us are broken in the center.

RXQ728. What proportion of A. A. Waterman pens coming to you are middle joints? A. Perhaps twenty-five per cent.

725 RXQ729. And you get in about one or two a day on an average? A. Yes, it is hard to give the exact amount.

Deposition closed.

Signature waived.

Adjourned to Wednesday, March 29, 1911, at 10 A. M.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

726

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.
} In Equity.

New York, March 29, 1911.

Testimony taken on behalf of the complainant at final hearing before Frederic M. Adams, an examiner of this court, at the office of Watson & Raymond, 10 Wall Street, New York, the

29th day of March, 1911, at 10 o'clock in the forenoon, pursuant to notice hereto annexed.

Met pursuant to adjournment.

Appearances:

Samuel S. Watson, for Complainant.
Alexander S. Bacon, for Defendant.

Mr. Watson: The post card referred to by the witness Kastner in connection with Plaintiff's Exhibit 39, which consisted of communications in connection with the transaction with the Neudorf Drug & Book Company has been found and plaintiff offers it in evidence as a part of Exhibit 39. 728

Same objections.

WILLIAM HILL KERNAN, a witness called on behalf of the plaintiff, being duly sworn testified as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, place of residence and occupation? A. William Hill Kernan; 1709 Ocean Avenue, Brooklyn, New York. I am connected with the L. E. Waterman Company.

Q2. At the New York Office? A. At the New York office, 173 Broadway.

Q3. In what department of their business are you? A. I am in the wholesale department. 729

Q4. You are in the wholesale selling department? A. Wholesale selling department, yes.

Q5. How long have you been connected with the L. E. Waterman Company? A. Fifteen years.

Q6. How long have you been connected with the wholesale selling department? A. In my present capacity five years.

Q7. What is your present capacity? A. I have charge of the wholesale department at present.

Q. How long altogether have you been connected with the selling department of the L. E. Waterman Company? A. About seven years.

730 *William Hill Kernan*

Q9. Prior to that time were you connected with the selling department of the business, or what department of the business? A. I served in various capacities.

Q10. Were you selling goods prior to seven years ago for the L. E. Waterman Company? A. I had sold.

Q11. How long had you been selling goods altogether? A. Altogether about eight years.

Q12. And prior to that in what department were you employed? A. I was in the order department.

Q13. Is not that part of the selling department? A. Yes.

Q14. How long were you connected with that department? A. About two years.

731

Q15. What were your duties prior to ten years ago? A. I served in a number of capacities. I have been pen cleaner and shipping clerk and served in whatever capacity I was designated for.

Q16. Have you ever been in the retail department? A. Not for any length of time; just occasionally.

Q17. Have you ever been connected with the manufacturing department of the L. E. Waterman Company? A. No, sir.

Q18. Since you have been connected with the selling department of the L. E. Waterman Company what are the names that customers ask for or order Waterman's Ideal Fountain Pens? A. They call for Waterman pens, Waterman's Fountain Pens, Waterman Ideal Fountain Pens.

732

Q19. Do they sometimes call them Ideal pens? A. Occasionally.

Q20. What is the name generally used? A. Waterman's pens.

Q21. How long has that been the case? A. Ever since I can remember.

Q22. All the time you have been connected with the business? A. Fifteen years.

Q23. Did you have any contact with customers prior to ten years ago? A. No, sir, not in a selling capacity.

Q24. Did you handle orders? A. Yes.

Q25. I show you Plaintiff's Exhibit No. 7 and ask you if you are familiar with that pen (handing witness the exhibit)? A. I am familiar with that make of pen, yes.

Q26. That is one of the Waterman Company pens is it not? A. The L. E. Waterman Company, yes.

Q27. Are you familiar with that marking? A. Yes.

Q28. I show you Plaintiff's Exhibit No. 8 and ask you if you are familiar with that pen (handing witness exhibit)? A. Yes.

Q29. Both of those methods of marking pens are used by the L. E. Waterman Company? A. Yes.

Q30. How long? A. As long as I can remember. 734

Q31. Both of them? A. Not both of them.

Q32. Please explain the periods when these markings were used and how? A. This Exhibit 7 is one of the later models.

Q33. How long has that marking been used? A. I cannot say as to the length of time.

Q34. Prior to that time they used the marking of Exhibit 8? A. Yes.

Q35. In what other ways, if you know, have Waterman's Ideal Fountain Pens been marked? A. They have been marked Waterman's and Waterman Fountain Pens and Waterman's Fountain Pens.

Q36. Have they ever been marked Waterman alone on the barrel? A. Yes.

Q37. How long has that been the fact? A. As long as I can 735 remember.

Q38. Are any of the pens manufactured by the L. E. Waterman Company marked Waterman's alone on the barrel? A. Yes.

Q39. How long has that been a fact? A. As long as I can remember.

Q40. Have you ever seen anywhere, at any time, any fountain pens other than those made by the L. E. Waterman Company or L. E. Waterman Company, Ltd., which were stamped and marked with the word Waterman alone without initials or other distinguishing marks? A. Yes. Any other? Will you repeat the question?

736 *William Hill Kernan*

Q41. (Repeated.) A. Yes, I have.

Q42. Who made them? A. Some were made by a party named I. Waterman.

Q43. They had the initial preceding the name did they not? A. They had the initial I. Waterman, yes.

Q44. Do you know whether the manufacture and sale of these pens was enjoined by the United States Circuit Court of this district? A. Yes, I do.

Mr. Watson: Counsel gives notice that he will introduce in evidence a certified copy of the injunction order.

737 Q45. I repeat the question. Have you ever seen any fountain pens other than those made by the L. E. Waterman Company or L. E. Waterman Company, Ltd. which were marked with the name of Waterman alone without any other distinguishing marks or initials anywhere, at any time? A. No, I don't recall it.

Q46. Have you at any time, anywhere, seen fountain pens marked with the name Waterman's alone without other initials or distinguishing marks excepting those made by the L. E. Waterman Company and the L. E. Waterman Company, Ltd.? A. No, sir.

Q47. The L. E. Waterman Company, Ltd. is a subsidiary company of the L. E. Waterman Company, to do its Canadian business? A. I so understand.

738 Q48. You have no personal knowledge of their business? A. No.

Q49. Have you been to their factory in Montreal? A. I have visited it.

Q50. Have any evidences of confusion in the trade, or in the minds of the public, come to your attention, between the fountain pens manufactured by the L. E. Waterman Company and those stamped and marked A. A. Waterman & Co., New York?

Mr. Bacon: Objected to as irrelevant and immaterial and not an issue.

A. Yes, I have had a number of instances of that sort come to my attention.

Q51. In what way? A. In the way that pens stamped A. A. Waterman & Co. were mistaken for the genuine Waterman Ideal Fountain Pen.

Q52. Do people bring them in to you or write to you about them or how do you find this out? A. Both by mail and by means of people bringing them in.

Q53. Can you produce some of the letters or communications that you received which you think show confusion? A. Yes, I can.

Q54. I notice these letters on top that you produce are the ones that were in the record on the motion for preliminary injunction. I show you communications from Mabel Gifford and 740
ask you if the plaintiff received these letters in due course of mail (showing witness the papers)? A. Yes, they did.

Q55. All you know about the matter is what appears in the letters? A. Yes,that is all.

Q56. You never saw Mabel Gifford? A. No, sir.

The letters identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 47.

Mr. Bacon: Objected to as incompetent, irrelevant and immaterial; the signature not verified; confusion not an issue, unless it is caused by some act of the defendant; and these letters are not in any way emanating from or connected with the defendant.

Q57. I show you letters dated December 22, 1909, and Jan- 741
8, 1910, signed D. S. Phleger and I ask you if the Waterman Company received these letters in due course of mail (handing witness papers)? A. Yes, they did.

Q58. All you know about the transaction is what appears in the letters? A. That is all.

Q59. What kind of a fountain pen was received in connection with those letters? A. A pen stamped A. A. Waterman & Co., New York.

The letters identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 48.

Same objections.

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Q60. What kind of a pen was received with the Mabel Gifford letter which you have just identified? A. A pen stamped A. A. Waterman & Co., New York.

Q61. I show you a letter dated September 29th, 1909, signed Henry Hall and ask you if the Waterman Company received that letter in due course of mail (handing witness a paper?) A. Yes.

Q62. Is this the page of the circular to which the letter referred (handing witness paper)? A. It is.

The letter and page of the catalogue identified by the witness is offered in evidence and marked Plaintiff's Ex-
743 hibit No. 49.

Same objections.

Q63. I show you a letter on the letter head of Brentano's, New York dated October 19, 1906, and ask you if that letter was received in due course of mail (handing witness a paper)? A. Yes, it was.

Q64. Does that refer to the plaintiff's business? A. Yes.

Q65. They have had close business connections with Brentano ever since you have been in the business have they not? A. Yes.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 50.

744 Same objections.

Q66. I show you a letter dated January 16th, 1910, signed by L. D. Fairchild and December 30th, 1909, signed by L. D. Fairchild and ask you if you received that in due course of mail (handing witness the paper)? A. Yes.

Q67. What kind of a pen was received in connection with those letters? If you do not remember just say so? A. I do not remember.

Q68. I show you a letter dated October 27th, 1907, signed by typewriter, by J. F. Hardy and ask you if you received that letter in due course of mail (handing witness the paper)? A. Yes.

745

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 51.

Same objections.

Q69. I show you letters dated February 11th, 1911, and March 2, 1911, and ask you if those letters were received in due course of mail (handing witness paper)? A. Yes, they were.

Same objections.

Q70. Annexed to these letters purports to be a wrapper, or a cover that has been through the post office. Did you receive that in connection with the pen that you received mentioned in those letters? A. Yes, we did.

746

The two letters and wrapper identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 52.

Same objections.

Q71. What kind of a pen was received in connection with Plaintiff's Exhibit No. 52? A. A pen stamped A. A. Waterman & Co., New York.

Q72. I show you letters dated December 31, 1910, and January 6th, 1911, and ask you if you received those letters in due course of mail (handing witness papers)? A. Yes.

Q73. What about the slip annexed to these letters; do you know anything about that? A. That is the slip that came in the package.

747

Q74. What was in the package? A. It contained a fountain pen stamped A. A. Waterman & Co., New York.

The letters and covers of the package are introduced in evidence and marked Plaintiff's Exhibits No. 53.

Same objections.

Q75. Have you the pen that came with these letters? A. Yes.

Q76. Is this it? (Showing witness the pen.) A. This is the pen.

748 *William Hill Kernan*

The pen produced by the witness is offered in evidence and marked Plaintiff's Exhibit No. 54.

Same objections.

Q77. I show you letter dated January 11th, 1911, from Edward C. Bowie and ask you if you received that in due course of mail (handing witness the paper)? A. Yes.

Q78. What about the slip annexed to it? A. This slip is the wrapper in which the pen was received.

Q79. Referred to in that letter? A. Referred to in that letter.

749 The letter and wrapper are introduced in evidence and marked Plaintiff's Exhibit No. 55.

Same objections.

Q80. What kind of a pen did you receive in connection with that letter and package? A. A pen stamped A. A. Waterman & Co., New York.

Same objections.

Q81. I show you a letter dated January 16th, 1911, and annexed to it a slip which bears the printed name of G. D. Davidson, 163 Newark Avenue, Jersey City, N. J., and also a fountain pen and ask you if you received these in due course of mail (handing witness papers and pen)? A. Yes.

750 Q82. I note an envelope annexed to these letters; was that the envelope in which the letter was received? A. Yes, it is.

The letter, slip and envelope are offered in evidence and markd Plaintiff's Exhibit No. 56.

Same objections.

The pen received in connection with Exhibit 56 is offered in evidence and marked Plaintiff's Exhibit No. 57.

Same objections.

Q83. Look at the pen and tell me what you find? A. I find that the pen is marked Waterman Ideal Fountain Pen, New York but the cap is stamped "Modern," and is not the one that we originally furnished with the pen.

Q84. The cap is not of the plaintiff's manufacture? A. No, sir.

Q85. I show you a letter dated January 28th, 1910, signed W. H. York and ask you if you received that letter in due course of mail (handing witness paper)? A. Yes.

Q86. What kind of a pen did you receive in connection with that letter? A. I received a pen stamped A. A. Waterman & Co., New York.

The letter identified by the witness if offered in evidence and marked Plaintiff's Exhibit No. 58.

Same objections.

752

Q87. I show you a letter dated July 27th, 1910, with a reply written thereon in long hand signed by D. D. Ewing and ask you if you received the letter, with this reply, in due course of mail (handing witness the paper)? A. Yes, we did.

Q88. The letter is one emanating from the plaintiff? A. Yes.

Q89. The reply purports to emanate from D. D. Ewing, New Orleans, La.? A. Yes.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 59.

Same objections.

Q90. I show you letters dated March 8th, 1910, and March 17th, 1910, signed J. C. Mimms and ask you if the Waterman Company received those in due course of mail (handing witness the papers)? A. Yes. 753

Q91. How about the envelopes annexed, do you know anything about those? A. The envelopes are those in which these letters referred to were received.

The letters and envelopes identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 60.

Same objections.

754 *William Hill Kernan*

Q92. What kind of a pen did you receive in connection with the letter dated March 8th, 1910, Plaintiff's Exhibit 60? A. The pen was one stamped A. A. Waterman & Co., New York.

Q93. I show you a letter dated January 5, 1910, signed Mrs. T. J. Steele, also a post card signed the same way, dated February 14, 1910, and ask you if you received those in due course of mail (handing witness papers)? A. Yes.

The letter and post card identified by the witness are introduced in evidence and marked Plaintiff's Exhibit No. 61.

Same objections.

755

Q94. What kind of a pen did you receive in connection with Plaintiff's Exhibit No. 61? A. A pen stamped A. A. Waterman & Co., New York.

Q95. Do you know anything about this transaction except what appears from the letter and post card and pen? A. Nothing except from the correspondence.

Q96. I show you a letter dated February 1, 1911, signed Walter W. Burdette and ask if you received that letter in due course of mail (handing witness the paper)? A. Yes.

Q97. What kind of a pen did you receive in connection with that letter? A. A pen stamped A. A. Waterman & Co., New York.

The letter identified by the plaintiff is offered in evi-

756 dence and marked Plaintiff's Exhibit No. 62.

Same objections.

Q98. I ask you if you received a pen from A. T. Hoyt dated February 18, 1910, in connection with the writing which I now show you (handing witness the paper)? A. Yes.

Q99. What kind of a pen was that? A. A pen stamped A. A. Waterman & Co., New York.

The writing identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 63.

Same objections.

Q100. I show you a letter dated March 25, 1910, signed V. A. Warren and another letter signed the same way dated April 12, 1910, and ask you if you received those letters in due course of mail (handing witness the papers)? A. Yes.

Q101. Do you know anything about the envelope annexed? A. The envelope is the one in which the letter of March 25, was received.

The letter and envelopes identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 64.

Same objections.

Q102. What kind of a pen was received in connection with those letters? A. A pen stamped A. A. Waterman & Co., New 758
York.

Q103. I show you a post card stamped as going through the Post Office dated November 16th, 1909, signed F. H. Wisewell and ask you if you received that in due course of mail (handing witness the paper)? A. Yes.

The post card identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 65.

Same objections.

Q104. Did the plaintiff ever mark or stamp fountain pens "Lincoln"? A. No, sir.

Q105. I show you letters dated November 24, 1909, and December 2, 1909, signed by C. G. Lee and ask you if they received 759
those in due course of mail (handing witness the papers)? A. Yes.

Q106. What about the envelopes? A. The envelopes are those in which the letters referred to were received.

Th letters and envelopes identified by the witness are offered in evidence and marked Plaintiff's Exhibit 66.

Same objections.

Q107. What kind of a fountain pen did you receive in connection with those letters? A. A pen stamped A. A. Waterman & Co., New York.

760 *William Hill Kernan*

Q108. Have you ever seen Mr. Lee himself personally? A. No, sir.

Q109. Do you know whether anybody from the Waterman Company has ever seen him about the matter? A. I could not say.

Q110. I show you two letters signed by John C. Innes dated October 26, 1909 and November 26, 1909, and ask you if you received those letters in due course of mail (handing witness the papers)? A. Yes.

The letters identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 67.

761 Same objections.

Q111. What kind of a pen did you receive in connection with those letters? A. A pen stamped A. A. Waterman & Co., New York.

Q112. I show you a letter dated October 16th, 1909, signed by George W. Hull and ask you if you received that letter in due course of mail (handing witness the paper)? A. Yes.

Q113. What kind of a pen did you receive in connection with that letter? A. A pen stamped A. A. Waterman & Co., New York.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 68.

762 Same objections.

Q114. I show you a letter dated January 17th, 1910, signed by Jay G. Shumway and ask you if you received that letter in due course of mail (handing witness the paper)? A. Yes.

Q115. What kind of a pen did you receive in connection with Mr. Shumway's letter? A. A pen stamped A. A. Waterman & Co., New York.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 69.

Same objections.

Q116. I show you a letter dated September 8th, 1910, and ask you if you received that in due course of mail (handing witness the paper)? A. Yes.

Q117. What kind of a pen did you receive in connection with the letter you have just identified? A. A pen stamped A. A. Waterman & Co., New York.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 70.

Same objections.

Q118. Do you know anything about Exhibit 70 except what appears on the letter? A. Nothing.

764

Q119. Do you know the writer? A. No, sir.

Q120. Have you ever seen him? A. No, sir.

Q121. I show you a letter dated March 3, 1910, signed R. W. F. Lendrum and also letter dated March 19th, 1910, signed the same way and ask you if you received those letters in due course of mail (handing witness the papers)? A. Yes.

Q122. What kind of a pen did you receive in connection with that letter? A. A pen stamped A. A. Wateman & Co., New York.

Q123. I note an envelope annexed and ask you if you know anything about the envelope? A. The envelope is that in which one of these letters was received.

The two letters identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 71. 765

Same objections.

Q124. I show you a letter dated January 28th, 1911, signed by Teresa Lanyon and ask you if you received that in due course of mail (handing witness the paper)? A. Yes.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 72.

Same objections.

Q125. I show you a letter dated February 7th, 1910, signed O. J. Burkley and another letter signed the same way dated

766 *William Hill Kernan*

January 30, 1910, and ask you if you received those letters in due course of mail (handing witness the papers)? A. Yes.

Q126. How about the envelope annexed? A. The envelope is the one in which the letter of February 7th was received.

The two letters and envelope identified by the witness are offered in evidence and marked Plaintiff's Exhibit 73.

Same objections.

Q127. What kind of a pen did you receive in connection with those letters? A. A pen stamped A. A. Waterman & Co., New York.

767 Q128. I show you a letter dated December 8th, 1910, signed by H. F. Partridge and ask you if you received that letter in due course of mail (handing witness the paper)? A. Yes.

Q129. How about the envelope annexed; do you know anything about that? A. The envelope is one in which the letter referred to was received.

The letter identified by the witness is offered in evidence together with the envelope and they are marked Plaintiff's Exhibit No. 74.

Same objections.

Q130. I show you a letter dated October 13th, 1909, signed by J. O. Hulberg and ask you if you received that letter in due course of mail (handing witness the paper)? A. Yes.

768 The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 75.

Same objections.

Q131. What kind of a pen did you receive in connection with that letter? A. A pen stamped A. A. Waterman & Co., New York.

Q132. I show you a letter without date, but stamped as received November 8th, 1909, signed by Ralph S. Goll, and a letter signed the same way, dated November 11th, 1909, and ask you if you received those letters in due course of mail (handing witness the papers)? A. Yes.

Q133. What kind of a pen did you receive in connection with those letters? A. A pen stamped A. A. Waterman & Co., New York.

The letters identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 76.

Same objections.

Q134. I show you two letters, one dated January 31, and one dated January 10, 1910, signed J. E. Heisler, and ask you if you received those letters in due course of mail (handing witness the papers)? A. Yes.

Q135. What kind of a pen did you receive in connection with 770
those letters? A. A pen stamped A. A. Waterman & Co., New York.

Q136. I note an envelope annexed. Do you know anything about that envelope? A. That envelope is the one in which the letter of January 31 was received.

The two letters and envelope identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 77.

Same objections.

Q137. I show you a letter dated November 22, 1909, signed E. B. Scannel, and ask you if you received that letter in due course of mail (handing witness the paper)? A. Yes.

Q138. What kind of a pen did you receive in connection with 771
that letter? A. A pen stamped A. A. Waterman & Co., New York.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 78.

Same objections.

Q139. I show you a letter dated November 21, 1909, signed H. H. Allen, and another signed the same way, dated January, 1910, and ask you if you received those letters in due course of mail (handing witness the paper)? A. Yes.

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Q140. What kind of a pen was received in connection with those letters? A. A pen stamped A. A. Waterman & Co., New York.

The Letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 79.

Same objections.

Q141. I show you a letter dated May 27, 1909, signed G. H. Newstedt; and also a wrapper or a package bearing a printed label with the name George H. Newstedt, Jeweler, Cincinnati, Ohio, and ask you if you received that letter and wrapper in due course of mail (handing witness the papers)? A. Yes.

773 Q142. What did the package referred to in that letter contain? A. It contained fourteen pens stamped A. A. Waterman & Co., New York.

Q143. Did you also receive a letter from Mr. Newstedt, dated June 8th, 1909, in connection with this matter (handing witness the paper)? A. Yes.

The two letters and wrapper identified by the witness are offered in evidence and marked Plaintiff's Exhibit 80.

Same objections.

Q144. What did you do with the pens that you received in that package? A. I delivered them to A. A. Waterman & Co.,

774 Thames Street, New York.

Q145. Did you deliver them personally? A. Yes.

Q146. I show you a letter dated December 13th, stamped as received December 15th, 1909, and ask you if you received that letter on or about December 15th, 1909, in due course of mail (handing witness the paper)? A. Yes.

Q147. What kind of a pen did you receive in connection with that letter? A. I received a pen stamped A. A. Waterman & Co., New York.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 81.

Same objections.

Q148. I show you a letter dated September 24th, 1909, signed Gulick Tailoring Co., and ask you if you received that letter in due course of mail (handing witness the paper)? A. Yes.

Q149. What kind of a pen did you receive in connection with that letter? A. A pen stamped A. A. Waterman & Co., New York.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 82.

Same objections.

Q150. I show you a letter dated April 11th, 1910, signed Fred. P. Tillson, and ask you if you received that in due course of mail (handing witness the paper)? A. Yes. 776

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 83.

Same objections, ruling and exceptions.

Q151. I show you a letter dated April 25, 1910, signed G. L. Mandaville, and ask you if you received that letter in due course of mail (handing witness the paper)? A. Yes.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit 84.

Same objections.

Q152. I show you a letter dated February 11th, 1910, signed Will S. Cogburn, and ask you if you received that letter in due course (handing witness the paper)? A. Yes. 777

Q153. What kind of a pen did you receive in connection with that letter? A. A pen stamped A. A. Waterman & Co., New York.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 85.

Same objections.

Q154. I show you a letter dated November 19th, 1909, and signed James H. McGrew, and another letter on the same kind of letter head, dated November 29th, 1909, without signatures,

778 *William Hill Kernan*

and I ask you if you received those letters in due course of mail (handing witness the papers)? A. Yes.

Q155. What kind of a pen did you receive in connection with those letters? A. A pen stamped A. A. Waterman & Co., New York.

The two letters identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 86.

Same objections.

Q156. I show you a post card stamped as passing through the mails on January 8th, 1911, and signed May B. Neall, and I ask you if you received that through the mails in due course
779 (handing witness the paper)? A. Yes.

The post card identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 87.

Same objections.

Q157. I show you a letter dated December 6th, 1909, signed George Burgess, and another letter dated December 8th, 1910, signed the same way, and ask you if you received those letters in due course through the mails (handing witness the papers)? A. Yes.

Q158. What kind of pens did you receive in connection with those letters? A. Two pens stamped A. A. Waterman & Co., New York, and one stamped Waterman's Ideal Fountain Pen.
780

The letters identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 88.

Same objections.

Q159. I show you a letter dated January 19th, 1911, signed Felix Klappenbach, and ask you if you received that in due course of mail (handing witness a paper)? A. Yes.

Q160. I notice that there is a paper annexed to this letter by a clip; what is that? A. That is the wrapper in which the pen was received.

Q161. What kind of a pen did you receive in connection with that letter and wrapper? A. A pen stamped A. A. Waterman & Co., New York.

The letter and wrapper identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 89.

Same objections.

Q162. I show you a letter dated January 31, 1911, and signed A. J. Dorn, Jr., and ask you if you received that in due course (handing witness the paper)? A. Yes.

Q163. What kind of a pen did you receive in connection with that letter? A. A pen stamped A. A. Waterman & Co., New York.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 90. 782

Same objections.

Q164. I show you a letter dated January 21, 1911, signed Charles Menges, and another letter signed the same way, dated February 3, 1911, and a wrapper bearing the same name and letter head, and I ask you if you received those two letters and wrapper in due course (handing witness the papers)? A. Yes.

Q165. What kind of a pen did you receive in connection with those letters? A. A pen stamped A. A. Waterman & Co., New York.

Q166. What about the package, the wrapper, do you know anything about that? A. That is the wrapper in which the package was received. 783

The letters and wrapper identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 91.

Same objections.

Q167. I show you a letter dated January 16th, signed Dr. H. R. Bryan, and ask you if you received that letter in due course (handing witness the paper)? A. Yes.

Q168. And from any stamps on the letter can you tell when that letter was received? A. Received on January 20, 1911.

Q169. How do you know it was 1911? A. We always stamp them with the date they arrived.

Q170. Is that letter stamped? A. Yes.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 92.

Same objections.

XQ171. I show you a letter dated January 6th, 1911, signed J. N. Brosius and also a letter dated January 18th, 1911, signed the same way, and also letter dated January 21, 1911, signed the same way, and ask you if you received those letters in due course (handing witness the papers)? A. Yes.

The letters identified by the witness are offered in evi-
785 dence and marked Plaintiff's Exhibit No. 93.

Same objections.

Q172. I show you a letter dated December 30, 1910, signed C. H. Williams; a letter dated January 6th, 1911, signed by the Modern Pen Company, by E. T. K.; a letter dated January 16th, 1911, signed C. H. Williams, and a letter dated January 23, 1911, signed Modern Pen Company by Hobart W. Geyer, treasurer, and I ask you if you received those letters in due course of mail (handing witness the papers)? A. Yes.

Q173. I note an envelope in the package; do you know anything about that? A. That is the envelope in which the letter of January 16th was received from Mr. C. H. Williams.

The envelope and letters identified by the witness are
786 offered in evidence and marked Plaintiff's Exhibit No. 94.

Same objections.

Q174. I show you a letter dated February 27, 1911, signed F. Morrow, and a wrapper showing that it has been through the mails, and ask you if you received those in due course (handing witness the papers)? A. Yes.

Q175. What kind of pen did you receive in connection with the letter and wrapper? A. A pen stamped A. A. Waterman & Co., New York.

Q176. Was it contained in the wrapper? A. Contained in the wrapper attached.

The letter and wrapper identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 95.

Same objections.

Q177. I show you a letter dated December 22, 1910, signed by J. P. Williamson and ask you if you received that in due course (handing witness the paper)? A. Yes.

Q178. What kind of a pen did you receive in connection with that letter? A. A pen stamped A. A. Waterman & Co., New York. 788

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 96.

Same objections.

Q179. I show you a letter dated May 11th, 1910, signed L. L. Spencer and another letter signed the same way, dated April 25, 1910, and ask you if you received those letters in due course (handing witness papers)? A. Yes.

Q180. What kind of pens did you receive in connection with those letters? A. One pen stamped A. A. Waterman & Co., New York, and one stamped Waterman's Ideal Fountain Pen.

The letters identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 97. 789

Same objections.

Q181. I show you a letter dated April 18th, 1910, and April 27th, 1910, signed John T. Hutchinson, and ask you if you received those letters in due course of mail (handing witness the papers)? A. Yes.

Q182. What kind of a pen did you receive in connection with those letters? A. A pen stamped A. A. Waterman & Co., New York.

The letters identified by the witness are offered in evidence and marked Plaintiff's Exhibit No. 98.

790 *William Hill Kernan*

Same objections.

Q183. I show you a letter dated January 17th, 1910, signed by John M. Roberts & Son Co., and ask you if you received that letter in due course of mail (handing witness the paper)? A. Yes.

The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 99.

Same objections.

Q184. All the mail is handled in your department? A. Yes.

Q185. That is where it comes in the first instance? A. Yes,
791 it is distributed from there.

Q186. Opened by a clerk whose desk is near yours, in view of yours? A. Yes.

Q187. Any matters outside of strictly routine matters are referred to you in the first instance? A. Yes.

Q188. Did you handle personally all of these letters that you have identified? A. Yes.

Q189. The only other evidences of confusion that come to your attention are people coming in and offering pens stamped A. A. Waterman & Co. and giving you to understand that they are of the plaintiff's manufacture? A. Yes.

Q190. Did many of these instances come to your attention? A. Quite a number.

792 Q191. Does the paper that I show you refresh your recollection in regard to any one of these transactions (handing witness the paper)? A. Yes, it does.

Q192. Please tell us what happened and all about it as far as you recall it now? A. On September 28th, 1910, Mr. O. E. Shay of Canaseraga, N. Y., called at the office of the L. E. Waterman Company, and in conversation with me, said—

Mr. Bacon: Objected to as hearsay.

A. (Continued.) Stated that he had bought a quantity of pens from the Scranton & Wetmore Company of Rochester, N. Y., bearing the name A. A. Waterman & Co., supposing that they were Waterman's Ideal Fountain Pens.

Q193. Did he tell you what was said to him at the time the pens were sold to him? A. He said the salesman who sold him those and who represented the Scranton & Wetmore Company gave him to understand that they were genuine Waterman Ideal Fountain Pens.

Q194. Did he bring in any of these pens? A. No, he did not.

Q195. Did he tell you how he found out that they were not pens of our manufacture? A. No, I cannot recall that he did.

Q196. Are there any other instances that you can call to mind, if so, please state, as hurriedly as you can, as we are in a hurry to adjourn for lunch? A. There was an instance where a pen was received from John Bingham & Co., 84 Wall Street, New 794
York, on March 21, 1910, that was order No. 2021, which they had sent to us for repair, supposing it to be a genuine Waterman Ideal Fountain Pen. It proved to be a pen bearing the imprint of the A. A. Waterman Co. of New York. This pen was brought to the attention of Mr. J. Everetts of the John Bingham & Co., and he instructed us to repair the pen, stating it would be a convenience and that he did not understand it was not one of ours when he sent it to us.

Q197. Did he state to you that he thought it was ours when he sent it to you? A. Yes.

Q198. Did he say that he sent it to you? A. Yes, he wrote an order and sent the pen.

Q199. Have you any other instances in hand? A. Yes, the 795
case of A. J. Thomson, care of L. Hamberger & Co., 91 Fifth Avenue, New York; on March 9, 1910, he left with us one Waterman Ideal Fountain Pen and one pen stamped A. A. Waterman & Co., thinking that they were both ours and when it was explained that the pen stamped A. A. Waterman & Co. was not made by the L. E. Waterman Company he expressed surprise.

Q200. Was that matter handled by you personally? A. Yes, it was.

Q201. Did a great many other cases come to your attention in the last year or two? A. Yes, numerous cases.

Q202. The letters you produce appear to be all of more or less recent date, extending back about a year, with possibly one

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or two exceptions. Are these all the complaints that you have ever received about A. A. Waterman & Co. pens and the confusion existing between the pens of the plaintiff's manufacture and those marked A. A. Waterman & Co., New York? A. No, sir, those are only a few.

Q203. Have you found this confusion and trouble has increased or decreased of late? A. It has increased of late.

Q204. What do you mean by "of late"? A. Within the last two years.

Q205. Many of the cases that are reported to you, you do not handle them? A. That is true.

797 Q206. And these cases that you have mentioned are some of the cases that you have handled yourself? A. Yes.

CROSS-EXAMINATION by Mr. Bacon:

XQ207. John Bingham & Co. are well known stationers on Wall Street, are they not? A. Yes.

XQ208. They have dealt in A. A. Waterman pens and L. E. Waterman Company pens? A. I don't know anything about the A. A. Waterman & Co. pens.

XQ209. Don't you know that they knew perfectly well the difference between the two? A. The man that I saw did not know the difference.

XQ210. And they sent an A. A. Waterman pen to you by 798 pure carelessness? A. He sent it to us because he thought it was a Waterman Ideal Fountain Pen.

XQ211. It is possible he had not looked at the imprint? A. That I don't know.

XQ212. This Mr. Shay who spoke to you did not tell you the name of the salesman who had sold him his pen? A. No.

XQ213. There is no way of tracing who made these statements to him, so far as you know? A. No, I don't know of any.

XQ214. How old are you? A. Thirty.

XQ215. Then you were fifteen when you were with the L. E. Waterman Company? A. Yes.

XQ216. You never have been employed by anybody else? A. I was employed previously to that.

XQ217. How long? A. About two weeks.

XQ218. That is all? A. That is all.

XQ219. How long have you been in the wholesale department? A. About eight years.

XQ220. And during that time your business has been exclusively in the wholesale department? A. Yes.

XQ221. You were in the order department before that? A. The order department and the wholesale are in the same room.

XQ222. In the same room? A. Yes.

XQ223. Is it your duty to take care of repairs as manager 800
of the wholesale department? A. Yes.

XQ224. Do you receive all of the mail? A. All of the mail that comes in, yes.

XQ225. For the retail department as well as the wholesale? A. All of the mail that is addressed to L. E. Waterman Company.

XQ226. I notice on many of these letters are memoranda in red ink. Did you put those memoranda on yourself? A. No.

XQ227. Was it not from those memoranda that you determined what pen was in any particular letter? A. No.

XQ228. Do you mean to say, with all of these letters that have been introduced this morning you have personal recollection of what pens came in them and the mark on them, without having to refresh your memory? A. I mean to say that the 801
pens referred to in all this correspondence were received with the correspondence and referred to me.

XQ229. And you have a personal recollection of each one of these letters without any reference to memoranda?

Mr. Watson: Objected to because the witness has stated just the opposite.

XQ230. What is your answer? A. I do not recall all those without the memoranda.

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XQ231. And the memorandum was not put on there by you? A. No, but it was put on at the time it was referred to me.

XQ232. Did you see it put on? A. Yes.

XQ233. In each instance? A. In each instance I saw it.

XQ234. Do you mean to say every time that red ink memorandum was put on a letter you saw it done? A. Yes.

XQ235. It was done under your immediate supervision? A. Yes.

XQ236. Whenever an A. A. Waterman pen came in for repair you always repaired it? A. If we could, yes.

803 XQ237. Are there any repairs that you could not make? A. Sometimes we did not have the necessary parts.

XQ238. What part would you lack? A. They varied according to the time it was received.

XQ239. You furnished the sacks if the sacks were injured, didn't you? A. We have furnished some sacks.

XQ240. And you had no trouble in repairing these pens, the same as your own? A. We did have some trouble, because we did not have the right parts.

XQ241. You could always get the right parts by applying to the A. A. Waterman Company, could you not? A. I suppose so.

XQ242. You did not have anything to do with the repairs? A. I did not make repairs personally, no.

804 XQ243. Did you have anything to do with the repairs at all? A. They were handled under my direction.

XQ244. I pick up at random Exhibit 81, "Supply new cap and straighten pen." Did you direct that those words should be put on this exhibit in red ink? A. May I see the exhibit (referring to the exhibit). No, I did not.

XQ245. Then you did not see that put on there? A. I saw the size of the pen and the style of the pen entered on there.

XQ246. Do you mean to say that memorandum was entered at different times? A. No, immediately after the first part was written.

XQ247. How could you tell what repair had to be done without examining the pen? A. I would examine the pen.

XQ248. Each one of these? A. Yes.

XQ249. And that is part of your business as manager of the wholesale department? A. I don't examine all the pens.

XQ250. You examined these particular pens? A. Yes.

XQ251. Because you had instructions to get evidence in this case? A. No, sir.

XQ252. You had instructions to select these letters, didn't you? A. I was asked to get anything that came to my knowledge.

XQ253. And to save them up, is that right? Yes or no? A. 806
Yes.

XQ254. How long since you have known anything about the firm of A. A. Waterman & Co.? A. I don't remember when I first heard of it.

XQ255. About how many years ago? A. That I don't know.

XQ256. It was a great many years ago, was it not? A. I would not say a great many.

XQ257. Ever since you have been in the business? A. No.

XQ258. Very nearly since you have been in the business? A. I don't think so.

XQ259. Ten years at least? A. It might go back that far.

XQ260. You have known them ever since they have been at 22 Thames Street? A. I have known of them.

XQ261. You knew it was a going concern? A. I didn't know 807
much about it at all.

XQ262. You talked of them with Mr. Frank D. Waterman, the president? A. No, sir.

XQ263. Never? A. I don't recall any instance.

XQ264. Do you know from any conversation with him whether he knew that there was such a firm as A. A. Waterman & Co.?

Mr. Watson: I object to that as being purely hearsay. Call him if you want to. The witness is instructed not to answer the question.

Mr. Bacon: We will take that to the Court. I will state on the record that Frank D. Waterman has sworn in a suit now pending in Italy that there was no such firm as A. A. Waterman & Co. doing business at 22 Thames Street, New York City, and I ask this witness if in conversation with Mr. Frank D. Waterman he referred to the existence of the firm of A. A. Waterman & Company.

XQ265. Do you refuse to answer?

Mr. Watson: Counsel for plaintiff moves to strike out the question and the remarks of counsel as entirely
809 improper; that if there is any such affidavit the affidavit is the best evidence, and the witness is instructed not to answer the question.

XQ266. Do you refuse to answer the question? A. I do.

Mr. Bacon: We will take it before the Court.

XQ267. Were not many of these letters received from dealers?

Mr. Watson: I object to that as the letters speak for themselves and are the best evidence.

XQ268. You may answer? A. The letters speak for themselves.
810 XQ269. You may answer. The letters do not indicate whether they are dealers? A. Then I am unable to tell.

XQ270. Then you don't know? You don't know the writer of a single one of these letters, do you; you never saw them? A. No.

XQ271. You don't know whether his signature is genuine or not? A. The only evidence is the letter.

XQ272. What is the imprint on Exhibits 7 and 8? A. The imprint on Exhibit 7 is Waterman's Ideal Fountain Pen, New York.

XQ273. Is that known by a number? A. The mark is not known by a number, no.

XQ274. Is that pen known by a number? A. Yes.

XQ275. What number? A. No. 12.

XQ276. In which the "2" of the "12" means the kind of pen point and the 1 the holders? A. It means the size of the pen point.

XQ277. Then the "2" of the 12 means the size of the pen point? A. The size of the pen point.

XQ278. And No. 1 the size of the holder; is that right? A. No, sir.

XQ279. What does the "1" of the "12" mean? A. It does not mean anything by itself.

XQ280. And what does the No. 12 mean? A. No. 12 indicates that particular style complete. 812

XQ281. Of both the pen point and pen? A. Yes.

XQ282. How much is it retailed at? A. $2.50.

XQ283. How much does it wholesale for?

Mr. Watson: Objected to as entirely immaterial to any issue in this case and the witness is instructed not to answer.

XQ284. Do you refuse to answer? A. Yes.

Mr. Bacon: The question is referred to the Court.

XQ285. Is it not a fact that the wholesale prices are 40 per cent off from the retail prices? 813

Mr. Watson: Same objection and the same instruction.

XQ286. What other numbered styles do you sell? A. We sell a large quantity of different numbers.

XQ287. 12, 13, 14, 15, 16, 17 and 18? A. Yes.

XQ288. No. 13 sells at $3.50 retail? A. Yes.

XQ289. No. 14 at $4? A. Yes.

XQ290. No. 15 at $5? A. Yes.

XQ291. No. 16 at $6? A. Yes.

XQ292. No. 17 at $7? A. Yes.

XQ293. No. 18 at $8? A. Yes.

XQ294. All of them with plain holders? A. Yes.

XQ295. How would these different styles from 12 to 18 inclusive be imprinted? A. They would be imprinted the same as a No. 12 would be.

XQ296. All have the same imprint? A. Yes.

XQ297. Are they all marked Waterman's Ideal? A. Not all of our pens.

XQ298. All of these numbers that I have spoken of? A. Not necessarily.

XQ299. Then the number does not refer to the imprint? A. No.

815 XQ300. No. 8—what number is that? A. This is a No. 13.

XQ301. How much does that retail for? A. It retails for $3.50.

XQ302. Do you know who this I. Waterman was, against whom you got an injunction? A. I never met him.

XQ303. Don't you know that his name was not Waterman at all? A. No.

XQ304. Don't you know that he sold a brass pen for about 25 cents? A. I don't know what his selling prices were.

XQ305. Then you don't know anything about him? A. Not personally.

XQ306. Who has told you anything about him? A. I met his wife, Rose Waterman.

816 XQ307. You never met him? A. No.

XQ308. How did you come to meet Rose? A. Her testimony was taken and she testified that her husband, I. Waterman, made those pens.

Q309. And that her husband was I. Waterman? A. Yes.

XQ310. Where did they live—in New York? A. I don't recall the address.

XQ311. You never have dealt in A. A. Waterman & Co. pens at all? A. No.

XQ312. You never have been connected with any store where they sold them? A. No.

XQ313. And you do not have any knowledge of what people ask for when they come into a store and want A. A. Waterman & Co. pens? A. No.

XQ314. You don't know whether they ask for Waterman pens or not? A. No.

XQ315. Your knowledge is confined exclusively to customers who come into the L. E. Waterman Company's store and want an L. E. Waterman Company pen, is that right? A. I have had these instances cited, where I met the people themselves, who testified that there was confusion in the name.

XQ316. How many have you ever met personally and testified to today? A. All that I have met I have not testified to. 818
I do not recall all of the cases.

XQ317. The only two cases that you can recall by name are Shay and the representative of Bingham & Co., is that right? A. Mr. Thomson.

XQ318. Who was he? A. He was the third party that I referred to.

XQ319. Did he tell who he bought the pen of? A. No.

XQ320. Then those three cases are the only names that you recall? A. Yes.

XQ321. In you fifteen years of experience? A. The only three that I have made a memorandum of.

XQ322. You take in A. A. Waterman pens in exchange for your own? A. Yes.

XQ232. What do you do with them when you repair them— 819
sell them again? A. No.

XQ324. What do you do with them? A. Throw them away.

XQ325. And you only take them in so as to induce a new sale of L. E. Waterman Company pens, is that right? A. Whenever the party wishes to exchange we do.

XQ326. How much do you allow on a self-filler A. A. Waterman? A. I could not say.

XQ327. You do not know anything about those prices?

Mr. Watson: Objected to as entirely immaterial to any issue in this case.

820 *William Hill Kernan*

XQ328. This letter from Brentano's asking for 5,000 circulars what has that got to do with this case, do you know? A. May I see the letter (referring to the letter). They are asking us for some circulars for Waterman Ideal Fountain Pens and it shows the confusion because they address the letter to A. A. Waterman.

XQ329. Don't that show merely carelessness? A. I don't know that it does.

XQ330. You never have had any personal communication with anybody connected with the A. A. Waterman Company or the Modern Pen Company, have you? A. No, sir.

821 XQ331. Then everything that you have testified to today relates to what other people have told you or what other people have written you; is that right? A. Not everything.

XQ332. Substantially everything? A. A large number of the cases.

XQ333. How many pens on an average do the L. E. Waterman Company sell per day or week? A. I could not say.

XQ334. You have no idea at all? A. No, sir.

XQ335. What proportion of those that they sell are marked Waterman or Waterman's without any qualifying words or initials?

Objected to as entirely immaterial to any issue in this case.

822 A. I don't know what proportion.

XQ336. You have not any idea at all? A. No, sir.

XQ337. Is it not a fact that there are very few that are manufactured that are printed in that way? A. I don't know anything about the quantity manufactured.

XQ338. You don't know how many are imprinted simply Waterman or Waterman's? A. No, they are mixed in with the regular stock.

XQ339. How long since you have seen one so imprinted? A. I have handled them right along.

XQ340. Did you see one yesterday? A. Not particularly, No.

XQ341. Did you the day before? A. I did not look for it.

XQ342. Or the day before that? A. I did not look for it.

XQ343. Can you say that you have seen one in a week? A. Yes.

XQ344. When did you see one and where did you see it? A. I handled it right in the wholesale department.

XQ345. Have you sold any so imprinted within a week? A. Yes.

XQ346. To whom? A. I could not tell you.

XQ347. How many? A. I could not tell you.

XQ348. Have you sold as much as a dozen within a week? 824
A. It might be a dozen and it might be two dozen.

XQ349. You simply don't know? A. No, sir.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ350. A large proportion of the silver and gold mounted pens are marked Waterman alone? A. Yes.

RDQ351. And some of them are Waterman without any other initial or distinguishing name? A. Yes.

RDQ352. Do you exchange any fountain pen that is brought in the store for your goods? A. Yes.

RDQ353. And you allow the same percentage on prices for A. A. Waterman pens, or those pens imprinted A. A. Waterman & Co., that you do for other makes? A. Yes. 825

RDQ354. No discrimination against pens stamped A. A. Waterman & Co.? A. None whatever.

RDQ355. Do you know of any complaint about the pens imprinted A. A. Waterman & Co. as to not being satisfactory? A. All the pens of that manufacture that come into our place are returned for that reason.

RDQ356. What do you find to be the objections made to the pens? A. They do not work well; they do not write.

RDQ357. Do you find anything the matter with the joint? A. Yes, we have a leaky joint.

826 *William Hill Kernan*

RDQ358. Did you ever know any person to come in and ask for a Waterman pen or a Waterman fountain pen and give you to understand that he expected or wanted a pen imprinted A. A. Waterman & Co.? A. No.

RDQ359. At any time, anywhere? A. No.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ360. You also have complaints of L. E. Waterman Company pens, leaky joints and the like, don't you? A. A few.

827 RXQ361. How many pens come in for repair every day on an average? A. I could not say.

RXQ362. They do not come to you at all, do they? A. They come through my department.

RXQ363. All of them? A. All the pens that come in by mail.

RXQ364. Do they come in by hundreds or by thousands a day? A. There would not be as many as a thousand.

RXQ365. There would be hundreds every day, wouldn't there? A. Well, how many hundreds?

RXQ366. I am asking you? A. There might be 200.

RXQ367. 200 a day for repairs? A. Yes.

RXQ368. How many of those would be A. A. Waterman & Co. pens? A. That I could not say exactly; a large num-
828 ber.

RXQ369. Can you say anything like how many? A. No, I never kept count of them.

RXQ370. Very few in number, are they not? A. We get more of the A. A. Waterman & Company repairs than we do of other miscellaneous manufacturers.

RXQ371. Out of 200 pens coming in for repairs every day about how many would be A. A. Waterman & Co.?

Mr. Watson: I object to the question. The witness has already answered.

RXQ372. Answer the best you can?

Mr. Watson: The same objection. The Court's attention is also called to the answer of the witness to this very question just above.

RXQ373. You may answer? A. I could not give you a definite amount.

RXQ374. Can you give me an indefinite amount, an approximate amount? A. It varies. Some days there may be a lot and some days there would not be so many.

RXQ375. What do you mean by a lot and what do you mean by not so many? A. There might be five or ten one day and their might be twenty the next day.

RXQ376. Will you average five or ten a day? A. I think 830
so.

RXQ377. And these complaints contained in these letters are the only ones where there was an apparent misapprehension as to the name of the pen? A. No, sir, there were numerous others.

RXQ378. Why didn't you bring the others? A. If I looked through our files to get all the others I would never do anything else.

Signature waived.

Adjourned to Monday, April 10, 1911, at 10 A. M.

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832 *Edward M. Stephens*

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.
} In Equity.

833 New York, March 30, 1911.

Testimony taken on behalf of the complainant at final hearing before Frederick M. Adams, an Examiner of this Court, at the office of Watson & Raymond, 10 Wall Street, New York, the 30th day of March, 1911, at 2:30 o'clock in the afternoon, pursuant to notice hereto annexed.

Met pursuant to agreement.

Appearances:

W. B. Raymond, for Complainant.
Alexander S. Bacon, for Defendant.

834 EDWARD M. STEPHENS, a witness called on behalf of the complainant, being duly sworn, testified as follows:

Direct-examination by Mr. Raymond:

Q1. Please state your name, place of residence and occupation? A. Edward M. Stephens, with Loring, Short & Harmon, Portland, Maine; salesman.

Q2. Where is the place of business of your concern? A. Portland, Maine.

Q3. What street address? A. 474 Congress Street.

Q4. How long have you been in the stationery business? A. Between 13 and 14 years.

Q5. How long have you handled and sold fountain pens? A. About ten years.

Q6. During that period have you been familiar with the fountain pens which are on the market? A. I have.

Q7. How did you get your familiarity with the fountain pens on the market? A. Selling them, buying them and handling them generally.

Q8. Do you buy fountain pens for your concern? A. Yes.

Q9. During that period what makes of fountain pens have you handled and sold? A. Waterman, Sterling, Moore, Crocker, and two or three other of our own which we imprint.

Q10. What do you mean by imprint? A. I mean pens got out 836
under our own name, our own private brand. Those are mostly bought of the Sterling Company and Davidson Rubber Company, successors to them today.

Q11. How long have you sold the Waterman Ideal Fountain Pen? A. About ten years.

Q12. Are you still selling them? A. Yes.

Q13. Do you come in personal contact, in the sale of these pens? A. Yes, I do.

Q14. By what name is the Waterman Ideal Fountain Pen, from your personal experience, asked for by customers? A. Waterman.

Q15. How long has that been the case? A. Ever since I have had anything to do with them.

Q16. In your experience with the Waterman's Ideal Fountain 837
Pen have you found them satisfactory to your customers? A. I certainly have.

CROSS-EXAMINATION by Mr. Bacon:

XQ17. What is the name of your firm? A. Loring, Short & Harmon.

XQ18. What pens are you now dealing in? A. The Waterman, Moore and Sterling.

XQ19. Do you find them all satisfactory? A. Yes.

XQ20. Just as satisfactory as the Waterman? A. No, I cannot say entirely so.

XQ21. You never have dealt in the A. A. Waterman pens at all? A. We had some A. A. Waterman pens I should judge about ten or twelve years ago, when I first came there.

XQ22. They were well known in that vicinity at that time? A. No, I cannot say that because the Waterman Ideal Pen is known better than the A. A. Waterman and always has been.

XQ23. But the A. A. Waterman was known at that time? A. Yes.

XQ24. And people called it the Waterman pen too, didn't
839 they? A. Yes.

XQ25. And it was sold openly and above board in the market? A. Yes.

XQ26. Anybody could buy them? A. Yes.

XQ27. No question about that? A. No.

XQ28. They were then manufactured in Boston, were they not? A. I couldn't say about that for sure. I did not buy them at that time.

XQ29. As far as you know they were satisfactory even ten or twelve years ago? A. I could not say on that score. I think they were, as the general run of pens go.

XQ30. And today if a man carried an A. A. Waterman pen he would probably call it a Waterman, wouldn't he? A. Yes, he would.

840 XQ31. And if he wanted to get another pen and went to an A. A. Waterman store he would probably call for a Waterman? A. Yes.

XQ32. Are A. A. Waterman pens sold in Portland? A. I don't think so today. I don't know of any concern that carries them. I may be wrong on that score. I am not positive about that.

XQ33. Has the L. E. Waterman Company ever made any imprints for you? A. They never have, no, sir.

XQ34. When dealers carry both the A. A. Waterman and the L. E. Waterman do they generally call them both Waterman? A. I don't know. I think they would call an A. A. a Waterman

Ideal. I have not handled those for so many years, running the two lines, I could not be positive. We have not had them for a great many years. There were some there when I first came there.

XQ35. How did you designate them when you did know them years ago? A. I cannot say about that sure. There was a pen we used to handle, made by the A. A. Waterman, called the Modern. If I remember right, it was called Modern at that time and I think if a man came in and asked for a Waterman pen we would show him a Waterman and if he wanted a Modern we would show him a Modern.

XQ36. Didn't you call the Modern pen a Waterman too? A. 842
I don't think they were sold that way. I think they were sold as Modern fountain pens if I remember right.

XQ37. They were all imprinted A. A. Waterman & Co., Boston, were they not? A. I imagine so. I could not swear to that because it has been so long ago.

RE-DIRECT EXAMINATION by Mr. Raymond:

RDQ38. Did you ever have a customer come into your store and ask for a Waterman pen who indicated in any way that he expected to receive an A. A. Waterman pen? A. No, I never have.

RDQ39. Did you ever have any customer come into your store 843
and call for an A. A. Waterman pen or say they were carrying a Waterman pen believing that they had the Waterman Ideal Fountain Pen? A. I have had customers come in with an A. A. Waterman pen that somebody else had sold them, believing that they were getting a Waterman Ideal. They had the impression that they had a Waterman Ideal when they had an A. A.

RDQ40. Did you ever know a person carrying an A. A. Waterman pen and calling it a Waterman pen who knew that he was carrying an A. A. Waterman pen and not a Waterman Ideal Fountain Pen? A. Yes.

RDQ41. Were these A. A. Waterman & Co. pens generally satisfactory to the customers? A. That is rather a broad question.

844 *Edward M. Stephens*

RDQ42. Did you have much trouble with the A. A. Waterman & Co. pens? A. More or less; that is, pens that are brought in for repairs, I find that the A. A. Waterman pen and the self-filler pen, they have a screw arrangement on the end to fill it, to twist. I have had a good many of those pens that customers have brought in where they could not get them open, on account of the fact that there was no chance to get a purchase on the pen to twist the rubber sack. I have run across one or two of the A. A. Waterman pens that I have not had trouble with, that is, taking the gold pens in and out; we often have to take them and clean them and the gold pens will never go back in
845 place. I should always send them to the factory. It is about the only make of pen that I remember that I do that. We usually have to send them to the factory and have the gold pen put in again, when we take them out for cleaning purposes.

RDQ43. Have you ever had an A. A. Waterman pen brought in to you that the person bringing it in to you said it was entirely satisfactory? A. I could not say that case has occurred although it may have. I should not at all be surprised. We get that in every pen more or less. I don't recall any one instance of that but it may have occurred of course.

RDQ44. Have you ever known of any cases where A. A. Waterman & Co. pens were called Waterman pens where the people knew that they were A. A. Waterman & Co. pens, and
846 that that concern had no connection with the L. E. Waterman Company? A. I think as a rule people have the two concerns confused; they think that the A. A. Waterman pen and the L. E. Waterman pen are the same company; that is, a man has an idea when he buys an A. A. that it is an L. E., in a great many cases.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ45. How do you know that? A. Very often we have customers come in who will bring an A. A. Waterman pen that they have bought from some dealer and they want to exchange it from our stock. We advertise as being agents of the Water-

man Ideal Pen and they will often bring a pen in and want to exchange it and then they find it is an entirely different manufacture.

RXQ46. Can you give the names of any of those? A. No, I could not.

RXQ47. Can you give the name of any person who ever had an A. A. Waterman pen and thought it was an Ideal? A. No, I don't think I could.

RXQ48. Did you ever notice that the middle joint of the A. A. Waterman pen was apt to leak, among those that they brought in for repair? A. No, not any more than any other pen would. If you got ink in the thread it would not leak any more than 848
any pen. That is apt to happen in any manufacture, if you get ink in the thread.

RXQ49. Do you repair all sorts of pens? A. Yes.

RXQ50. You carry sacks to repair the A. A. Waterman pens? A. No, we do not.

RXQ51. Don't you know that for the last five or six years, since the organization of the Modern Pen Company, the button on the end of the pen has been made very much larger than it was in years past and that there has never been any trouble during that time? A. I never noticed that they had increased the size of it but they may have.

RXQ52. You very rarely get in an A. A. Waterman pen for repairs? A. A very small percentage of them are A. A. Water- 849
man pens.

RXQ53. They are not sold very much in Portland? A. No, not today. There was one concern used to carry them a number of years ago but they have gone out of business and since then as far as I know there has been no regular agent there.

RXQ54. And the only way to run across an A. A. Waterman pen is when it comes in for repairs at Portland? A. Yes.

RXQ55. And you are not very often in Portland? A. Yes. I am here perhaps as a rule once or twice a year. This year I am here twice, but as a rule I spend a week in New York and two weeks on vacation.

850 RXQ56. Then you are not a traveling salesman? A. No, I am right inside of the store. I have entire charge of the office supply department.

Deposition closed.

Signature waived.

Adjourned to Monday, April 10, 1911, at 10 o'clock A. M.

UNITED STATES CIRCUIT COURT,

851

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY, Plaintiff, vs. MODERN PEN COMPANY, Defendant.	In Equity.

New York, January 13, 1911.

Met pursuant to adjournment.

852 Appearances:

Samuel S. Watson, for Plaintiff.
Alexander S. Bacon, for Defendant.

Mr. Watson: Counsel for plaintiff asks counsel for defendant to admit that the advertisement of Wolfson Bros. of Jersey City, now shown defendant's counsel, appeared in the Jersey Journal, Saturday evening, December 11, 1909

Mr. Bacon: I do.

Mr. Watson: Counsel for plaintiff offers the advertisement in evidence and asks that it be marked Plaintiff's Exhibit 11. 853

Mr. Bacon: Objected to as incompetent, irrelevant and immaterial, and in no way connected with the defendant.

Marked Plaintiff's Exhibit 11, January 13, 1911, F. M. A., Exr.

It is consented that the cuts in the printed book be marked exhibits in this case.

Mr. Watson: Counsel for plaintiff asks counsel for defendant if he will admit that the defendant paid one-half of the cost of inserting the advertisement, Exhibit 11, in two newspapers published in Jersey City on Saturday evening, December 11, 1909. 854

Mr. Bacon: The answer is no.

Mr. Watson: Counsel for plaintiff asks counsel for defendant if he will admit that the defendant wrote certain letters to Wolfson Bros., copies of which are now exhibited to defendant's counsel, said letters being dated December 16, 1909 and December 18, 1909.

Mr. Bacon: I am willing that these letters shall go in provided the whole correspondence be put in the record as set forth in the printed record in this case as Exhibits II, JJ, KK, LL and MM, on pages 441 to 444 of the record on the motion for preliminary injunction in the United States Circuit Court of Appeals.

Mr. Watson: Am I to understand from counsel that he admits that these letters shown in this correspondence were written by the parties whose names are appended to them? 855

Mr. Bacon: Yes, that the correspondence passed as indicated in the letters themselves. It is understood that this entire correspondence is in; is that so?

Mr. Watson: Counsel offers in evidence the letters Exhibits JJ and LL, dated December 16, 1909, and December 18, 1909, addressed to Wolfson, Bros., Jersey City, signed by the Modern Pen Company by Hobart W. Geyer, Assistant Treasurer and asks that they be marked Plaintiff's Exhibit No. 12.

856 *Richard H. Waldo*

The letters referred to are marked in the printed book: Plaintiff's Exhibit 12, January 13, 1911, F. M. A., Exr.

Mr. Bacon: I offer in evidence the letters of December 14, 1909, from Wolfson Bros. to A. A. Waterman & Co.; December 17, 1909, from Wolfson Bros. to Modern Pen Company, and December 20, 1909, from Wolfson Bros. to Modern Pen Company, it being understood that in the printed record these letters shall be printed in chronological order.

Mr. Watson: Counsel for plaintiff now asks counsel for defendant if he will admit that the defendant paid
857 for one-half of the cost of the advertisement of Wolfson Bros. appearing as Plaintiff's Exhibit 11.

Mr. Bacon: No, I do not admit it. I want to look at the bill before I say what we will do.

RICHARD H. WALDO, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, place of business and residence? A. Richard H. Waldo; residence 3609 Broadway, New York City; advertising manager of the Good Housekeeping Magazine.

Q2. Where is your office? A. 439 Lafayette Street, New York City.

858 Q3. Were you connected with Good Housekeeping in the same capacity during the year 1909? A. Yes.

Q4. I show you a copy of the magazine Good Housekeeping of September 19, 1909, and ask you if that is a copy of the magazine which was printed and distributed at that time (handing witness a magazine)? A. Yes.

Q5. Is that a magazine of general circulation? A. Yes, 250,000 copies at that time.

Mr. Watson: The magazine is offered in evidence, and the Examiner is asked to mark it Plaintiff's Exhibit No. 13.

Mr. Bacon: Objected to as incompetent, irrelevant and immaterial, as self-serving and containing an advertisement of the plaintiff itself.

Marked Plaintiff's Exhibit 13, Jan. 13, 1911, F. M. A., Exr.

Q6. This magazine contained an advertisement of the L. E. Waterman Company of its fountain pens, did it not? A. Yes.

Q7. The magazine also contained a puzzle problem or contest, did it not? A. Yes, it has for eight years.

Q8. That is a regular part of the magazine? A. For the last eight years every issue has carried it, with one exception.

Q9. Did the Waterman Company pay anything in addition 860
to the regular advertising rates for the appearance of this puzzle problem? A. No, sir.

Q10. Did any of the other advertisers in the magazine pay anything for their interest in this particular puzzle? A. No, sir; none of them had any knowledge of it; they had no knowledge of it until some time after it appeared, after it was actually printed and distributed.

Q11. Did the Waterman Company at any time pay any part of the cost of this puzzle problem except the regular advertising rates for its advertisement? A. No, sir; in no way whatever.

Q12. Did you receive any replies which referred to the Waterman Ideal Fountain Pen in connection with this puzzle? A. A considerable number. 861

Q13. What became of those replies; have you got them now? A. We transcribed a certain number of them; the clerk acting under usual instructions to pick out those replies which would be of real interest to the advertiser.

Q14. That applied to every person referred to in this puzzle, did it not? A. Every letter which comes in usually contains mention of one or more names of advertisers included in the puzzle. This clerk's duty has been for the last eight years, to select from these letters the points of interest to the various advertisers and transcribe them on the typewriter for transmission in due course as matter of general interest.

862 *Richard H. Waldo*

Q15. And the clerk who made the extracts from these letters received in reply to the September puzzle relating to Waterman's Ideal Fountain Pen, worked under your direct supervision? A. Under my order.

Q16. What became of the replies after this summary was made? A. They are destroyed each month as soon as the transcript is taken. The volume is too large to admit of their preservation.

Q17. In the case of the replies to the September issue of the puzzle, as matter of fact these replies were destroyed before the Waterman Company communicated with you in reference to
863 them at all? A. They are always destroyed within two or three days—within ten days; they sometimes keep them that long—within ten days of the transcription.

Q18. Will you produce a copy of the extracts which were made from the replies which you received from the September puzzle which related to Waterman's Ideal Fountain Pen?

(The witness produces a paper.)

Mr. Watson: The extracts produced by the witness are offered in evidence, and the Examiner is asked to mark them Plaintiff's Exhibit No. 16.

Mr. Bacon: Objected to as incompetent, irrelevant and immaterial, secondary evidence and hearsay, and self-serving.

864 Marked Plaintiff's Exhibit No. 16, January 13, 1911, F. M. A., Examiner.

Q19. At my request have you made a computation of the different names which the writers of these letters to Good Housekeeping used in referring to Waterman's Ideal Fountain Pen? A. Yes. Such computation was made by my secretary and verified by me.

Q20. Have you it? A. I have it with me (producing a paper).

Mr. Watson: The computation produced by the witness is included in his answer.

Mr. Bacon: The same objection.

The computation referred to is as follows:

Waterman Pen	used	45	times
Waterman Ideal Fountain Pen	"	42	"
Waterman Fountain Pen	"	41	"
Waterman's Ideal Fountain Pen	"	23	"
Waterman's Ideal Pen	"	11	"
Ideal Fountain Pen	"	9	"
Waterman's Pen	"	10	"
Waterman	"	8	"
Waterman's	"	7	"
Waterman's Fountain Pen	"	6	"
L. E. Waterman Fountain Pen	"	2	"
L. E. Waterman Pen	"	1	"
L. E. Waterman Co. Fountain Pen	"	1	"
Ideal Pen	"	3	"

866

Q21. What is known in your line of business as Waterman's Pens, or Waterman's Fountain Pens; what is known, if you know, when these terms are used? A. A certain pen which I can best describe as identical with one which was presented me by my office workers at Christmas time, that I have with me (producing a pen).

Q22. How is that pen marked? A. "Waterman Ideal Fountain Pen." 867

Q23. Do you know who the manufacturers of those pens are? A. No, sir; I do not.

Q24. Who sells those goods, that you know of? A. A concern at the corner of Broadway and Cortlandt Street, that is the headquarters, answering the question purely from impression.

Q25. Is it generally known in your line of trade that the Waterman pens are made and sold by the Waterman Company, whose office is at 173 Broadway, New York? A. That is my impression.

868 *Richard H. Waldo*

Q26. And in your line of trade, by what name is the L. E. Waterman Company commonly referred to? A. Waterman.

Q27. How long have you been familiar with the Waterman Company and its fountain pens? A. Ten years.

CROSS-EXAMINATION by Mr. Bacon:

XQ28. This puzzle feature of your magazine has been in every issue of the magazine but one for eight years, has it? A. Yes.

XQ29. Each month you select six advertisers? A. From six to twelve.

869 XQ30. And put a part of the advertisement into the puzzle? A. Yes.

XQ31. So that anybody by reading the puzzle will read a part of the advertisement? A. No, sir.

XQ32. Where, in this exhibit or puzzle picture is the L. E. Waterman Company referred to? (The witness indicates.)

XQ33. It is the printing on the top of the boy's cap? A. Yes.

XQ34. And that is part of the printing of their advertisement in that particular issue? A. It is a selection, yes.

XQ35. How often has the Waterman advertisement appeared in the picture puzzle? A. But once. We average each advertiser about once in three or four years.

XQ36. And how long have they been advertising with you? A. They are on their fourth year now.

870 XQ37. And it never has appeared but that once? A. No, sir. They are about due again.

XQ38. Did you solicit their advertisement? A. No.

XQ39. It was done under your management? A. Yes.

XQ40. Is it not a fact that when you solicit advertisements you tell the people about this puzzle feature which attracts attention to the advertisement? A. The absolute instructions to all solicitors are that the puzzle page shall not be mentioned in any way, shape or manner in connection with securing advertisements.

XQ41. You don't know whether they obey those instructions or not?

Mr. Watson: Objected to as absolutely immaterial.

A. Except that I would discharge the man who disregarded them.

XQ42. Any man who can read a picture can tell that that is a feature of your magazine? A. It is a well known feature of the magazine.

XQ43. And every advertiser knows that he will have his chance within about three years? A. No, sir; there are many whom we do not include at all.

XQ44. Are there any who have been advertising three years or more with you who have not been included in the puzzle picture? A. Absolutely. 872

XQ45. How do you make these selections? A. The usual way is to have an equal number included in the puzzle from each territory; the central territory, New England territory and the Western territory. That is absolutely in the hands of the puzzle editor in Springfield, and until after the selection has been made the advertising department does not know who is to be included.

XQ46. The advertisers know this habit? A. Through long custom.

XQ47. And the L. E. Waterman Company knew it? A. I have no reason to believe that it ever has been brought to their attention.

XQ48. You do not know that it was not brought to their attention? A. I have every reason to believe that it was not. It would be an exceptional thing if it had been, unless by their own advertising agents, which is a matter beyond my knowledge. 873

XQ49. Was there any reward for guessing these right? A. Yes.

XQ50. What was it? A. A $5 prize and certain other prizes, to be paid by the selection of goods to the value of $2 and by the offer of certain books of fiction.

XQ51. That is, anybody who would write in these letters was seeking this reward? A. That was their intent.

XQ52. Then these letters, copies of which you have today submitted, were not the voluntary act of the writer, but they

were seeking a reward by writing what they did? A. No, sir; it is expressly stipulated in the explanation that no mention of any experience is required, but if they see fit to put it in we shall be glad to have it.

XQ53. They are requested, are they not, to praise the article that they select? A. No, sir.

XQ54. Is not this contained in the magazine: "While it is in no way a part of the condition of this puzzle, yet if you have had any experience with the article or articles mentioned we would be pleased to have you state it. The prizes are, however, not contingent upon such information?" A. That is correct.

875 An unfavorable experience is as welcome as favorable.

XQ55. Are you apt to get unfavorable comments from those who are seeking a reward for a correct solution of the puzzle? A. A small proportion only send unfavorable criticisms.

XQ56. What percentage? A. Five per cent.

XQ57. Then is it a fact that every person who wrote a letter in relation to the plaintiff's pen and advertisement in the issue of your magazine expected or hoped to get a prize? A. Every person who answered the puzzle expected to get a prize, and whether they selected the pen or some other of the six mentioned was a matter of option with them purely.

XQ58. They could select one or more? A. One or more; usually more.

876 XQ59. And the more they selected the more apt they were to get a prize? A. Quite the reverse.

XQ60. On what did the prize depend? A. The award of prizes has been based on the neatness, clearness and general attractiveness of the answer. The great majority of the answers sent in are correct, so that it comes down to a point for selection as in many cases the answer is hand-painted or illumined in some very attractive way, and the award goes on that basis.

XQ61. If it happens to be in poetry they are more apt to get an award? A. Poetry is sometimes favorably considered.

XQ62. Just now you had to take the pen from your pocket to find out what the name of it was, did you not? A. No, I took it out to find out what the name on it was.

XQ63. Will you read what is on that pen? A. "Waterman Ideal Fountain Pen, New York. Pat. Feb. 12 and Nov. 12, 1884, U. S. A."

XQ64. When was that bought? A. It was presented to me this last Christmas. I believe it was purchased just before that

XQ65. 1910? A. Yes.

XQ66. Is "L. E. Waterman Company" on it anywhere? A. I do not see it.

XQ67. Have you ever become familiar with the A. A. Waterman Pen Company? A. No, sir; I have not.

XQ68. Then you do not know anything about that make of pen? A. No. 878

XQ69. You do not know whether that is called Waterman or not? A. No.

XQ70. You do not know by what term it is designated? A. I have no knowledge that there is such a pen.

XQ71. Do you mean to say you do not know who manufactured that pen in your pocket? A. I presume it was manufactured by the concern from whom it was purchased.

XQ72. Don't you know the name of that company? A. The Waterman Pen Company, yes.

XQ73. Don't you know it is the L. E. Waterman Company? A. I presume my office records would show that.

XQ74. Have you not been looking at the advertisement right before your face all the time you were testifying? A. No.

XQ75. Was not that pointed out to you by Mr. Watson a 879 little while ago? A. No, it was turned upside down.

XQ76. D you mean to say that when he showed you the part of this advertisement that was on the boy's cap in the puzzle, it was not right side up just as it is at this moment? A. It was sidewise to me, with my eye directed to the letters "Co." at the end of the name.

XQ77. Then you did not see the "L. E. Waterman" preceding the "Co."? A. Not at the moment. I see it clearly now that you have called my attention to it.

XQ78. In the month when this Waterman advertisement was a part of the puzzle picture you received replies in relation to all

880 *Richard H. Waldo*

the other advertisements in the picture, too, did you not? A. Yes.

XQ79. Just as many from the others as you did from Waterman? A. That would be difficult to tell. It varies tremendously. As, for instance, in the current issue we received 200 from one and 11 from another.

XQ80. It depends upon the plainness of the reference? A. No, it depends entirely on how well known the concern is to our readers. For instance, the Singer Manufacturing Company holds the high record for securing replies.

XQ81. It is not determined largely by the plainness with which
881 the advertisement is indicated in the puzzle picture? A. Quite the reverse. The obscure one is very apt, because it must be very diligently sought, to make the greater impression and so lead to the attention being directed to that particular advertisement, if the knowledge of that advertiser is in the mind of the reader.

XQ82. If a person would simply send in a letter stating that they had discovered the L. E. Waterman advertisement they would not get any prize? A. Oh, no.

XQ83. They had to put in some flourish or some praise of the advertiser? A. No, they have to send in Waterman with the other five all correct. Whether or not there is a commendation included is absolutely irrelevant.

XQ84. You send copies of these replies to all of the adver-
882 tisers? A. Not all the copies of the replies. Some of the copies of the replies, not all the copies of the replies. Some of the copies of the replies to all of the advertisers if there are a sufficient number to amount to anything.

XQ85. And if they are complimentary? A. The transcripts are not sent if they are uncomplimentary. If they are seriously uncomplimentary the matter is taken up in person by myself or the manager of one of the branch offices and if the feature about which complaint is made is not remedied the advertising is discontinued.

XQ86. You do not know whether there were any uncomplimentary notices among these Waterman replies, or not? A.

There is no record in my office, I find, on searching, and there would be ordinarily such a record in case that had been sent down to me.

XQ87. Sent down to you by whom? A. By the puzzle editor in Springfield, Mass.

XQ88. You only know what he sent; you do not know what he kept back? A. I always know what is kept back. If anything is kept back and not transcribed they are to be sent to me, with the reasons.

XQ89. You don't know whether they carry out those instructions or not? A. Simply to the best of my knowledge and belief.

Signature waived.

Adjourned subject to notice.

Plaintiff's Exhibit 16.

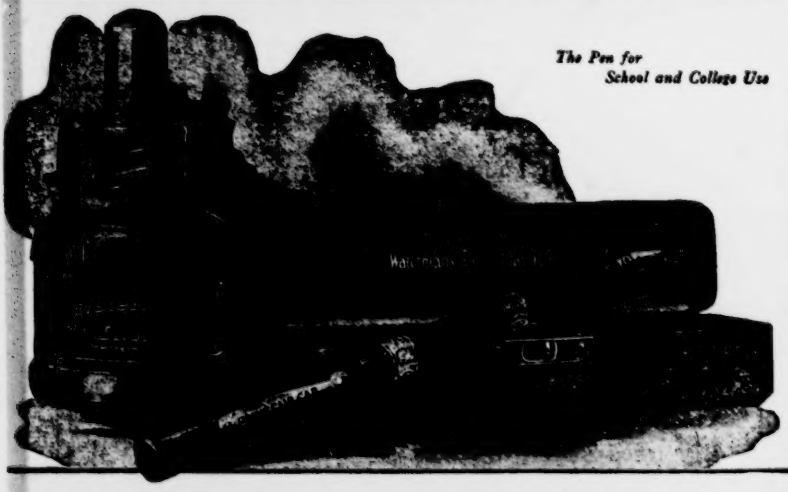
The magazine (Plaintiff's Exhibit 13) contained the following:

"On the preceding left-hand page appears our September puzzle. Within the illustration are six parts of advertisements taken from six announcements appearing in this issue. Look through all the advertisements carefully.

Make up your list, giving the names of the firms represented, together with the name of the product they manufacture.

While it is no way a part of the condition of this puzzle, yet if you have had any experience with the article or articles mentioned, we would be pleased to have you state it. The prizes are, however, not contingent upon such information."

A copy of the puzzle page and plaintiff's advertisement are annexed hereto.



The Pen for School and College Use

Quality and Simplicity

ARE THE STRONGEST CHARACTERISTICS OF

Waterman's Ideal Fountain Pen

Other methods of writing have outlived their usefulness. In keeping abreast of the times the users of this pen find the greatest satisfaction in its efficiency. Made in the largest and best equipped fountain pen plant in the world, from the best raw materials that money can buy. The uncommon existence of simplicity obtains not only accuracy but durability. This pen and ink provide the tried and successful materials for all writing purposes. Try it for comparison.

The styles are Standard (*illustrated*), Safety and Self-Filling. There are 366 patterns and sizes—34 varieties of pen points in each size—Prices $2.50 and upwards.

From the Best Dealers Everywhere

L. E. Waterman Co., 173 Broadway, N. Y.

8 School Street, Boston
734 Market Street, San Francisco
209 State Street, Chicago
136 St. James Street, Montreal
12 Golden Lane, London
6 Rue de Honovre, Paris

rel
music
dealer
latest
Farnum

886 *Plaintiff's Exhibit 16*

A large number of letters were receivd from the readers of said magazine, and the substantial parts thereof read as follows:

"I used a Waterman Ideal Fountain Pen during my entire high school course and intend taking it to college with me in the fall.

MISS C. CURTISS JOHNSON,
87 High St.,
Yonkers, N. Y.

Waterman's Ideal Fountain Pen can be bought from the 'Best Dealers' everywhere or from the firm.
887

MRS. CHAS. S. HARKINSON,
209 Garfield Ave.,
Aurora, Ill.

I am at present using a Waterman fountain pen and am never without it.

MISS C. H. BRADLEY,
Apartado 155,
Parrae, Chih.
Mexico.

I have used a Waterman Ideal Fountain Pen for about eight years and find it fulfills all that is claimed of it.
888

MRS. H. M. DODGE,
Rockville
Centre, L. I.

I have used a Waterman's Fountain Pen and have found it very satisfactory.

CHARLOTTE E. MORRILL,
24 Jacques Ave.,
Worcester, Mass.

Plaintiff's Exhibit 16 889

My husband, my college daughter and myself all use Waterman Fountain pens, which we find most satisfactory.

MRS. C. N. GEER,
West Hartford,
Conn.

Waterman fountain pens according to my opinion are the only fountain pens worth buying. I have never seen another kind that hasn't a number of faults, such as leaking or not running when you want them to. The Waterman seems to discover remedies for all fountain pen evils existing.

MAE E. FINN, 890
Evansville, Wis.

W hene'er I wish a word to write
A t evening, morn or dead of night
T o you I turn for timely aid
E xpecting I will find you laid
R ight at my hand, ready and waiting
M y work to do—unhesitating;
A nd in the daily stress and strain
N e'er have I called on you in vain,
S uch is the IDEAL FOUNTAIN PEN.

MISS ANNA F. COOTE,
Thompsonville, Conn.

891

When I graduated from business college, one of my gifts was a Waterman Ideal Fountain Pen, and since then, it has had the hardest kind of use, and has always given perfect satisfaction. I use it for both stenography and longhand.

LUCY WILLIAMS TAGGART,
903 French St., N. W.,
Washington. D. C.

892 *Plaintiff's Exhibit 16*

I never would use but a 'Waterman' fountain pen—they are always reliable and don't balk when most needed, as do most others.

MISS RIGINA NEUMAN,
4414 Michigan Ave.,
Chicago, Ill.

I have been using a Waterman Ideal Fountain Pen for several years and find it superior to a number of other makes that I have also used.

MRS. G. FRANK WITMEN,
893 40 Tremont St.,
York, Pa.

Should like to say a few words for Waterman's pen. I find it more satisfactory than any other I have used although I have had several. It is in good condition and attractive in appearance and I have used it for a year and more and constantly at that.

MARGARET NORTON,
75 Clayton St.,
Dorchester, Mass.

I have used a Waterman Ideal Fountain Pen for two years, and it has given perfect satisfaction.

894 MRS. PAUL H. LIPP,
323 12th St., S. W.,
Washington, D. C.

I have used a Fountain Pen
Ever since the Lord knows when,
And I've found, in every test,
Waterman's is by far the best.

HENRIETTA S. BOYD,
426 Waverly St.,
Palo Alto, Cal.

Plaintiff's Exhibit 16

895

I have one of the Waterman Fountain Pen and use it every day. I like it real well.

GERTRUDE FOHY,
P. O. Box 274,
Webster, N. Y.

The pen now in use, I have owned for seventeen years and it has daily work for the past ten years. It now seems in its prime and has never been in need of repairs. Such is Waterman's.

MRS. GEO. WUICHET,
R. F. D. No. 13,
Dayton, O.

896

I used a Waterman pen for many years in a publishing house and found it highly satisfactory, using it when I was addressing wrappers.

MRS. M. B. SCHNOYER,
West Hazelton, Pa.

I wish to say that my husband has used a Waterman pen for several years and finds none are equal to them in any way either in durability or simplicity.

MRS. NATHANIEL FROST,
1008 E. Grove St.,
Bloomington, Ill.

897

I have used Waterman's Fountain Pens and like them very much. I think they are far ahead of all others.

Isabell Ewell,
14 Vine St.,
Medford, Mass.

I have used Waterman's Fountain pens and the many good things said about them are not exaggerations. Whenever I go my pen goes too; it has spoiled me for all others.

MRS. CHRIS J. OLESON,
Deansboro, N. Y.

898 *Plaintiff's Exhibit 16*

Have used a Waterman's Ideal pen at home and at office for years. I feel that I could not do without one. They are the best ever.

MRS. LOUIS JACOBS,
Kinghee, S. C.

The L. E. Waterman pen I have used for a long time and think it the best pen on the market. If people would give it the same care and attention that they do the rest of their belongings, there would be no cause for complaint. I would not give it up for any pen I have ever used.

899 CLARISSA Z. DAWSON,
216 Main St.,
Little Rock, Ark.

I have had a great deal of experience with the Waterman Fountain Pen in fact am using it now and am never without one. It is the best made pen and the firm the most reliable. Each year a new pen of newer style is given in return for an old pen and nearly half cost for allowance is made for *old* pen if not broken—now what other firm would be as generous?

I have used these pens for fifteen years, and would feel lost without one.

MRS. FRED M. GILBERT,
900 239 New York Ave.,
Brooklyn, N. Y.

I am writing this with a Waterman Ideal Fountain Pen and I think it is far superior to any other.

MRS. E. L. HOUSTON,
Bozeman,
Montana.

It gives me great pleasure to recommend the Waterman pen. In my work as a nurse I find it invaluable. Always ready for

use, it is a faithful servant, and I should not want to part with mine.

MISS DORCAS A. BOYD,
81 Thorndike St.,
Brookline, Mass.

I have tried the Waterman Ideal Fountain Pen and found it convenient and fine in every way.

MRS. J. A. SEALE,
Thomasville, Ala.

I am using a Waterman Ideal Fountain Pen and think every man should have one in his pocket. 902

MRS. G. B. JACK,
2534 N. Senate Ave.,
Indianapolis, Ind.

I cannot too highly praise the Ideal Fountain Pens, one of which I have possessed for years and it still does perfect work.

MISS P. L. KILLAM,
Room 302, 56 Wall St.,
New York.

I have tried several kinds of fountain pens but Waterman's has proved the most satisfactory of them all.

MISS EDITH L. BARTLETT,
Raymond, N. H.

903

For a year I have used a Waterman pen and I consider it ideal. I have just bought a new one for a friend.

MRS. E. A. PARKS,
13 Draper Ave.,
Plattsburgh, N. Y.

I am writing this with a Waterman Ideal Fountain Pen and consider it the best. Our family all use them and are perfectly satisfied.

MISS ADELIA KELLEY,
903 Michigan Ave., West,
Lansing, Mich.

904 *Plaintiff's Exhibit 16*

I always carry a Waterman Fountain pen in my bag and could not get along without it. I think there is none better.

BLANCHE WALLACE,
539 So. 26 Ave.,
Omaha, Nebr.

The Waterman Ideal Fountain Pen is the only ideal fountain pen. Have had two other makes but find none as good as Waterman's.

MISS SYBILLA SHARER,
354 E. Union St.,
Bethleham, Pa.

905

I would like to state that my brother and I have used Waterman's Fountain Pens for three years in all our school work and find nothing better.

RUTH E. POLLOCK,
275 Clinton Ave.,
Brooklyn, N. Y.

I have used a Waterman Fountain Pen daily for the past three years. I can recommend it very highly.

MRS. C. E. KILBY,
129 1st Place,
Brooklyn, N. Y.

906

I have used the Waterman pen for a period of four years and with perfect satisfaction.

MRS. WALTER I. NICHOLS,
267 Cherry St.,
Fall River, Mass.

I have constantly used the Waterman fountain pen and find it to be the best of all the makes I have tried.

BEATRICE TROMMER,
109 West 113 St.,
New York City.

Plaintiff's Exhibit 16

907

I have used a Waterman pen with best results. They never refuse to write if supplied with ink.

J. J. BARRINGER,
Schenectady, N. Y.

I am now writing with a Waterman Ideal Fountain Pen and sincerely would dislike to be compelled to do without it for they are all that is claimed for them and more.

MRS. ALICE M. KASE,
36 Demarest Ave.,
Englewood, N. J.

908

I have used a Waterman Fountain pen and have been very much pleased with it.

MISS ANNA T. KELLEY,
11 Vernon St.,
Worcester, Mass.

I have had a Waterman's pen in the house for years and find it is all its advertised.

MARTHA R. FISSEL,
New Carlisle, Ohio.

I have a Waterman Fountain pen constantly for three years and would not use any other in its place.

909

MRS F. F. WELLS,
529 Monroe St.,
Brooklyn, N. Y.

I consider the Waterman Ideal Fountain Pen the best ever made.

AMANDA LANGDON,
202 West 148th St.,
New York.

910 *Plaintiff's Exhibit 16*

I have used Waterman's Ideal Fountain Pen while a student at the University of Georgia and have found that they are the most satisfactory obtainable.

WILLIAM E. FORT,
Mt. Airy, Ga.

I can speak from long experience of the excellence of the Waterman Fountain Pen. I have used other makes when away from home but am always glad to get my own into my hand again. I have used the same pen for seven or eight years.

FANNY G. SMITH,
15 77 Riverdale St.,
911 Chicopee, Mass.

I have used the same Waterman pen for six years which is a good recommend in regard to its lasting qualities.

MRS. RODERICK FITCH,
Walton, N. Y.

Waterman Fountain pen—the *only* fountain pen in the market.

MRS GUY VAUGHN,
11 Echo Ave.,
New Rochelle, N. Y.

I know the value of the "Fountain Pen" for convenience, and
912 that the "Waterman" is alright.

ROBERT K. SQUIER,
Monson, Mass.

I have had the most satisfactory results from the Waterman Fountain Pen. Every member in our household has found it necessary to use one.

(MISS) VERA McMINN,
622 Ave. K.,
Flatbush, B'klyn.

Plaintiff's Exhibit 16

913

I have used the Waterman Ideal Fountain Pen and can say it is all it is represented to be.

(MISS) MAMIE STEWART,
Rockton, S. C.

I have had business connection with the L. E. Waterman Co. This letter is written with an Ideal Fountain Pen. I have used the pen for five years and there is no other make on the market like it.

MRS. A. L. BUTLER,
590-66th St.,
Oakland, Cal.

914

Have used a Waterman Fountain Pen for several years and am well pleased with it.

MRS. J. R. HEAD,
Gibsland, La.

My husband uses Waterman's Ideal Fountain Pen, has two of them and prizes them very highly.

MRS. CHAS. F. POLAK,
824-9th Ave.,
Nashville, Tenn.

I have also a Waterman Fountain Pen and can not get along without one, they are the greatest convenience of the age, and especially useful for travelers. 915

MISS JESSIE FRY,
424 Deer St.,
Dundkirk, N. Y.

I have used a Waterman Ideal Fountain pen for a number of years and feel now I could not get along without one.

ELIZABETH J. BALDWIN,
34 Dana St.,
Cambridge, Mass.

916 *Plaintiff's Exhibit 16*

L. E. Waterman Co. whose make of Fountain Pen is ideal for school use.

CHARLOTTE FRANCIS HARRIS,
571 First Ave.,
West Haven, Conn.

I write with the Waterman Ideal Fountain Pen altogether and would not exchange it for any other.

MRS. R. A. COLLINS,
Meridian, Miss. P. O. 422.

917 I am writing this with Waterman Ideal pen and cannot write with any other. They are the "Best Dealers."

MRS. H. E. MACK,
501 Walker St.,
St. John, Mich.

I have used one of the Waterman Fountain pens for a number of years and find them just what they are represented to be "Ideal."

BESSIE S. ANDERSON,
Middletown, Del.

I have had experience with Waterman's Ideal Fountain Pen and should say it was indeed Ideal.

918

MRS. W. L. RINGER,
Lockeport, N. S. Canada.

I have had experience with Waterman pen and found it always satisfactory.

AMELIA A. COOKE,
R. F. D. #7 Norwich, Conn.

After considerable experience with fountain pens I find the Waterman the best. The quality and workmanship is A. No. 1.

DOROTHY H. ROBINSON,
304 Lark St.,
Albany, N. Y.

Plaintiff's Exhibit 16 919

I know the Waterman Fountain Pen to be durable and very best pen.

KATE M. WITHREL,
27 Judson St.,
Hartford, Conn.

The Waterman Ideal Fountain Pen I have found to be in every particular all that is claimed for it in "Waterman's" advertisements. It is something I should not care to journey without.

MRS. VIOLET SMITH,
14 Kensington Sq., 920
Lynn, Mass.

I have used a Waterman Fountain Pen for years and it has proven to be a friend indeed as well as a friend in need.

MRS. EDITH M. NESCOTT,
4 Spring St.,
Rochester, N. Y.

The Waterman Ideal Fountain Pen is of the highest quality and there are none better.

MRS. HELEN L. FOSBURGH,
411 Lake Ave,
Manchester, N. H. 921

My fountain pen came from one of the "best dealers."

MRS. F. A. MORRISON,
Atlantic Highlands,
New Jersey.

I have used Waterman's Ideal Pen and think it one of the widest and best known fountain pens there is. It writes smooth and has an easy flow of ink. Most fountain pens clog up—not so with Waterman's. It has more durability than any other pen I know of.

MRS. WILLIAM F. EDMONDS,
Castle Height Ave., and Bway.,
New York City.

922 *Plaintiff's Exhibit 16*

Waterman pens are tried and true.

MRS. JOHN F. REYNOLDS,
Pine Lawn Farm,
Iowa City, La.

Several members of our family have used Waterman's pens and have been greatly pleased with them.

MRS. H. V. STARRETT,
Warren, Me.

923 I have used a Waterman Fountain pen for years and have found it perfectly satisfactory.

MRS. R. M. WITHERELL,
Everett, Wash.

Have used the Waterman Ideal Fountain Pen for a number of years in my clerical work and find it superior to any other. Have always recommended it as such.

MRS. WALTER DUNKELBERGER,
15 E. Market Sq.,
Williamsport, Pa.

I am using one of their *Ideal* Fountain Pens. I have used it since March, 1904. It has always done fine work. No blot-
924 ting or anything that a fountain pen should not do. It is gold banded and I have never had to have it repaired. It is certainly a fine pen, none better.

MISS MARY D. ELDRED,
Stockbridge, Mass.

I am using a Waterman's Ideal Fountain Pen which I have carried for four years and which is in perfect condition. I gave my mother, who is a trained nurse, a Waterman pen for Xmas. she uses it in making out her record every day and finds it indispensable. I also gave my husband one the same

925

time, they both have the Clip-cap and are giving entire satisfaction.

MRS. EDWARD KAUFMAN,
123 Clark St.,
Canadaigua, N. Y.

I am writing this with a Waterman Fountain Pen. It is one that I have used for four years and found very satisfactory.

LAURA E. JONES,
428 Roslyn Place,
Chicago, Ill.

926

I have used a Waterman Ideal Fountain Pen for several years when employed in stenographic work, and always found it satisfactory.

MRS. F. L. HARRAR,
1200 W. 8th St.,
Wilmington, Del.

I have used a Waterman Ideal Fountain pen and found it superior to a number of other makes.

RUTH H. TOWNSEND,
Hudson, Mass.

927

I have a Waterman Fountain Pen which I prefer above all other kinds.

(MISS) M. G. DAVIS,
110 Winter St.,
Portland, Me.

I have been user of Waterman's Ideal Fountain pen for several years and have found it an indispensable luxury both when at home and when traveling.

(MISS) I. M. WALLACE,
216 Orange St.,
Montclair, N. J.

928 *Plaintiff's Exhibit 16*

The Waterman Fountain Pen is to my idea the best.

MRS. J. R. CARPENTER,
5452 Irving St.,
Philadelphia, Pa.

I have used a Waterman pen and found it very efficient.

MRS. E. V. DEWITT,
Montrose, Pa.

The Waterman pens have been used by four people in our family, and it is safe to say that at least eight of these pens have been purchased by the head of the family, for home use and as gifts. We use no other.

929 MABEL HOWLETT,
Wakefield, Mass.

I have one of the Waterman pens and think it the best ever made.

MRS. J. R. M.

I have used the Waterman pens and find it entirely satisfactory and all it is advertised to be.

MRS. C. F. LUNDBERG,
1316 14th Ave.,
Moline, Ill.

Have used Waterman pens. They are O. K.

MRS. W. D. MORREL,
930 Sherman, Tex.

Both my husband and I have used this pen for years— in fact practically to the exclusion of every other pen.

ETHEL M. THOMAS,
The Ayliner Apartment,
Ottawa, Canada.

The Waterman Fountain Pen I have been using for some time and find it an absolute necessity in my work as bookkeeper.

(MISS) ELLA H. CHISHOLM,
#213 East 8th St.,
Brooklyn, N. Y.

Plaintiff's Exhibit 16

931

I use a Waterman's Ideal Fountain Pen every day and find it very satisfactory.

(MISS) JENNIE SEWALL,
York Village, Me.

I have found the Waterman Fountain Pen—Ideal.

CATHERINE C. DOUBLEDAY,
41 Cedar St.,
Binghampton, N. Y.

The Waterman Pen I have used for five years. It is as good as ever today. I desire no better Pen.

932

MRS. SARAH M. REYNOLDS,
402 John St.,
Bridgeport, Conn.

I have used a Waterman's Ideal Fountain Pen constantly for the last two years and would not be without one.

CAROLINE R. WOODS,
Lutherville, Md.

I have used in my family Waterman's Fountain Pens and have found them eminently satisfactory.

G. D. BIRCHARD,
181 Bowdoin St.,
Springfield, Mass.

933

Am pleased to say that I have had a great deal of real satisfaction out of the "Ideal" pen I am now using.

AMIEE E. WAE,
Warren, Ind.

I have had two of the "Ideal Pens" both of which I used constantly until through carelessness I lost one and soon purchased the second only to have the departure of my younger

934 *Plaintiff's Exhibit 16*

brother for college take the second, and I've no doubt he is now singing its praises while I am mourning its loss.

MRS. F. H. BOUCHER,
208 So. 3rd Ave.,
Marshalltown, Ia.

I have been using the Waterman Pen for some time and find it excellent.

MRS. O. J. PARKER,
57 Alpine St.,
Dubuque, La.

935 The Waterman Ideal Fountain Pen, I can recommend very highly as to durability, having used one for over two years and it is in very good condition at the present time.

(MISS) RUTH MONTGOMERY,
Y. W. C. A.,
Long Beach, Calif.

I have used the Waterman Ideal Fountain Pen for about two years, during which time I have found it absolutely satisfactory.

EMANUEL LONDON,
41 Lewis St.,
Newark, N. J.

936 Waterman's Fountain Pen gives me great satisfaction.

J. R. SNYCKER,
Curry, N. Y.

In college work, school teaching and housekeeping, I used a Waterman and found it always ready, so reliable and so durable.

MRS. C. F. PATTERSON,
3124 California St.,
Omaha, Neb.

Plaintiff's Exhibit 16 937

I have used a Waterman Pen for years and like it very much.

MRS. ARTHUR F. BLOCKI,
1010 Washington St.,
Racine, Wis.

I have used a Waterman's Ideal Fountain Pen for a number of years and find it satisfactory in every way.

(MISS) SYBIL KEEP,
19 S. Olive St.,
Alhambra, Cal.

These Fountain Pens are the best made and give the most satisfaction. 938

MRS. ROYCE BECKWITH,
Niantic, Conn.

I own one of the Waterman Pens and would not be without it. It is the most satisfactory kind of fountain pen I have ever used.

AGNES K. APTHORP,
Tallahasse, Fla.

All of our family use a Waterman Pen and are well pleased with it.

MYRA WASHBURN,
606 N. Popular St., 939
Charlotte, N. C.

The Waterman Pens have been used in our family for years —they are unexcelled.

DAVID TAPPAN HOUSTON,
Mt. Gilead, Ohio.

I am using the Waterman pen,
Its the best on the market, and then,
Its just the right size,

940 *Plaintiff's Exhibit 16*

And will help me get the prize,
Or at least to be one of the ten.

MRS. J. E. SCHENCH,
5929 Chestnut St.,
New Orleans, La.

From experience I know the Waterman Fountain pen to be Ideal.

MRS. IRENE E. BEECHER,
Townley, Mich.

941 I use a Waterman Fountain pen much of the time and should not like to be without it—especially when traveling.

HELEN L. SMITH,
Y. W. C. A. Bldg.,
Cleveland, Ohio.

Have used a Waterman Fountain pen for the past five years and find it quite indispensable.

(MISS) M. E. MOORE,
36 St. Nicholas Place,
New York City.

I have used Waterman's Ideal Fountain Pen for several years and find it superior to all others.

942 MRS. O. P. HACKLER.

I have used one Waterman Ideal Fountain Pen for seven years and it has given the very best of satisfaction under all conditions where others have been no use at all. There is no question that Waterman pens are the best to be had.

MRS. WALTER W. HORAK,
321 B. Ave., West,
Cedar Rapids, Iowa.

Plaintiff's Exhibit 16

943

Am a constant user of Waterman's Ideal Fountain Pen and like it very much.

EDITH H. MARTS,
175 Arsenal St.,
Watertown, N. Y.

I have used a Waterman Fountain Pen for five years and it is entirely satisfactory.

ELIZABETH L. KEYES,
922 6th St.,
Springfield, Ill.

944

I am writing this letter with a $2.50 Waterman "Ideal" pen which has been in almost constant service for the past eight or nine years and is practically as good as new today.

MRS. F. W. ROPE,
208 Woodward Ave.,
Buffalo, N. Y.

Have used a Waterman Fountain Pen for years and it has always given satisfaction.

MRS. TOM ELROD,
Columbus, Ind.

945

I would like to say that the "Waterman Ideal Fountain Pen" is to my mind the best pen on the market. I have used the same pen for years and have no fault to find with it.

MRS. C. C. CORSA,
Allenhurst, N. J.

The Waterman Fountain Pen is excelled by no other.

MRS F. R. ALEXANDER,
1217 Oak Ave.,
Evanstan, Ill.

946 *Plaintiff's Exhibit 16*

I have used a Waterman fountain pen for many years and think these pens the best on the market.

(MISS) CLARA JOSLYN CAGWIN,
Walsenburg, Colorado.

I am a trained nurse, have always used the Waterman fountain pen and like it very much as it never stains the fingers.

(MISS) IDA M. ARVIDSON,
1491 No. Clarke St.,
Chicago, Ill.

947 I have used the Waterman Ideal Fountain Pen and am very well pleased with it.

MRS. P. F. BURTCH,
Morrison, Ill.

We have used Waterman's Ideal Fountain Pens for years and find them excellent.

JOHN F. KLINE,
Allentown, Pa.

I consider the Waterman Ideal Fountain Pen a useful article of high grade workmanship.

(MISS) HATTIE B. BISSIKUMMER,
608 Swan St.,
948 Dunkirk, N. Y.

I think the Waterman Ideal Fountain Pen is excellent at the present moment I am using one and have not had any other in my hand for three years, it is still giving perfect satisfaction and I shall never be without one.

ADELAIDE M. READ,
605 Detroit St.,
Flint, Mich.

Plaintiff's Exhibit 16 949

We are fond of the Waterman pen and have had 5 pens in the family.

L. G. LORALD,
Hayes, So. Dakota.

The Waterman Ideal Pen is all that its name implies. I had the misfortune to lose mine not long since which makes me prize it that much more highly, for substitutes are not satisfactory.

MRS. HARRIET C. EAMES,
Muskegon, Mich.

950

I have used one of Waterman's Ideal Pens for eight years. It is as good now as it ever was. Ideal is certainly the correct name for them.

RUTH A. RICHARDSON,
1144-21st St.,
Ogden, Utah.

My husband and brother have both used Waterman Fountain Pen and pronounced them all they are advertised.

MRS. M. W. HOLT,
Norfolk, Va.

I have used a Waterman's Ideal Fountain Pen and it has given me the greatest satisfaction not only from its simplicity of construction but because of its accuracy and durability after years of use. 951

MRS. CARRIE TALBOT.

I use Waterman's Ideal Fountain Pen in my writing and find it to be worthy of recommendation.

ELIZABETH D. SUPLEE,
Malvern, Pa.

952 *Plaintiff's Exhibit 16*

I have been using a Waterman's pen since I can remember and today I would not exchange for any other on the market.

M. H. GARLICK,
Waynesboro, Ga.

I have used this Fountain Pen and consider Waterman's *Ideal*.

MRS. JAS. G. HARRIS.

I have always used a Waterman's Ideal pen and would not be without it. It is especially valuable when one is traveling.

MRS. NELLIE L. HODGES,
953 1733 Kilbourne Place,
Washington, D. C.

I would not sell my Waterman Fountain Pen for $25.00 if I could not replace it.

(MISS) E. L. CLARK,
554 Mott Ave.,
New York, N. Y.

According to my experience the Waterman pens are very satisfactory and are among the best on the market.

MRS. A. F. GOODHUE,
Fort Fairfield, Me.

954

I have had a great deal of experience with fountain pens and have found Waterman's to be the best.

MRS. H. M. HENSHEY,
Hollidaysburg, Pa.

This letter as is all my correspondence is written with a Waterman's Ideal Fountain Pen and it is invaluable in my family.

MRS. T. B. OWENS.

Plaintiff's Exhibit 16 955

I have used Waterman Ideal Fountain Pen and can readily testify to its merit.

MRS. W. A. GODDARD,
23 Church St.,
Rutland, Vt.

The Waterman Pen A comfort and delight at home or abroad. I have used my Waterman pen with which I write this for seven years.

MRS. CLOYD L. FRITZE,
Angels Camp, Calif.

Am writing this letter with a Waterman and with my left hand. That pen is adapted to any style or manner of writing. 956

MRS. CHARLES A. NOBLE,
313 S. Eastern Ave.,
Joliet, Ill.

I have used and enjoyed using Waterman's Ideal Fountain Pen for a time and consider it a very good pen.

(MISS) RUTH C. ANDREWS,
Hudson, Wis.

My husband has used a Waterman's Ideal Fountain Pen since 1901, and that same pen gives him as good satisfaction today as when he bought it.

MRS. J. A. FLEMINGS, 957
480 Lebanon St.,
Melrose, Mass.

I have had some experience with Ideal Fountain Pen and have always found it satisfactory.

MRS. C. H. BANKHEAD,
Elkins, W. Va.

The Waterman Ideal Fountain Pen is the only article in the above list I have had experience with. The pen I have found to be "exactly as advertised" and have put it to a good deal of constant use.

MRS. G. A. WIEDERMANN,
4540 N. 16th St.,
Phila., Pa.

958 *Plaintiff's Exhibit 16*

I have used a Waterman Ideal Fountain Pen and have found it just as represented.

MRS. CHAS. F. FISHER,
Homer, N. Y.

I have used the Waterman Pen and with only the best results.

MISS FLORIE ANDREWS,
Baoneville, Missouri.

I have used Waterman's pen and have found it the most satisfactory pen I have ever used.
959

F. FEENEY.

Waterman's Ideal Fountain Pen I have seen appreciated by clergymen, physicians, lawyers, authors, nurses, artists, invalids and students.

RUTH POPE,
1206 Barastown Road,
Louisville, Ky.

Waterman's Ideal Fountain Pen is regarded by all I know as the safest investment made in fountain pens.

Mrs. G. B. ELLIOTT,
3816 Washington Boulevard,
960 Indianapolis, Ind.

I have used an Ideal Fountain Pen for years and have always been satisfied with it.

MISS CLARA SCHOUFELD,
458 E. 31st St.,
Chicago, Ill.

I have had experience with the Waterman Ideal Fountain Pen, too much can not be said of it. My husband has one that

he and I have used for twelve years and it appears to be good for as many more.

MRS. G. R. ELLIS,
Rehoboth, Del.

I consider Waterman's Ideal Fountain Pen the best on the market for reliability and also for durability.

MISS WINIFRED T. KIMBALL,
1311 Ontario Ave.,
Niagara Falls, N. Y.

We have a Waterman pen that has been used with much satisfaction. 962

L. H. HARDING,
Casper, N. Y. C.

I have used a Waterman's pen during the past year, and find it very satisfactory.

MISS BEULA B. FRANCIS,
335 Tenth St.,
Connellsville, Pa.

Waterman Ideal Pen which is now in active use, and has been for the past 8 years in my possession and is as good now as when purchased.

ALBERTA JACOBUS, 963
Cedar Grove, N. J.

My husband has an Ideal Fountain Pen and is never without it, except when I have it. I have also given them away Christmas and I think it the only pen.

MRS. A. H. PURNELL.

I have used one of the Waterman pens almost constantly for five years and always found it very good.

Mrs. R. W. SNYDER,
1015 Vine St.,
Scranton, Pa.

964 *Plaintiff's Exhibit 16*

We have a Waterman pen with which we are much pleased.

MRS. W. H. REYNOLDS,
196 Greenwood St.,
Auburn, R. I.

I am acquainted with the Waterman Ideal Fountain Pen and like every one else who uses it, I swear by my "Waterman."

MRS. G. W. FAIRGRIEVE,
Bantam,
Litchfield Co.,
Conn.

965 I have used the Waterman Fountain Pen for years in my family, finding it a standard of excellence in every respect.

MRS. VICTOR COBB,
Falls Church, Va.

Have had a Waterman Fountain Pen for a number of years and it is as good as new.

Mrs. H. C. BROWN,
58 West Stratford Ave.,
Lansdowne, Pa.

I am using a Waterman Ideal Fountain Pen and am sure there is none better.

966 MRS. C. R. YANSON,
450 1st Ave.,
Astonia, N. Y.

I am the possessor of a Waterman pen and have used it with much satisfaction for years.

EDNA C. WHEELER,
89 Belmont Ave.,
Springfield, Mass.

Plaintiff's Exhibit 16 967

Whether for man, wife, maid or student, for comfort in writing, no pen can surpass the Waterman Ideal Fountain Pen, made in various styles.

MISS CARRIE E. GREEN,
Rushville, N. Y.

I have used a Waterman Fountain pen for years and still use one, finding it satisfactory in every respect.

MRS. A. W. POWELL,
Chatham, N. Y.

My father has been using a Waterman Ideal Fountain Pen, one of those with silver filigree work over it, for a number of years. He has had the pen changed with very satisfactory results and at a very slight cost, if any at all. 968

MISS LILLIE L. WEISS,
120 N. Main St.,
Bethleham, Pa.

I have used the Waterman Fountain pen and like it very much.

(MISS) IDA C. NICHOLS,
3210 Montgomery Ave.,
Phila., Pa.

The Ideal Fountain Pen is considered the best on the market to-day. They stand more use than any other pens, and need the least repairing. 969

MABEL E. WYATT,
343 Gregory Ave.,
Passaic, N. J.

I have used the Waterman's Ideal Fountain Pen and considered it to be, indeed, an Ideal one.

(MISS) M. A. McLAUGHLIN,
80 Bay St.,
Glens Falls, N. Y.

970 *Plaintiff's Exhibit 16*

I am still writing with Waterman pen after six years of service and it is O. K.

MRS. F. W. TODD,
240 Main St.,
Lakewood, N. J.

This pen is certainly ideal and has given both my husband and myself perfect satisfaction for years.

MRS. E. A. WESTBURY,
Iowa Falls, Iowa.

971 We have a Waterman pen and it is a delight to use it.

MRS. HARRY BRINER,
721 N. Second St.,
Reading,
Berks Co. Pennia.

I have had very satisfactory experience with Waterman's pens.

GRACE PARMELE,
Presbyterian Hospital,
Chicago, Ill.

Have used a Waterman pen for ten years. Am devoted to it

MRS. FRANK MAYTHORN,
Colhin, N. Y.

972

I have used this Waterman Ideal pen for four years and could not write without it. It flows with uniform ease and is always ready for use. Our family have a Waterman pen apiece and consider them the finest made.

HELEN F. BASHFORTH,
Griggsville, Ill.

I have used Waterman Ideal Fountain Pen for several years and have never known it to fail.

MISS ERNESTINE OSTEROLH,
14 Morgan Oak St.,
Cape Girardeau, Mo.

Plaintiff's Exhibit 16

973

Have used a Waterman Ideal for eight years and would not part with it.

MRS. H. E. SATTERFIELD,
West Raleigh, N. C.

I have tested the qualities of Waterman Fountain Pen and can say that they are first class and I consider it a fine pen.

MRS. WALTER D. GARRETSON,
1503 Grace St.,
Chicago, Ill.

I have had experience with Waterman pen and find it to be all they claim. 974

MRS. FRANK W. KLINE,
North Germantown, N. Y.

I have a Waterman pen which has done good service for the past four years and that during that time I have had no word of fault to find with it.

KATHARIN HALL,
Owen, Wis.

Ideal Fountain Pen is one of the first and finest pens made. I have used one steady, it shows no weakness in the point, the Clip-Cap prevents you from losing it, a person would not want a better pen. 975

JOHN H. McKEE,
1546 Fourth Ave.,
Watervliet, N. Y.

I have used Watermans Ideal Fountain Pens for several years. Have found them most satisfactory—Ideal. I can pay them no higher tribute than to say they fully deserve a full page "ad." in the advertising section of our excellent magazine.

MRS. W. W. EMMONS,
145 Hamilton Ave.,
Portland, Me.

976 *Plaintiff's Exhibit 16*

The name "Waterman" on a fountain pen, I think is the only recommendation necessary.

L. DEMPSEY,
Public School No. 20
N. Albany, N. Y.

Wish to recommend Waterman's Ideal Fountain Pen. I always use a fountain pen in preference to any other, and have found Waterman's the best and most satisfactory.

FLORENCE ROBINSON,
123 Mt. Auburn St.,
Cambridge, Mass.

977

Have used many other makes but find Waterman is the ideal pen.

JOHN J. DOODY,
Sanford, Me.

Watermans pen I could not be without, although I am a woman. It is the handiest ever.

WINNIE F. LEAMY,
207 Sigourney St.,
Hartford, Conn.

I have a Waterman pen which I think is one of the best things
978 that have been on the market as they are always ready to use.

MRS. G. B. COBB, JR.,
80 Fairview Ave.,
Plainfield, N. J.

I have a Waterman pen and it is well named.

MRS. CLARA R. MORSE,
120 Court St.,
Newtonville, Mass.

Plaintiff's Exhibit 16 979

Have three Waterman pens in the house, a very useful family article.

MRS. LENA KRICHBAUM,
207 Bellevue Ave.,
Upper Montclair, N. J.

The Waterman Ideal Fountain Pen is an excellent pen, never failing always ready to use.

MRS. FRED. D. SPRAGUE,
15 So. Merriam St.,
Pittsfield, Mass.

I have had very satisfactory results from my Waterman pen which is indispensable in my home. 980

VIVIAN T. MELLOR,
140 Hanover St.,
Trenton, N. J.

We have used a Waterman pen for years and have always found it perfectly satisfactory in every respect. In fact after trying several other makes the Waterman is the only one we have found which is sure to not leak, and soil ones fingers.

EMILY M. BOLTNY,
Omaha, Neb.

Having used the Waterman Fountain pen I can hardly use any other, I like it so much. 981

MRS. H. I. ALLEN,
111 S. Laurel St.,
So. Bend, Ind.

I use a Waterman Ideal pen and of course, find it fills the bill.

MRS. ERNEST KITCHEN,
Lawndale, Phila., Pa.

982 *Plaintiff's Exhibit 16*

I have used a Waterman Ideal pen since I went to High School. I would use no other.

OLIVE M. KELLOCK,
4 Beaufort Place,
New Rochelle, N. Y.

Have used Waterman pen and consider it a first class article.

C. W. PORT,
52 Herkimer St.,
Brooklyn, N. Y.

983 This was written with an Waterman pen which I have used and abused for several years without repairs and I find it writes as well now as when new.

MRS. H. P. KERRISON,
130 Brooks St.,
Brighton, Mass.

Have used L. E. Waterman's Fountain Pen for six years and would use no other makes and their pens surpass all others.

ELIZABETH L. PACE,
123 Wadsworth Ave.,
New York City.

984 I am writing this letter with a Waterman pen, which I have carried in my hand-bag (woman like) for seven years and as this shows will probably do the same for a like term of years to come. Their pens are practically infallible.

LOUISE ELLIOTT,
366 Main St.,
Buffalo, N. Y.

I have used Waterman's pen and always was very well satisfied with it because it could always be depended upon.

MRS. L. H. REEMTSEN,
Burdette, Iowa.

Plaintiff's Exhibit 16

985

I have used a Waterman Ideal Fountain Pen for 15 years with perfect satisfaction.

MRS. H. A. PATTERSON,
252 No. 7th St.,
Newark, N. J.

I have used a Waterman pen for eight years and always find it in good condition.

ELSIE L. TRAVIS,
51 Chestnut St.,
Brighton, Mass.

986

I have a Waterman's pen and it is the best I ever had. Have used it for four years and it seems as good as new.

MANNIE MOON,
Washington C. H., Ohio.

I have used a Waterman Ideal Fountain Pen for nearly a year and my experience has been extremely pleasant and satisfactory. In fact I am lost without it. It is 'Ideal.'

MRS. C. W. ELLIOTT,
80 Whitney Place,
Buffalo, N. Y.

987

I have used the Waterman Ideal Fountain Pen and find same to be best on the market. My pen has been satisfactory in every way and I can most heartily recommend said pen to any one.

MRS. E. L. CANNON,
217 Glasgow St.,
Portsworth, Va.

Have used an L. E. Waterman Fountain Pen with entire satisfaction. Have recently purchased another.

ADDIE ROSAMOND,
Easley, S. C.

988 *Louis W. Ash*

In addition to the foregoing there were other replies but they were destroyed some months ago, as it was not expected there would be any further use for them."

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

989 L. E. WATERMAN COMPANY, Plaintiff, vs. MODERN PEN COMPANY, Defendant. } In Equity.

New York, March 9, 1911.

Met pursuant to agreement.

Present:

S. S. Watson, for the plaintiff.
Morton Stein, for the defendant.

990 LOUIS W. ASH, a witness called on behalf of the complainant, being duly sworn, testified as follows:

Direct-examination by Mr. Watson:

Q1. Please give your name, age, residence and occupation? A. Louis W. Ash; age, 44 years.

Mr. Stein: I ask for an adjournment upon the record upon the ground that Col. Bacon, who alone is familiar with the case so far as the defendant is concerned, is actually engaged in the Gottsch Estate litigation before Surrogate Ketchum in Brooklyn and cannot be here, and

that the testimony to be taken, if taken, is taken over our objection, on the ground that the one counsel who knows about the case cannot be here and has a legal excuse, and I ask my adversary to consent to an adjournment until some hour this afternoon when Col. Bacon can be here.

Mr. Watson: This testimony is taken pursuant to notice duly given and is a continuation of sessions held on previous days. Col. Bacon was present at the session which was held on March 7th, and at the close of the session the hearing was adjourned until March 8th, at which time it was adjourned to this hour and counsel for defendant was immediately notified. The testimony of this witness has been in substance admitted in affidavits submitted by the defendant in this action, on preliminary injunction. This witness is entirely disinterested and is here under subpoena, and the facts to be deduced are so very simple that we do not feel disposed to take the witness' further time. If counsel for defendant desires to further cross examine this witness at some future day we will try to arrange it. 992

Mr. Stein: May it appear on the record that the witness does business in Jersey City and resides in Hoboken; that Mr. Stein has no knowledge as to the nature of the testimony to be adduced, or as to any admission, if any, contained in any affidavits in this action. 993

Mr. Watson: The admissions referred to by defendant's counsel are contained in the affidavit of Hobart W. Geyer, verified April 27, 1910, and particularly in exhibits annexed to that affidavit and the testimony simply refers to advertisements appearing in the Jersey City papers, of Wolfson Bros., of Jersey City, the fact that these advertisements occurred, and the fact that the defendant paid a portion of the cost of those advertisements.

Q2. What is your residence? A. Hoboken, New Jersey.

994 *Louis W. Ash*

Q3. Your business? A. Superintendent and advertising manager for Wolfson Bros.

Q4. Of Jersey City? A. Yes.

Q5. Wolfson Bros. is a department store? A. Yes.

Q6. And in connection with that store they sell fountain pens? A. Yes.

Q7. I show you an advertisement which appeared in the Jersey City Journal, Saturday evening, December 11, 1909, on page 2 of the paper, and I ask you if that was inserted by Wolfson Bros.? A. Yes.

Q8. And on the same day the same advertisement appeared in other Jersey City papers? A. In a Hoboken paper.

995 Q9. What was the name of that paper? A. The Hoboken Observer.

Q10. That advertisement appearing in the Hoboken Observer was an exact duplicate of the one before you? A. Yes.

Q11. Did the Modern Pen Company of 27 Thames Street, New York, pay any portion of the cost of this advertisement? A. Yes.

Q12. What portion? A. One-half the cost of their space.

Q13. You refer to the space allotted to fountain pens? A. Yes.

Q14. And they paid that same proportion of the advertisement appearing in the Hoboken Observer of the same date? A. Yes.

996 Q15. And that payment was made by the deduction of the amount of their payment from the amount which Wolfson Brothers owed them on goods bought A. Yes.

Q16. You are here under subpoena? A. Yes.

Direct-examination closed.

Mr. Stein: Can it be stipulated on the record that any cross-examination of mine shall not be deemed complete and that Col. Bacon shall have a right to re-subpoena this witness, either for further cross-examination or as a witness in chief, and upon such latter examina-

tion complete the cross if such further cross be necessary.

Mr. Watson: Of course the defendant can subpoena this witness as a witness in chief if he sees fit at the time he takes his answering proofs.

Mr. Stein: That does not meet my question. Can the witness be further subpoenaed for cross-examination, if any further be deemed necessary by Col. Bacon; in other words, I do not want to bring Mr. Ash over here again.

Mr. Watson: We shall not produce Mr. Ash again. If the defendant desires to call him as a witness, of course, he is at liberty to do so when he takes his answering proofs.

998 Mr. Stein: And at that time to be at liberty to cross-examine, if necessary, as to the matters brought out today by you on your direct?

Mr. Watson: They are at liberty to examine him as their own witness.

CROSS-EXAMINATION by Mr. Stein:

XQ17. How long after this advertisement appeared did the Modern Pen Company pay you for one-half of the fountain pen space in the ad or for that part of the ad devoted to the Waterman Fountain Pen?

Mr. Watson: Objected to as entirely immaterial. 999

A. I do not recall the exact space of time. Possibly within ten to fifteen days. I do not just recall. After correspondence with them in reference to the payment.

XQ18. Did you have any correspondence with them prior to the insertion of these particular advertisements? A. Not to my recollection.

XQ19. The correspondence arose subsequent to the publication of those advertisements? A. Yes.

XQ20. How much was the amount they paid? A. I think it was $3 as far as I can remember.

1000

XQ21. Did you submit the advertisements to them before they were published? A. No.

XQ22. I show you a paper marked Exhibit II, page 441 of the printed record in the United States Circuit Court of Appeals for the Second Circuit, in this action, of the appeal from the order of Judge Hough, and I ask you whether that is a copy of a letter that you sent to the Modern Pen Company? A. Yes.

Mr. Stein: It is understood that this letter is now in evidence?

Mr. Watson: It is so admitted.

1001

XQ23. This letter was written three days after the advertisement appeared? A. Yes, according to the dates.

XQ24. And was this the first correspondence, the first talk of any kind, that you had with A. A. Waterman & Co. relative to that ad? A. The first that I was personally concerned in.

XQ25. I ask you to read Exhibit JJ at page 442 of that record which purports to be a letter from the Modern Pen Company to Wolfson Brothers, dated December 16, 1909, and refers to your letter of the 14th inst., and I ask you whether you received the original of that? A. Yes.

It is admitted by Mr. Watson and by Mr. Stein that Exhibits II, JJ, KK, LL and MM on pages 441 to 444 of the record are already in evidence.

1002

These are letters respectively dated December 14, 1909, from Wolfson Bros. to A. A. Waterman; the answer thereto of December 16, 1909, sent to Wolfson Bros. by the Modern Pen Company; the reply of December 17, 1909, sent by Wolfson Bros. to the Modern Pen Company; the letter of December 18, 1909, sent by the Modern Pen Company to Wolfson Bros.; and the letter of December 20, 1909, sent to the Modern Pen Company by Wolfson Bros. per L. W. Ash.

XQ26. You are the L. W. Ash referred to in that letter of December 20th? A. Yes.

XQ27. And was each of these letters that I have just noted received by you personally and sent by you personally? A. As the representative of the firm, yes.

XQ28. But you attended to it personally? A. Yes.

XQ29. Have you the entire charge of the advertisements of Wolfson Bros. ? A. Subject to the approval of those concerns.

XQ30. You prepare them? A. Yes.

XQ31. And arrange for their publication? A. Yes.

XQ32. And for the matter contained therein? A. The matter contained therein is submitted to me by the different heads of the departments.

XQ33. Do I correctly understand that at no time until the first of these letters was the subject of these advertisements or the contents thereof submitted to the Modern Pen Company or A. A. Waterman & Co.? A. They were not submitted to them. 1004

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ34. In the letter of December 17th it appears that the cost of the space of the fountain pen advertisement referred to was $3 for each insertion; is that correct? A. Yes.

RDQ35. $6 for the two insertions? A. Yes. Both insertions were on the same day.

RDQ36. It appears in the letter of December 14, 1909, that you submitted a copy of these advertisements to A. A. Waterman & Co.; is that correct? A. According to the letter, yes. 1005

RDQ37. And you submitted that copy of the advertisements before they paid for them or agreed to pay for them, did you not? A. I understood that arrangements had been made with the A. A. Waterman Company to pay for one-half of the advertisement, but I did not know until after the advertisement was inserted that they were to pay it.

Mr. Stein: I move to strike out the witness' understanding.

RDQ38. The advertisement or a copy of the advertisement was submitted to the Modern Pen Company before they paid their portion of the cost? A. Yes.

RDQ39. And after they had seen the advertisement, or a copy of it, they paid their portion of the cost? A. After controversy over the matter.

RDQ40. The controversy being what appears in these letters? A. In these letters, yes.

RE-CROSS EXAMINATION by Mr. Stein:

RXQ41. There was no submission of this ad to A. A. Waterman & Co. or the Modern Pen Company until after the actual publication in these papers? A. No.

RXQ42. And the controversy arose over the fact that the ad did not describe the goods as A. A. Waterman's pens? A. Yes.

RXQ43. And they were merely described as Waterman? A. Waterman pens.

RXQ44. And the defendant complained and wanted you to describe its pens as A. A. Waterman Company pens? A. Yes.

RXQ45. Did you subsequently so describe your pens when you advertised? A. Yes.

RXQ46. And did you advertise these pens as Waterman pens? A. No.

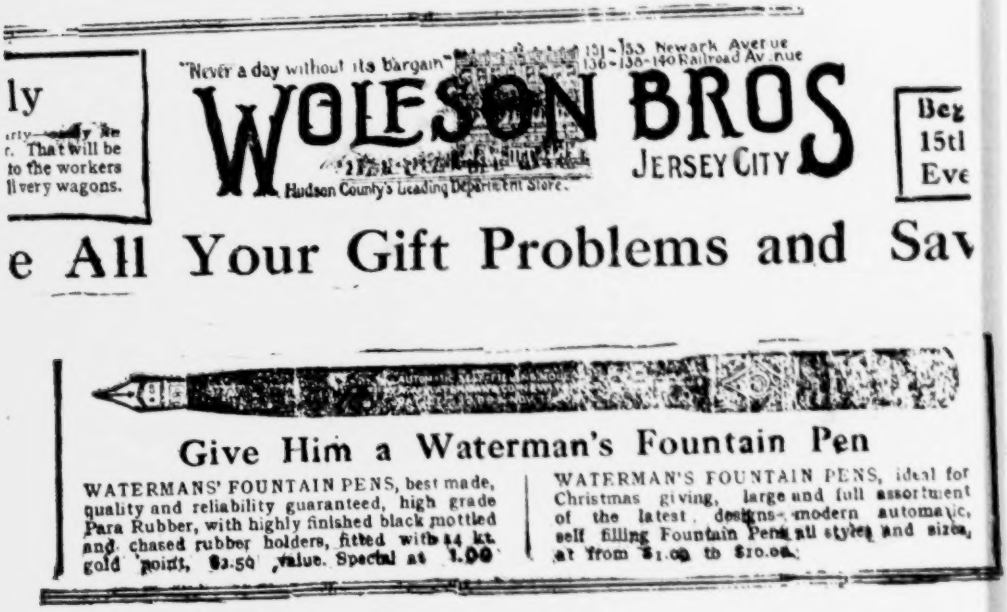
RXQ47. Always used the term A. A. Waterman pens? A. Yes.

Deposition closed.

Signature waived.

Plaintiff's Exhibit 11.

Wolfson Bros. Advertisement of A. A. Waterman & Co. Pens.



1012 **Plaintiff's Exhibit 12.**

Letters Referred to in Mr. Ash's deposition.

December 14, 1909.

Messrs. A. A. Waterman & Co.,
125 Greenwich St.,
New York City.

Gentlemen:

Herewith we beg to hand you copy of advertisement, which appeared in last Saturday evening's issue of two of our local papers.

1013 The cut, of course, appeared much plainer in the regular issue than on this proof.

We presume that it will be agreeable to have us charge you with one-half of the cost of this advertisement.

Anticipating your prompt reply, we are

Yours very truly,
WOLFSON BROS.

LWA/E.

Dec. 16, 1909.

Messrs. Wolfson Bros.,
1014 Jersey City.

Dear Sirs:

Your letter of the 14th inst., enclosing copy of your ad. which appeared in last Saturday evening's papers, received and contents have our attention.

We cannot see that this ad. covers our pens at all. In advertising our line we have to be very particular to advertise it as A. A. Waterman & Co.'s pens, while your ad. would lead the general public to infer that it was the Waterman's Ideal pen.

We do not make a practice of paying for advertising of this kind, and you do not give us any idea as to what you figure the

Plaintiff's Exhibit 12 1015

proportion of cost for the ad. would be. If you will let us know what the cost is, we will then let you know if we will pay a portion of it providing you wish to advertise our line under its proper style.

Yours truly,
THE MODERN PEN CO.,
HOBART W. GEYER,
Ass't. Treas.

Dict. to N. H.

1016

Jersey City, December 17, 1909.

The Modern Pen Co.,
125 Greenwich Street,
New York City.

Gentlemen:

Replying to your favor of the 16th inst., we beg to advise you that the cost of the advertisement, copy of which we sent you, is $3.00 for each insertion, or $6.00 in all.

We did not intend this advertisement to be misleading, nor do we think it is; we merely advertised Waterman's pens, which we think your pens are entitled to be called.

However, if you prefer that we should advertise your goods as the A. A. Waterman pen, we shall be glad to do so. 1017

Awaiting your further reply, we are

Yours very truly,
WOLFSON BROS.

LWA/E

1018 *Plaintiff's Exhibit 12*

Dec. 18, 1909.

Messrs. Wolfson Bros.,
Jersey City, N. J.

Dear Sirs:

Your letter of the 17th inst. received, and we will be very much pleased to stand half the cost of the ad., as per your former request.

For your own sakes as well as ours, it will be necessary for you to advertise the goods as A. A. Waterman & Co.'s, so that you may have no trouble with the L. E. Waterman Co.

1019 Yours truly,
THE MODERN PEN CO.,
HOBART W. GEYER,
Ass't. Treas.

Jersey City, N. J.,
December 20, 1909.

The Modern Pen Co.,
125 Greenwich Street,
New York City.

Gentlemen:

1020 Replying to your favor of the 18th inst., we beg to enclose herewith our bill for one-half cost of the advertisement, inserted December 11th.

We note your further remarks regarding the similarity of the names, and the proper manner in which to advertise your goods, and in the future we will do so.

Thanking you for your kind consideration, we are

Yours very truly,
WOLFSON BROS.,
L. W. ASH.

LWA/E.

UNITED STATES CIRCUIT COURT, 1021

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.
} In Equity.

New York, March 11, 1911.

Met pursuant to adjournment. 1022

Present:

S. S. Watson, for Plaintiff.
Alexander S. Bacon, for Defendant.

Counsel for complainant states on the record that two witnesses, Peter Hoffman and Mrs. Peter Hoffman, were duly subpoenaed to appear here at this hearing, this morning at eleven o'clock, and that they have failed to appear, and that it is now 11:40, and counsel has waited forty minutes for their appearance.

Adjourned to Monday, March 13, 1911, at 2 P. M. 1023

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.
} In Equity.

Testimony taken on behalf of the plaintiff for final hearing, before Frederick M. Adams, an Examiner of this Court at the office of Watson & Raymond, 10 Wall Street, New York, on Wednesday, January 11, 1911, pursuant to notice hereto annexed.

Appearances:

Samuel S. Watson, for Plaintiff.
A. S. Bacon, for Defendant.

Adjourned from 10:30 o'clock in the forenoon until 3 o'clock in the afternoon on January 11, 1911.

———

January 11, 1911, at 3 P. M.

HENRY W. ROGERS, a witness produced on behalf of the complainant, having been duly sworn, testified as follows:

Direct-examination by Mr. Watson:

Q1. Please state you name, age, residence and occupation? A. Henry W. Rogers, age, 38; residence, Maplewood, New Jersey; occupation, manufacturing and retail stationer.

Q2. Where is your place of business? A. 37 Fulton Street, New York.

Q3. What is the name of the firm with which you are connected? A. Wilbur & Hastings.

Q4. How long have you been in the stationery business? A. Over twenty years.

Q5. During this time what part of it have you been dealing in and handling fountain pens? A. The greater part of that time; about sixteen years.

Q6. Are you generally familiar with the fountain pens that have been on the market for the last sixteen years? A. Yes.

Q7. How long have you been familiar with the Waterman's 1028
Ideal fountain pen? A. Ever since I have been in the business.

Q8. How long have you been connected with any concern that has been selling Waterman's Ideal fountain pens? A. Ever since I have been in the business. We have handled and sold fountain pens that entire time.

Q9. And all this time have you been selling and handling Waterman's Ideal Fountain Pens? A. Yes.

Q10. By what, name, if you know, are the pens manufacturned by the L. E. Waterman Company generally known in the market? A. As "The Waterman Pen;" "Waterman's Pens;" "Waterman's Ideal Pen."

Q11. By what name are the plaintiffs in this case usually 1029
known in the trade and by the public? A. Waterman Company.

Q12. How long has that been the fact, to your knowledge? A. Sixteen years, anyhow.

Q13. And how long have their pens been known as Waterman's Pens, or Waterman Fountain Pens? A. Ever since I have been in the business.

Q14. When pens are called for by customers as Waterman's pens, or Waterman's fountain pens, what is meant, as the trade understands it? A. Pens manufactured by the L. E. Waterman Company.

1030 *Arthur N. Chaffee*

Q15. Do you know whether that is a fact generally known in the trade? A. It is an understood thing that the "Waterman Pen" would call for a pen manufactured by the L. E. Waterman Company.

HENRY W. ROGERS.

Cross-examination reserved.

Adjourned to Friday, January 13, 1911, at 11:30 A. M.

1031 SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES CIRCUIT COURT,

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.
} In Equity.

New York, January 20, 1911.

1032 Met pursuant to notice and by agreement.

Present: Counsel as before.

ARTHUR N. CHAFFEE, a witness called in behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Watson:

Q1. What is your name, residence and occupation? A. Arthur N. Chaffee: I reside at 772 St. Nicholas Avenue, New York City; buyer for the stationery department of Gimbel Brothers, New York.

Q2. Where is their place of business? A. Broadway at 32nd and 33rd Streets and Sixth Avenue, New York City.

Q3. And their business is that of a large department store? A. Yes.

Q4. And in connection with that store they have a department in which stationery and fountain pens are sold? A. Yes.

Q5. How long have you been connected with Gimbel Brothers? A. Since last July, 1910.

Q6. And prior to that time with whom were you connected? A. I was connected with John Wanamaker, New York City.

Q7. That is also a large department store, is it not? A. Yes.

1034

Q8. And they have a department in which are handled and sold stationery and fountain pens? A. They have.

Q9. What was your connection with that concern, in what capacity? A. I was assistant buyer for the stationery department.

Q10. How long were you with John Wanamaker in New York City? A. I was with him for two years and eleven months.

Q11. Prior to that time with whom were you connected? A. I was with George E. Newcombe & Co., 621 Broadway.

Q12. What was their business? A. They were manufacturing stationers.

Q13. Did they handle and sell fountain pens? A. They did.

1035

Q14. How long have you been in or connected with any business that handled or dealt in fountain pens? A. For seventeen years, with the exception of two years that I was with George E. Newcombe.

Q15. And prior to your connection with Newcombe & Co. with whom were you connected? A. I was with the American News Company, their branch at Springfield, Mass.

Q16. And at that place of business were fountain pens handled? A. Yes, they were; there was a retail department there.

Q17. Were you connected with that department? A. I was; I was buyer for the department.

1036 *Arthur N. Chaffee*

Q18. And during the seventeen years, with the exception named by you, have you been personally familiar with the fountain pens handled by the concerns that you have been connected with? A. Yes.

Q19. And have you been during this period personally familiar generally with fountain pens on the market? A. I have, very familiar.

Q20. During the period you have been handling and selling fountain pens, during what time have you handled and sold Waterman's Ideal Fountain pens? A. As I stated before, with the exception of the couple of years that I was with Newcombe, I handled them for the full period of time that I have been
1037 in the stationery business.

Q21. By what name are these pens commonly known to the trade by the public, if you know? A. They ask for and speak of them under the name of Waterman's Pen and the Ideal Pen and the Waterman Fountain Pen, and they speak of it as Waterman's Fountain Pen, and Waterman's Pens.

Q22. What is the name most generally used in your experience? A. Most always a customer will ask for a Waterman pen; possibly they will ask for an Ideal.

Q23. Are these pens well known among the trade and the public generally? A. They are very well known.

Q24. How long has that been the fact, as far as you know? A. Back as far as I have had any experience with buying and sell-
1038 ing pens.

Q25. How long has it been a fact that the public, and purchasers generally, called for these pens as Waterman's pens? A. Just as far back as I have had any experience in selling pens.

CROSS-EXAMINATION by Mr. Bacon:

XQ26. Have you ever dealt with the A. A. Waterman pens? A. No, sir, I never had any dealings with them.

XQ27. Never handled them at all? A. No, sir.

XQ28. Never have been with any firm that ever handled them? A. No, sir.

XQ29. You handle other pens, did you, besides Waterman's? A. Yes, other manufacturers' makes.

XQ30. Then you do not know how people speak of the A. A. Waterman pens when they purchase them? A. That I cannot say.

XQ31. You do not know but what they, too, are called for as Waterman pens, do you? A. No, I cannot say as to that.

XQ32. You simply have had no experience with that pen at all? A. No experience whatever.

XQ33. You have heard of it often? A. I have heard of it 1040
and have had it confused with other pens that I have been selling, a great many times.

XQ34. That is, people would ask for a Waterman pen when they wanted A. A. Waterman? A. No, I mean principally to the extent that I have had fountain pens brought to my departments for repairs or for exchange, or to be fixed up in some way.

XQ35. And those people had A. A. Waterman pens? A. What I mean by that is where the A. A. Waerman was confused with the Ideal pens.

XQ36. And those people that brought them in called them Waterman's pens? A. They called them Waterman's pens.

XQ37. Then they called the A. A. Waterman pen the Water- 1041
man pen, just as those who had L. E. Waterman's pens called them Waterman's pens? A. Yes, they did.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ38. And these people that had A. A. Waterman pens called them Waterman's pens because they thought they were of the L. E. Waterman Company make, or they thought they were Waterman's Ideal Fountain Pens? A. The way I would answer that would be this. I have had my sales people, that were under me, come to and say, "Mr. Chaffee, here is a pen

that has been bought as a Waterman pen. The lady wants it exchanged." Of course we guarantee any Waterman pen that we sell to give satisfaction. We, of course cannot guarantee it against breaking; any one can break a pen, but they buy it as a pen that they had seen advertised or known as a Waterman pen and a great many times have been very indignant because we would tell them they did not have the Waterman pen that they thought they had; consequently we would have to return it to them without fixing it, and sometimes we would get it fixed for them if they were a customer of the house, where we could not very well refuse to fix it for them.

1043 RDQ39. Did you ever know anybody to ask for a Waterman pen wishing to secure an A. A. Waterman pen? A. I have no recollection of any one asking for an A. A. Waterman pen.

RDQ40. Did you ever know of anybody asking for a Waterman pen expecting to get an A. A. Waterman pen? A. Not to my knowledge.

RDQ41. In every case where a Waterman pen was asked for, as far as you were able to discover they wanted a Waterman's Ideal Fountain Pen? A. That is what I think is generally understood by a customer when they ask for a Waterman pen, that they want a Waterman Ideal pen.

RDQ42. It is a fact within your knowledge, I understand from your cross-examination, that there is a confusion in the trade by the use of the name of A. A. Waterman & Co. on
1044 fountain pens which are not of the L. E. Waterman make? A. Yes, I know that there has been such confusion.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ43. Did you, generally speaking, refuse to repair any pens that bore the name of A. A. Waterman & Co.? A. Why, no, not as a rule. The concerns that I have been with would usually take—excepting in some very special instances—they would take any make of a fountain pen and have it repaired. Of course the customer would have to pay for the repair.

1045

RXQ44. You don't know what was in the mind of any person who owned an A. A. Waterman pen—what was in their mind when they purchased? A. Certainly, I could not tell what was in their minds.

RXQ45. And when they appeared to you to be indignant, was it not from the fact that you refused to repair the pen? A. Why no; they were indignant because they were told that they had not got the Waterman pen that they thought they had, and they have even gone so far as, in one instance, but a very few months ago, to go to the head of the firm because they thought the department heads and sales people did not know their business.

1046

RXQ46. In other words, they believed that their pens were Waterman pens? A. They did.

RXQ47. And they designated them as such? A. They did.

RXQ48. Then is it not true that generally speaking if a man owns an A. A. Waterman pen he calls it a Waterman pen, and if he owns an L. E. Waterman pen he calls it a Waterman pen? A. Naturally if a man buys a pen that is represented to him as a Waterman pen, and it has got the name Waterman on it, he believes that he has got a Waterman pen.

RXQ49. And that belief is founded upon the mere fact that there is "A. A. Waterman" on the barrel, is not that so? A. And it was sold to him as a Waterman pen.

RXQ50. Has any of your concerns ever sold A. A. Waterman pens at all? A. No, they did not.

1047

RXQ51. Then how do you know how any of these pens were sold to the people who owned them? A. I know from hearsay, from people, concerns, that have handled them, and they have been unsatisfactory, they have had so much dissatisfaction in handling other pens, there has been so much confusion, they have had so many brought back that were unsatisfactory, the customers thinking that they were the Ideal pen which is advertised.

RXQ52. Do you mean to say that any one of these concerns that you have been connected with have had any large

1048 *Arthur N. Chaffee*

number of A. A. Waterman pens returned? A. I could safely say that the three concerns that I have been with in the length of time that I have been with them have had quite a good many.

RXQ53. How many would you call quite a good many? A. I could not say.

RXQ54. You have no idea at all? A. Not in figures, no.

RXQ55. It might be a dozen? A. It might be a dozen, it might be a hundred and it might be two hundred and it might be a thousand.

RXQ56. You have no idea whether it was one dozen or one thousand? A. No, I have no idea.

1049 RXQ57. In other words you have no idea at all? A. But I do know we have had a great many returned and a great deal of dissatisfaction and lots of complaints from customers that did return them because they did not have what they thought they had.

RXQ58. They did not return them to you, did they—because you had not sold them? A. They did, for this reason: a Waterman fountain pen is guaranteed to any one that buys it to give satisfaction, and any one that buys one can return it to any dealer that sells Waterman pens and they will either repair it, exchange it, or send it to the company and get it repaired, or exchanged for the customer, if they do not want to do it themselves.

1050 RXQ59. Don't you know that a person who buys an A. A. Waterman pen, if there is anything wrong about it, any dealer who deals in that pen, or any one else, can send it to the factory and have it repaired? A. I don't know that. I have had no dealings with them.

RXQ60. In other words you do not know anything about the A. A. Waterman people? A. All I know about them is simply hearsay, what I have heard about them in the trade, through pens that have been brought in there by people.

RXQ61. But of course there are hundreds of L. E. Waterman pens brought in to one A. A. Waterman pen, are there not? A. That I cannot say.

RXQ62. You do not sell anything but L. E. Waterman pens? A. No, but we repair any pens.

RXQ63. You cannot give any figures whatever as to the proportion of L. E. Waterman pens and A. A. Waterman pens that come in for repair? A. No, I cannot.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ64. These people that were indignant because you told them that they had an A. A. Waterman pen and not a genuine Waterman pen were indignant because you would not make it satisfactory, as they expected you to do if it was a Waterman pen; is not that the fact? A. That is the fact. 1052

RDQ65. And when you say that people told you that they bought a Waterman pen, or that they had a Waterman pen, as the case might be, your knowledge of that is what they told you? A. Yes.

RDQ66. And you found in many instances that as matter of fact the pen that they had was an A. A. Waterman pen and not a genuine Waterman pen? A. Yes.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ67. Did not the dissatisfaction arise from the simple fact that they brought back a guaranteed pen to be repaired to the wrong shop? A. No. 1053

RXQ68. Thinking that yours was an A. A. Waterman shop, where you sold that kind of pen? A. No.

RXQ69. Can you give the words of any particular man, or name any particular person that ever brought one pen back that was unsatisfactory? A. I cannot call any person by name, but I can remember distinctly several customers saying they did not know there was but one Waterman pen made.

RXQ70. How many of those can you remember in seventeen years? A. I don't know how many, but I can say that there were quite a good number.

1054 *H. Lee Mason, Jr.*

RXQ71. You cannot say that there were a dozen in seventeen years, can you? A. I cannot say anything about the quantity.

Signature waived.

Adjourned subject to notice.

UNITED STATES CIRCUIT COURT,

1055 SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.

Testimony taken on behalf of the plaintiff for final hearing before William T. Lindsey, Esquire, United States Commissioner, at his office, Room 309, Post Office Building, in the City of
1056 Pittsburgh and State of Pennsylvania, on the 21st day of March, A. D. 1911, beginning at 10:30 o'clock in the forenoon, pursuant to the notice hereto annexed.

Appearances:

Samuel S. Watson, Esquire, for the plaintiff.
Alexander S. Bacon, Esquire, for the defendant.

Mr. H. LEE MASON, JR., who resides in Pittsburgh, in Pennsylvania, a witness produced on behalf of the plaintiff, being duly sworn, deposes and states as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, place of residence and occupation? A. H. Lee Mason, Jr., Pittsburgh, a member of the firm of J. R. Weldin & Company, stationers.

Q2. Where is their place of business? A. 429-431 Wood Street, Pittsburgh.

Q3. How long have you been in the stationery business, Mr. Mason? A. A little over twenty years.

Q4. And during what period of time have you handled and sold fountain pens? A. All of that time.

Q5. What makes of fountain pens during this period have you handled and sold? A. Principally the L. E. Waterman pen and the Paul E. Wirt pen.

Q6. Have you become as familiar with the fountain pens on the market as a merchant usually is? A. Yes, sir.

Q7. How long have you been dealing in Waterman's Ideal Fountain Pens? A. Since before I went into the business, that is, the firm.

Q8. Personally how long have you handled these Waterman Ideal Fountain Pens? A. Twenty years and a half.

Q9. By what names do your customers ask for Waterman's Ideal Fountain Pens? A. The Waterman Fountain pen and Waterman pen, very rarely using the "Ideal."

Q10. How long has that been the case? A. During all my knowledge.

Q11. All the time you have been handling these goods, Mr. Mason? A. Yes, sir.

Q12. And what is the name that comes to your knowledge that these goods are usually called for and referred to by the trade? A. You mean the technical name?

Q13. The name that these goods are usually spoken of by the trade? A. They are simply spoken of as the Waterman pens and the Waterman fountain pens.

1060 *H. Lee Mason, Jr.*

Q14. How long has that been a fact? A. During the twenty years of my experience.

Q15. As far as the matter has come to your personal knowledge, have the Waterman Ideal Fountain pens proved satisfactory to your customers? A. Very.

Q16. What is the reputation among the trade as to the quality of Waterman's Ideal Fountain pens as far as it has come to your knowledge? A. The very best.

Q17. The very best? A. Yes, sir.

CROSS-EXAMINATION by Mr. Bacon:

1061

XQ18. How long have you been selling the "Ideal" pen, Mr. Mason? A. Twenty years and a half.

XQ19. And the other pen that your firm sells is the "Work"? A. The Wirt.

XQ20. How long have you been selling that? A. The same time.

XQ21. That is a cheaper pen? A. Yes, sir.

XQ22. You don't sell many other pens? A. Very few.

XQ23. These are your two leading makes? A. The Waterman is the leading make. We simply have the other in reserve.

XQ24. You never sold the "Modern" pen, manufactured by the A. A. Waterman Company? A. No, sir.

1062 XQ25. Never sold any of their goods? A. No, sir.

XQ26. You have known of their goods being sold in town, have you not? A. Yes, sir.

XQ27. For how long? A. To my knowledge for four or five years.

XQ28. Have you not known of them being sold here for twelve or thirteen years? A. I have not known that, no.

XQ29. You do not know anything about the A. A. Waterman fountain pen? A. No, sir.

The signature of the witness is waived by counsel.

MR. JOHN ALBERT COOPER, who resides in Avalon Borough, Allegheny County, Pennsylvania, a witness produced on behalf of the plaintiff, being duly sworn, deposes as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, place of residence and occupation? A. John Albert Cooper, Avalon Borough, Allegheny County, Pennsylvania, head salesman for William G. Johnson & Company.

Q2. What is the business in which you are engaged, Mr. Cooper? A. Selling stationery.

Q3. How long have you been in the stationery business? A. I have been in the stationery business twenty-three years, or twenty-four years. 1064

Q4. Where is your place of business now? A. William G. Johnson & Company, Penn Avenue and Ninth Street, Pittsburgh.

Q5. How long have you been with William G. Johnson & Company? A. Sixteen years.

Q6. Does William G. Johnson & Company handle fountain pens, Mr. Cooper? A. Yes, sir.

Q7. How long have you been in any business or connected with any business that handled and sold fountain pens? A. Twenty-three or twenty-four years.

Q8. During that period of time, what fountain pens have you handled and sold? A. I handled first the Wirt—that was the old original; the Weidlich; the Holland; there is a few other odd pens that I can't recall the names, but those are the principal makes; and the Waterman. 1065

Q9. How long have you handled the Waterman Ideal Fountain pen? A. About twelve years, I should judge; that is my recollection, twelve years.

Q10. Do you come into constant contact with the customers that are purchasing fountain pens? A. Yes, sir.

Q11. By what names do these customers ask for Waterman's Ideal Fountain pen? A. As a rule, it is the Waterman or the Waterman Fountain pen.

1066 *John Albert Cooper*

Q12. How long has that been a fact? A. Always, in my experience.

Q13. What is the name by which Waterman's Ideal Fountain pens are generally known to the trade as far as it has come to your knowledge? A. The Waterman pen or Waterman Ideal pen.

Q14. In your experience, as far as the matter has come to your personal knowledge, have the Waterman Ideal fountain pens proved satisfactory to your customers, Mr. Cooper? A. Very much so.

Q15. What is the reputation of the Waterman fountain pen as to quality among the trade? A. It has the highest reputa-
1067 tion of any fountain pen that I know of.

Q16. How long has that been a fact? A. Practically all the time that I have been handling the pen.

Q17. Have you ever sold and handled the pen marked A. A. Waterman & Company? A. No, sir.

Q18. Have any evidences of confusion between Waterman's Ideal Fountain pen and those marked A. A. Waterman & Company, come to your notice? A. Yes, sir; in one or two instances. I couldn't recall the date or the circumstances except that persons have brought the A. A. Waterman pen in for repairs, or for some attention.

Q19. How did they show that they were confused? A. By the fact of the pen being marked "Waterman." It was stamped
1068 "Waterman," and in some cases, my idea from the conversation with the customer, was that they thought there was only one Waterman pen.

Q20. Which one did they think they had? A. From the fact that they came to the dealer in the Ideal pen, they thought they had the L. E. Waterman pen.

CROSS-EXAMINATION by Mr. Bacon:

XQ21. They bring in all sorts of pens? A. Yes, sir.

XQ22. Nothing strange that an A. A. Waterman should be brought in any more than a Wirt? A. No, sir.

XQ23. You never have sold any of the A. A. Waterman pens at all? A. No, sir.

XQ24. You know nothing about it except that an occasional pen comes in for repairs? A. Yes, sir.

XQ25. The great number of pens that come in for repairs are the L. E. Waterman? A. Yes, sir.

XQ26. If a man gets an A. A. Waterman pen, he is as apt to call it a "Waterman" as not? A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ27. These people think so for what reason? A. From the fact that they are stamped "Waterman." 1070

RDQ28. Did they think they had the Waterman Ideal fountain pen, did you get that impression? A. In most cases, they did.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ29. They are all stamped A. A. Waterman? A. Yes, sir.

RXQ30. How would you know that they thought they had an "Ideal" pen? A. From the fact that they brought it to the dealer in "Ideal" pens, saying that they had a Waterman pen.

RXQ31. That is the only thing that made you think they thought it was an Ideal pen? A. Yes, sir. 1071

The signature of the witness is waived by counsel.

MR. EPHRAIM M. JOEL, who resides in Pittsburgh, Pennsylvania, a witness called on behalf of the plaintiff, being first duly sworn, deposes and states as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, place of residence and occupation? A. Ephraim M. Joel, 7309 Hamilton Avenue, Pittsburgh, Pennsylvania, salesman with William G. Johnson & Company.

1072 *Ephraim M. Joel*

Q2. With what concern are you connected? A. With William G. Johnson & Company.

Q3. Where is their place of business? A. Ninth and Penn Avenue, Pittsburgh.

Q4. Their business is what? A. Commercial stationery.

Q5. How long have you been in the stationery business, Mr. Joel? A. Ten years.

Q6. Have you come into contact with the customers who buy fountain pens at your store? A. Yes, sir.

Q7. What makes of fountain pens have you sold during the time you have been connected with the stationery business? A.
1073 The Waterman Ideal Fountain pen, and the Eagle pen and the Paul E. Wirt.

Q8. How long have you sold Waterman's Ideal Fountain pens, Mr. Joel? A. Eight years.

Q9. By what names do the customers call for Waterman's Ideal Fountain pens? A. Mostly as Waterman's pens or Waterman's Ideal.

Q10. How long has that been a fact? A. Since I have handled the Waterman pen.

Q11. As far as the matter has come to your personal knowledge, have the Waterman Ideal Fountain pens proven satisfactory to your customers? A. Thoroughly satisfactory.

Q12. By what name was the Waterman Ideal Fountain pen known generally to the trade within your own personal knowl-
1074 edge? A. Waterman's pen and Waterman's Ideal.

Q13. How long has that been a fact? A. As long as I have been handling fountain pens or been connected with them.

Q14. Have you ever handled or sold the fountain pen marked "A. A. Waterman & Company"? A. No, sir; I never have, only in repair work.

Q15. Have any evidences come to your personal attention of confusion between the Waterman Ideal Fountain pen and those marked A. A. Waterman & Company? A. Occasionally I have had the people bring the pens in, and I have talked with people who had the A. A. Waterman pen who were under the

impression that there was only one Waterman pen and they seemed to think they had the one Waterman pen.

Q16. Which one of the Waterman pens did they refer to, Mr. Joel? A. They seemed to know it as the L. E. Waterman or the Waterman Ideal. They seemed to have a knowledge of that pen only.

CROSS-EXAMINATION by Mr. Bacon:

XQ17. You repair all sorts of pens? A. Yes, sir.

XQ18. There is nothing unusual in an A. A. Waterman pen coming in to be repaired? A. No, sir. 1076

XQ19. You have repaired very few? A. Yes, sir.

XQ20. Mostly L. E. Waterman pens? A. Yes, sir.

XQ21. If a person came in with an A. A. Waterman, they thought that was a Waterman pen? A. Yes, sir.

XQ22. They perhaps did not know anything about the L. E. Waterman pen? A. They only knew one Waterman pen.

XQ23. That was their own? A. Yes, sir.

XQ24. There are a great many people that know the A. A. Waterman pen, but don't know any other pen, just as there are many who know the L. E. Waterman and no other? A. Well, they understand it as the "Waterman" pen, whether it is an L. E. Waterman or an A. A. Waterman pen.

XQ25. That is universal? A. Yes, sir; to the best of my knowledge. 1077

XQ26. Is the A. A. Waterman pen sold in Pittsburgh? A. Yes, sir; I believe it is.

XQ27. How long has it been sold? A. I don't know.

XQ28. Do you know how many years? A. It is not generally handled in Pittsburgh, to the best of my knowledge. It is being sold in Pittsburgh now, I believe.

XQ29. You don't know for how many years it has been sold, do you? A. No, sir.

XQ30. Your knowledge of the A. A. Waterman pen is exceedingly slight? A. Yes, sir.

1078 *Ephraim M. Joel*

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ31. Where in Pittsburgh, at the present time, is the A. A. Waterman pen sold? A. In the drug store at the corner of Seventh and Liberty, they are selling them now, advertising them.

RDQ32. Have you seen their display or advertisement of these pens? A. Yes, sir.

RDQ33. When did you see them? A. Yesterday.

RDQ34. What was the display? A. A board filled with pens, with the prices.

1079 RDQ35. What were the prices? A. They were advertising a two dollar and a half and three dollar pen for ninety-five cents.

RDQ36. What kind of pens were they? A. They were assorted, mounted pens and plain pens.

RDQ37. What do you mean by "mounted" pens? A. One with a silver mounting.

RDQ38. Any pen displayed was advertised for ninety-five cents? A. Yes, sir.

RDQ39. When people come to you with an A. A. Waterman pen and call it a Waterman pen, do you know whether they did so because they thought they had a Waterman Ideal Fountain pen? A. To the best of my knowledge, they were under the impression that they had the only Waterman pen. The Waterman pen is generally known as the Ideal.

1080 RDQ40. From their conversation, you understood that that was what they thought, that they had a Waterman Ideal Fountain pen? A. Yes, sir.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ41. Where they were displaying these ninety-five cent pens, you did not look to see whether they were the A. A. Waterman pens? A. No, sir.

RXQ42. You say that they were marked three and a half? A. They ran from two and a half up.

RXQ43. You do not mean to say that they were selling a three dollar and a half pen for ninety-five cents, Mr. Joel? A. That is what their sign read.

RXQ44. Did they mean any pen in any certain subdivision of the window? A. I don't know.

RXQ45. You do not believe that they were selling a three dollar and a half pen for ninety-five cents? A. I don't see how they could.

RXQ46. You just glanced at the window and read the sign, did you not? A. I just glanced at the sign which said "A. A. Waterman." It said from two and a half to four and a half for ninety-five cents.

1082

RXQ47. You are not prepared to say that you could go in there and buy an A. A. Waterman pen for ninety-five cents? A. No, I am not.

Signature of the witness is waived by counsel.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

1083

L. E. WATERMAN COMPANY,
Plaintiff.

vs.

MODERN PEN COMPANY,
Defendant.

Testimony taken on behalf of plaintiff for final hearing, before Sidney W. Petrie, Clerk of the United States District Court for the Western District of New York, at his office in the main post office building, in the City of Buffalo, State of New York,

1084 *Du Monte A. Whiting*

on the 20th day of March, 1911, at 10 o'clock in the forenoon, pursuant to the notice annexed hereto.

Appearances:

Samuel S. Watson, for the plaintiff.
Alexander S. Bacon, for the defendant.

DU MONTE A. WHITING, called as a witness for plaintiff, and duly sworn, testified as follows:

Direct-examination by Mr. Watson:

1085 Q1. State your name, place of residence and occupation, please? A. DuMonte A. Whiting, 149 St. James Place, Buffalo, Vosburgh & Whiting, stationers.

Q2. Where is their place of business? A. Swan and Washington Streets, Buffalo.

Q3. How long have you been in the stationery business? A. 28 years.

Q4. And how long have you handled and sold fountain pens? A. Well, during the whole of that period, I believe. I think they just came on the market about the time we started.

Q5. During that period have you been familiar, as a merchant usually is, with the fountain pens which have been on the market? A. Yes, I have been familiar with nearly everything that has been offered to the trade.

1086 Q6. Your familiarity comes from having them presented to you by travelling salesmen? Is that so? A. That is true.

Q7. During this period what makes of fountain pens have you handled and sold? A. Well, let's see; the Wirt pen was the first, and we have sold the Parker, the L. E. Waterman pen and, oh, perhaps a dozen different makes, more or less, known to the trade.

Q8. How long have you sold Waterman's Ideal Fountain Pen? A. I should say 12 years or more.

Q9. And are you still selling that pen? A. We are.

Q10. By what name is the Waterman Ideal Fountain pen, from your personal experience, asked for by your customers?

A. Usually they simply ask for the Waterman Fountain pen. Sometimes it is "L. E. Waterman;" sometimes "Waterman's Ideal," but the usual expression is "Waterman's Fountain Pen."

Q11. How long has that been the case? A. Ever since we have handled them.

Q12. In your experience, as made known to you by the trade, have you found that Waterman's Ideal Fountain pen has proved generally satisfactory to your customers? A. The Waterman pen we have sold more of them than any other pen we have handled, and so far as I know personally, it has given the best of satisfaction, and is recognized as the standard fountain pen.

1088

Q13. Is that the opinion of the trade so far as it has come to your personal knowledge? A. It is, universal.

CROSS-EXAMINATION by Mr. Bacon:

XQ14. Have you ever handled the A. A. Waterman goods? A. We have not. They have been offered to us at various times. I know Mr. A. A. Waterman personally, and he has several times tried to interest us in the line, but we never have seen fit to take hold of it.

XQ15. How long have you known Mr. A. A. Waterman? A. Oh, I should say—let's see; 8 or 10 years I should say.

XQ16. And when you first knew him he was selling A. A. Waterman pens, was he not? A. He was.

1089

XQ17. And openly to the trade? A. Yes.

XQ18. And was advertising them as such? A. Well, simply through his own personal efforts. I do not know that I ever saw any advertising matter of the A. A. Waterman pen when he was handling them.

be 10. Perhaps I will qualify that and say eight years.

XQ19. That is 10 or 12 years ago? A. Well, it may not

XQ20. Well, then, he was a member of the firm of A. A. Waterman & Co., was he not? A. I so understood.

XQ21. And with headquarters in Boston? A. I have forgotten whether it was in Boston or New York.

1090 *Du Monte A. Whiting*

XQ22. And he was openly selling and advertising A. A Waterman & Co. fountain pens at that time, was he not?

Mr. Watson: I object to that as already answered by the witness.

A. Yes, I should say so.

XQ23. Are A. A. Waterman & Company fountain pens sold in Buffalo largely? A. I don't think so. Of my own knowledge I don't know of anyone handling them.

XQ24. Then you do not know anybody that owns one? A. I have been told that one of the department stores are handling them. In fact my information came from a customer who had
1091 bought one there and came to us to have it repaired, and happened to come to me personally. I was on the floor at the time.

XQ25. And you repaired it for him? A. No, we did not. We don't repair any pens except those that we sell ourselves; that is, the makes that we sell ourselves.

XQ26. Well, he knew that he was getting a Waterman pen, did he not? A. He said at the time he supposed he was getting the genuine Waterman pen. He thought it was very strange that we wouldn't repair it. I simply told him that he better go to Adam, Meldrum & Anderson, where he bought it, and they would perhaps repair it for him.

XQ27. He called his pen a Waterman pen just as you called yours a Waterman pen? A. Yes, he called his pen a Waterman
1092 pen.

XQ28. People generally do that, do they not, if they have any Waterman pen they call it "Waterman"? A. Yes, I think they would call it a Waterman pen.

Mr. Bacon: That is all.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ24. They called it a Waterman pen because they thought it was a genuine Waterman's Ideal Fountain Pen, isn't that so?

Objected to.

Question withdrawn.

RDQ30. They called this pen because they told you they thought it was a genuine Waterman fountain pen made by the L. E. Waterman Company, did they not?

Mr. Bacon: I object to that because the witness has already sworn that he only knew the one instance.

Question repeated.

A. They did.

RDQ31. In other instances of people coming to you with an A. A. Waterman pen, to which you referred in your cross-examination, where they called the pen a Waterman pen, did they 1094
give you to understand that they thought they had a genuine Waterman's Ideal Fountain Pen? A. So far as I remember, in every instance that has come to my personal knowledge, that is a fact.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ32. Did they say that they thought they had an Ideal pen when they had an A. A. Waterman pen? A. I don't know that they used the word "Ideal." They used the word "Genuine Waterman."

RXQ33. But they did not use the initials "L. E." or the word "Ideal"? A. I would not swear that they did. 1095

RXQ34. And if it was made by A. A. Waterman & Co., was it not as much a genuine Waterman pen as though it was made by L. E. Waterman Company? A. Not in the opinion of the trade. Not in my opinion.

By Mr. Watson:

RXQ35. A genuine Waterman fountain pen means in the trade Waterman's Ideal Fountain Pen, does it not? A. No question about it. Yes, sir.

1096 *Du Monte A. Whiting*

By Mr. Bacon:

RXQ36. Is it not a fact that for at least 12 or 13 years A. A. Waterman pens have been sold on the market openly as such? A. My knowledge does not go back as far as that, and I have not had the A. A. Waterman pen offered me in years and not since Mr. A. A. Waterman was through here himself, which I should say was before our fire, and that was some five or six years ago; I don't think he has been here since.

RXQ37. What is your answer to my question, if you confine it to the time when you had Waterman's pens offered to you? A. Not to exceed 8 years ago.

1097 RXQ38. (Question repeated.) A. Oh, I should say that as far as my personal knowledge goes it was not to exceed 8 years that such has been the case.

By Mr. Watson:

RXQ39. So far as your personal knowledge goes of the A. A. Waterman pen being sold, that began about eight years ago? A. I should put it that period.

RXQ40. As far as your personal knowledge goes, these pens have not been offered to you in the last five or six years? A. That is true.

RXQ41. And it was only just for two or three years that you knew anything about the sale of A. A. Waterman's pens? A.

1098 Yes, sir.

By Mr. Bacon:

RXQ42. But they have actually been sold in Buffalo right along for the last twelve or thirteen years, have they not? A. That I don't know. Just as I stated before, I don't know personally of their being sold here except as I was told by customers who had been in the store.

RXQ43. And they told you that they were being sold openly? A. Well they told me that they bought this pen in this instance, this last instance which I speak of. And by the way, I would not confine that to one instance. There have been a number of

such instances; sometimes a salesman coming to me and asking if we would repair an A. A. Waterman pen, and in that way I have known of their being brought into the store, but of course I could not tell whether they had been bought in Buffalo or elsewhere.

RXQ44. There was a representative of the L. E. Waterman Company to see you about the first of March and asked you about taking this testimony? A. Why I don't know whether he was—he was a representative of the L. E. Waterman Company.

RXQ45. He was a lawyer? A. So I understood.

RXQ46. Was it Mr. Raymond? A. Well I don't remember the name.

1100

RXQ47. It was not Mr. Watson? A. No, sir.

RXQ48. He was there and told you what evidence he wanted to produce, is that right? A. No. He simply asked me if I would be willing to—he said perhaps it would be necessary to take my testimony later on in the spring, and asked me if I would be willing to testify as to my opinion as to the genuine Waterman pen, and whether the pen produced by the A. A. Waterman Company was in different instances understood as the genuine Waterman pen made by the L. E. Waterman Company.

RXQ49. He called it the genuine Waterman pen, did he? A. I don't know that he did at that time. But the trade universally—

RXQ50. I am asking you now what this representative of L. E. Waterman Company said to you? A. As I stated before, he simply asked me—I understood at that time that he was going to have someone come to the office and take my affidavit as to our selling the L. E. Waterman pen, and my experience with the A. A. Waterman, but he did not go into details. He was not in the store probably five minutes.

1101

RXQ51. Then you have not had any experience with the A. A. Waterman pen at all, have you? A. Not in selling.

1102 *Willis P. Whiting*

WILLIS P. WHITING, called as a witness for plaintiff, and duly sworn, on direct-examination by Mr. Watson, testified as follows:

Q1. Please state your name, place of residence and occupation? A. Willis P. Whiting. 112 Norwood Avenue, Buffalo, N. Y. Business is stationers and printers.

Q2. Where is your place of business? A. 274 Main Street, Buffalo.

Q3. How long have you been in the stationery business? A. 27 years.

Q4. How long have you handled and sold fountain pens? A.
1103 Nearly as long as that, I think. I don't know. Yes, I guess we have sold fountain pens that time.

Q5. During this period, have you, as a merchant generally is, been familiar with the fountain pens on the market? A. Yes, sir.

Q6. During this period that you have been handling fountain

(Signature of witness is waived.)

pens, what makes of fountain pens have you sold? A. Oh, to go way back do you mean?

Q7. Yes. Give us a rough idea? A. We have sold the Beamel's, Waterman's, Aikin-Lambert & Company's the Diamond, Conklin's Self-filler.

Q8. How long have you sold Waterman's Ideal Fountain
1104 Pens? A. About fifteen years.

Q9. Are you still selling them? A. We are still selling them.

Q10. By what name, as far as this matter comes to your personal knowledge, do your customers call for, ask for Waterman's Ideal Fountain Pen? A. What do they ask for?

Q11. Yes? A. Why, "Waterman's pens," and "Waterman's fountain pen," and—

Q12. How long has that been the fact? A. How long has it?

Q13. Yes? A. Oh, I guess ever since I have sold them.

Q14. As far as it has come to your personal knowledge, have Waterman's Ideal Fountain Pens proved satisfactory to your customers? A. Yes, sir.

Q15. Are these pens generally known by the trade as the Waterman pen?

Mr. Bacon: I object to that as leading.

Question withdrawn.

Q16. By what name are these Waterman Ideal Fountain Pens known and spoken of by the trade generally, as far as it has come to your attention? A. Why, I think as "Waterman Fountain Pen."

CROSS-EXAMINATION by Mr. Bacon:

XQ17. Have you ever handled the A. A. Waterman fountain pen? A. No, sir.

XQ18. Never had anything to do with it? A. Well, only as 1106
far as they were soliciting our business, that is all.

XQ19. Who solicited your business? A. A. A. Waterman did.

XQ20. How long ago? A. It must have been about 14 years.

XQ21. 14 years ago? A. 13 or 14, yes, sir.

XQ22. For how long a period was he soliciting your business that you remember; how many years? A. Do you mean Waterman personally?

XQ23. A. A. Waterman personally? A. Probably a year.

XQ24. And he was then selling the A. A. Waterman pen, was he not? A. Yes, sir.

XQ25. With headquarters in Boston? A. I don't think so at that time. I think they were in New York. I don't know. 1107
I couldn't tell whether it was New York or Boston.

XQ26. And did he call his pen the Waterman pen too? A. Well, he wanted to sell it as a Waterman pen, yes.

XQ27. Do the people who carry A. A. Waterman pens usually speak of them as the Waterman pen? A. Do they usually?

XQ28. Yes? A. Well, I don't know how I could answer that. I don't know.

Mr. Bacon: That is all.

(Signature of witness is waived.)

Mr. Bacon: Wait a minute, Mr. Whiting.

XQ29. Was there a representative of—

Mr. Watson: I object to the further examination of the witness after the examination is closed.

XQ30. Was there a representative of the L. E. Waterman Company to see you about the 1st of March this year? A. Well, there seems to be an objection there.

Mr. Watson: Well, you answer just the same.
The Examiner: You have to answer.

A. A representative? Well, we have a representative that calls on us regularly.

1109 XQ31. Did Mr. Raymond of the firm of Watson & Raymond a lawyer for the L. E. Waterman Company, call upon you about the 1st of March and speak to you with reference to giving this testimony? A. I think about along in March, yes; I don't know when it was.

XQ32. Well, what did he say to you? A. What did he say to me?

XQ33. Yes. A. Well, I can't recall just exactly what he said to me.

XQ34. He told you that he was looking for testimony, did he not? A. Why, I don't remember whether he said he was looking. I suppose he was of course.

XQ35. He told you what kind of testimony he wanted you
1110 to give? A. No.

XQ36. He told you the subject-matter of it, did he not? A. He didn't tell me anything about but what I had known for a number of years.

XQ37. Well, what did he tell you that you had known? A. Why, he didn't tell me he wanted any testimony about anything except with regard to the Waterman fountain pens, and my experience with the Waterman fountain pen, that is all.

XQ38. And you knew what questions were going to be asked you here today, did you not? A. No.

XQ39. Substantially? A. I might say I would; yes, sir. I naturally would; yes, sir.

XQ40. He told you about what you were going to be examined on? A. No, he did not.

XQ41. He told you that they were going to ask you about the Waterman pen being called the genuine Waterman pens, did he not? A. No.

XQ42. What did he say along that line? A. Well, I'll tell you, the most that Mr. Raymond had to say to me was about—why, about conflicting trade and about a concern up the street that had been selling the A. A. Waterman pens which had interfered with our business.

XQ43. And he wanted you to give testimony? A. About that? 1112

XQ44. No. He said that he wanted to call you to give testimony in this suit, did he not? A. Oh, yes.

XQ45. What did he say about that? A. Well, that is all he said substantially. He didn't—

XQ46. Did he not tell you what subject you were to be examined upon? A. No, sir.

XQ47. None whatever? A. Why, as I tell you, in reference to the Adam, Meldrum & Anderson Co.—or the concern up the street here that were—I think I brought that up myself, about their interfering with our business.

XQ48. Did he not state to you that you would be called upon to testify along certain lines? A. What do you mean, "along certain lines"? 1113

XQ49. You are an educated gentleman, Mr. Whiting; you understand English reasonably well? A. Yes, but you say, "along certain lines."

XQ50. When I say certain lines, I mean of course any specific lines. A. I don't know that he had any specific lines; no, sir.

XQ51. Well, now, did he not tell you that you were going to be examined along the line just about as Mr. Watson has examined you this morning? A. No, sir; he asked me about the same questions that Mr. Watson has asked me. That is about all.

1114 *Sidney J. Burgoyne*

XQ52. Yes. He asked you the same questions? A. Well, h
asked me what information I knew.

XQ53. And you told him the answers then? A. Yes, I tol
him what I knew about it, of course.

XQ54. And he suggested the answers to you, did he not? A
He did not.

(Signature of witness waived at page 15.)

1115 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY, Plaintiff, against MODERN PEN COMPANY, Defendant.	In Equity.

1116 Testimony taken *de bene esse*, under Sections 863 and 864 of the Revised Statutes as amended, before William W. Craig United States commissioner, in the Main Post Office Building in the City of Philadelphia, State of Pennsylvania, on the third day of April, 1911, at 2:30 o'clock in the afternoon, pursuant to notice hereto annexed.

Appearances:

Samuel S. Watson, Esq., for Plaintiff.
Morton Stein, Esq., for Defendant.

SIDNEY J. BURGOYNE, of full age, a witness produced on behalf of the plaintiff, being duly sworn, deposes as follows:

By Mr. Watson:

Q1. Please state your name, age, residence and occupation? A. Sidney J. Burgoyne; age 35 years; residence Oak Lane Pennsylvania; occupation stationer.

Q2. How long have you been in the stationery business? A. Eighteen years.

Q3. How long have you handled fountain pens? A. All this time.

Q4. What kind of fountain pens have you handled? A. Waterman's Ideal, a few Moore's and a cheap grade pen, which is below their minimum. 1118

Q5. How long have you handled Waterman's Ideal Fountain Pen? A. Sixteen years.

Q6. By what name are these pens usually called for by your customers? A. Waterman.

Q7. How long has that been a fact? A. Ever since I have sold them.

Q8. By what name, as far as the matter has come to your attention, are those fountain pens known in the trade generally? A. Waterman pens.

Q9. How long has that been a fact, as far as you have been able to observe? A. I never knew of anything else. Of course they have a trade-mark which is well known to the trade. 1119

Q10. What is that trade-mark? A. The Ideal, but as far as the general public is concerned they do not know anything about that.

Q11. Has the Waterman Ideal Fountain Pen, so far as the matter has come to your knowledge, proved satisfactory to your customers?

Mr. Stein: Objected to as immaterial, incompetent and irrelevant.

A. Entirely.

Q12. What is the reputation for quality and grade in the trade, as far as the matter has come to your attention, of the Waterman Ideal Fountain Pens?

Mr. Stein: Objected to upon the same ground; and upon the further ground that no proper foundation has been laid.

A. We have always considered that having their pens in the store was just as good as if you had the money; that is, if there is anything wrong with them at any time you can have your money back.

1121 Mr. Stein: I move to strike out the answer. Notice is given that a motion will be made to strike out the answer, as irresponsive.

By Mr. Watson:

Q13. What is the reputation among the trade, for grade and quality, of the Waterman Ideal Fountain Pen, good or bad? A. It is considered the standard.

Q14. Do you mean by that that it is considered the best pen on the market? A. Yes, sir.

Q15. How long has that been a fact, as far as you have been informed? A. It has always been considered the standard pen.

Q16. Ever since you have been in business? A. Yes, sir.

1122 *CROSS-EXAMINATION by Mr. Stein:*

XQ17. The few cheap pens below the regular grade, that you spoke of at the first of the examination, were pens manufactured by L. E. Waterman Company? A. No, sir.

XQ18. By whom were they manufactured? A. We used to buy pens from the Franklin Pen Company. We bought some from Akin-Lambert & Company of New York, pens to retail at a dollar.

XQ19. Never bought any from A. A. Waterman & Company? A. No, sir.

XQ20. Or the Modern Pen Company? A. No, sir.

XQ21. Do you know anything about their pens? A. No, sir; I do not know anything about them.

XQ22. You keep in touch rather closely, I presume, with the advertising and other literature regarding fountain pens? A. Yes, sir.

XQ23. When the L. E. Waterman Company advertise these pens it usually advertises the Ideal Pen, does it not? A. They always have their trade-mark in the advertisement.

XQ24. Of the Ideal Pen? A. Yes, sir.

XQ25. So that when the fountain pen ad is spread before the public it contains prominently the words "L. E. Waterman," and "Ideal"? A. I do not agree with you there exactly. The word "Ideal" as far as the trade is concerned is known much more than it is from a public point of view. 1124

XQ26. The public sees the Ad. does it not? A. You take advertising, and people advertise Waterman's pens.

XQ27. Who advertises Waterman's pens? A. When the stationers advertise those pens you can take a great many advertisements, and I question whether you see the word "Ideal" in them. A great many will simply advertise Waterman's pens.

XQ28. Have you ever had anything to do with the A. A. Waterman Company pens? A. No, sir.

XQ29. Do you know anything about them? A. No, sir; only I have always understood that it was a very good thing for another manufacturer to be able to use the name of a man that already had a reputation. 1125

XQ30. Will you please answer my question. Have you ever had anything to do with A. A. Waterman & Company pens? Do you know anything about them? A. No, sir; the only case that ever came to my mind was, when we had a store over here, where a man brought in a pen to get it exchanged. Anybody handling an Ideal Pen is practically a sub-agent of the Waterman Company; that is if I bought a pen in San Francisco, I could take it to John Wanamaker and he would have to fix it for me, or give me a new pen, or exchange it for anything I wanted.

1126 *Sidney J. Burgoyne*

This man came in with a pen and wanted us to exchange it. He had a Waterman pen, but it was not the L. E. Waterman. He was very indignant when we would not exchange it. In that case we could not do anything for him.

XQ31. His was the A. A. Waterman pen? A. Yes, sir.

XQ32. He called his a Waterman pen? A. Yes, sir; he thought he had one of the Waterman Ideal's but he had not.

XQ33. How do you know he thought that? A. Because he said he wanted one.

XQ34. He wanted an Ideal pen? A. Yes, sir.

XQ35. He did not say anything about what pen he wanted. He wanted a Waterman exchanged? A. He wanted a Water-
1127 man pen. That is what he said.

XQ36. Do you know where he bought it? A. No, sir.

XQ37. Whether it was out in California or Michigan or New York or Philadelphia? A. No, sir; I do not know anything about that.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ38. Why have you not carried the A. A. Waterman Company's pens?

Mr. Stein: Objected as immaterial, incompetent and irrelevant.

1128 A. I never thought it was necessary. That question came up in another matter last week at a very prominent stationer's in town here—

Mr. Stein: Confine yourself to the question.

Mr. Watson: Put your objection on the record.

Mr. Stein: I insist that the witness confine himself to the answering of the questions and not volunteering statements.

By Mr. Watson:

RDQ39. You proceed and make your answer as you are so disposed? A. What I was going to mention was a case here of

a man who had a big stock of blank books, and another manufacturer comes along and wants his line put in. The man does not think he can afford to have two lines in. He wants to stick to one house. That is the way we are today. With the guarantee that the Waterman Company always gives its customers we always felt it was practically banking to have their pens. Any time you want to discontinue using them you can always get your money back.

RDQ40. Has the reputation of the Waterman Ideal Fountain Pen had anything to do with your carrying it as part of your stock? A. Their reputation is half the sale of them.

RDQ41. You are connected with the Association of Stationers in this city A. Yes, sir. 1130

RDQ42. In what capacity A. Secretary.

RDQ43. As secretary of that association do you come in frequent contact with the prominent members in the stationery business in Philadelphia? A. Yes, sir.

RDQ44. It is through this source that you learned of the reputation of the Waterman Ideal Fountain Pen among the trade? A. Not necessarily; no, sir.

RDQ45. How did you learn of the reputation of the Waterman pen? A. We had a lecture a few weeks ago on the Waterman pen, so that the boys in town could sort of find out a few things about it, the manufacturing point of it that they did not know of.

RDQ46. How long have you known about the reputation of the Waterman Ideal Fountain Pen? A. Ever since I have handled them. 1131

RDQ47. That reputation came to you from contact with other dealers in the trade? A. Yes, sir.

RE-CROSS EXAMINATION by Mr. Stein:

RXQ48. Is it not a fact that one of the reasons you want to stick to the one line of the L. E. Waterman Company is because of its reputation and liberal advertising propositions? A. No,

1132 *Sidney J. Burgoyne*

sir; they manufacture an article that we feel pretty safe in selling a man. They offer you a good profit, and what more can a man want, when he knows the pen is all right.

RXQ49. Then it is the profit plus the stability of the house? A. And the goods.

RXQ50. That induces you to stick to this particular line of goods, and not to branch out? A. Yes, sir.

RXQ51. You spoke about feeling as though you had bankers behind you in dealing with the L. E. Waterman Company, did you not?

Mr. Watson: Counsel for plaintiff states on the rec-
1133 ord that that is not a fact, and that the record will show it.

A. Yes, sir.

RXQ52. You answer yes? A. I answered that having their goods was like doing banking, that at any time that you had made up your mind you did not want to continue handling them you could always send them back and get your money back. That assurance you have from very few houses in any line.

RXQ53. Can you get that assurance from the A. A. Waterman Company? A. I do not know.

RXQ54. You have the assurance from the L. E. Waterman Company that they will take back all undisposed of goods on demand, and pay you what you paid for them? A. At any time.

1134 RXQ55. Giving you full credit? A. Yes, sir; at any time.

RXQ56. Who gave this lecture on the process of manufacturing the Waterman pen? A. Mr. Seymour.

RXQ57. Connected with the L. E. Waterman Company? A. Yes, sir.

RXQ58. In what position? A. I do not know what position he has.

RXQ59. From the New York office? A. Yes, sir.

RXQ60. Was that lecture any more than the usual demonstration? A. Just an illustrated lecture, that was all.

RXQ61. Showing how that particular pen was manufactured? A. Yes, sir.

RXQ62. Did he state whether they were manufactured by the L. E. Waterman Company, or by other people for L. E. Waterman Company?

Mr. Watson: Counsel for plaintiff objects to all this line of testimony as entirely irrelevant to any issue in this case, and gives notice that he will move at the final hearing to have it all stricken out. Furthermore, counsel for plaintiff has, during many sessions, permitted a lot of irrelevant questions to be asked on the record that are unendurable, and he will make a motion at the final hearing that the cost of taking these extended depositions on matters not pertinent to the issues in this case be taxed 1136 against the defendant.

A. I do not think that question was touched on at all.

By Mr. Stein:

RXQ63. Did he state whether the L. E. Waterman Company manufactured its pens, or merely assembled the parts which they purchased from different people?

Mr. Watson: I enter the same objection.

A. The views simply showed the material going through the course of manufacture.

RXQ64. Did he state they were going through the course of manufacture in the factories of the L. E. Waterman Company? 1137

Mr. Watson enters the same objection.

A. That I could not tell you.

RXQ65. You do not remember that part of the lecture? A. No, sir.

(By agreement of counsel signature of witness waived.)

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.
} In Equity.

1139 Testimony taken *de bene esse* on behalf of plaintiff for final hearing, under Sections 863 and 864 of the Revised Statutes of the United States and in accordance with the rules and practice of this Court, before A. M. Parkins, a notary public in and for the District of Columbia, at her office, room 516 Washington Loan & Trust Building, Washington, D. C., on Tuesday, April 4, 1911, at 2:30 o'clock in the afternoon, pursuant to notice hereto attached.

Appearances:

Samuel S. Watson, Esq., on behalf of plaintiff.
Morton Stein, Esq., on behalf of defendant.

1140 RALPH S. BAILEY, of lawful age, a witness produced on behalf of plaintiff, being first duly sworn, testified as follows in answer to interrogatories by Mr. Watson:

Q1. Please state your name, residence and occupation? A. Ralph S. Bailey; Washington, D. C.; stationery business.

Q2. How long have you handled and sold fountain pens, Mr. Bailey? A. About fourteen years.

Q3. What kind of fountain pens have you handled and sold during that time? A. Different makes; Waterman's Ideal for the whole fourteen years, and I have handled for a little while a few Sterling pens.

Q4. By what name do your customers come into your store and ask for Waterman's Ideal Fountain Pen? A. They come in and ask for Waterman pens, or Ideal pens, as they are known.

Q5. What is the usual name? A. Waterman.

Q6. How long has that been the fact? A. Ever since I have been selling pens.

Q7. By what name are Waterman's Ideal Fountain Pens usually referred to by the trade, according to your information?

By Mr. Stein: Objected to as incompetent, immaterial and irrelevant, and no foundation therefor laid.

A. Waterman pens.

1142

Q8. And how long has that been the fact, so far as you know? A. As long as I have been handling pens.

Q9. You have heard them spoken of frequently by other dealers, have you? A. By other dealers—yes, sir.

Q10. In your experience with handling Waterman Ideal Fountain Pens have they generally proved satisfactory to your customers, so far as the matter has come to your knowledge?

By Mr. Stein: Objected to as incompetent, immaterial and irrelevant.

A. They have.

CROSS-EXAMINATION by Mr. Stein:

1143

XQ11. Do you handle the pens manufactured by A. A. Waterman & Co.? A. Don't know them at all.

XQ12. Did you ever know that A. A. Waterman & Co. ever manufactured a pen? A. No.

XQ13. Did you ever know that the Modern Pen Company of New York, was selling fountain pens? A. Never heard of it.

XQ14. You have discussed fountain pens very freely with the trade and among the trade? A. Well, in a general way, as they came in and bought the pens.

XQ15. Then when you spoke, Mr. Bailey, of the way in which the Ideal fountain pen was spoken of generally by the trade,

you referred to the trade that came in and bought fountain pens? A. Sure.

XQ16. And that is the only reference you had to the trade? A. Yes.

XQ17. You never heard anybody complain, did you, about the A. A. Waterman & Co. fountain pen? A. I don't know. I never heard of the A. A. Waterman fountain pen.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ18. You have heard the Waterman Ideal Fountain Pens spoken of by other dealers, haven't you? A. I have talked
1145 to other dealers about them in a general way.

RDQ19. By what name did they refer to those pens? A. Waterman's.

RE-CROSS EXAMINATION by Mr. Stein:

RXQ20. Did you ever talk to other dealers about the A. A. Waterman & Co. pen? A. No.

RXQ21. Or pens made or sold by the Modern Pen Co.? A. No, sir.

RXQ22. Did you ever talk to other dealers about any other fountain pen except the L. E. Waterman Ideal pen? A. Oh. I have talked to other dealers about the make of the Sterling
1146 pen.

RXQ23. Any other? A. No other.

RXQ24. And in all of those talks covering, as I understand, a period of fourteen years, you never heard of A. A. Waterman & Co. or the fountain pen bearing that name? A. No, sir.

RE-RE-DIRECT EXAMINATION by Mr. Watson:

RRDQ25. Where is your place of business? A. 814 F Street, Washington, D. C.

RRDQ26. That is one of the principal business streets of Washington? A. Yes, it is.

RRDQ27. And your store is directly opposite the Patent Office, is it not? A. Yes, sir.

RRDQ28. And your store has been in that vicinity ever since you have been selling fountain pens? A. Yes, there and also at 619 Seventh Street.

RRDQ29. That is also opposite the Patent Office isn't it? A. Yes.

RRDQ30. What is the name of the concern with which you are connected? A. Swayze, Bailey & Co.

RRDQ31. And you are one of the partners A. Yes, sir.

RRDQ32. And you come in personal contact with the customers who purchase fountain pens? A. Yes. 1148

Examination of witness closed.

(Signature waived.)

HARRY H. ALLEN, of lawful age, a witness produced on behalf of the plaintiff, being first duly sworn, testifies as follows in answer to interrogatories by Mr. Watson:

Q1. Please state your name, residence and occupation? A. Harry H. Allen; Washington, D. C.; lawyer.

Q2. Do you practice in Washington? A. Yes, in Washington.

Q3. Did you have occasion recently to purchase a fountain pen? A. Yes. 1149

Q4. Where did you purchase that fountain pen? A. In what is known as Gilman's Drug Store, near 7th and Pennsylvania Avenue, Washington, D. C.

Q5. When you purchased this pen, what did you ask for?

By Mr. Stein: Objected to as incompetent, immaterial and irrelevant; no foundation laid, and no connection with this defendant shown.

A. As near as I can recall I asked the clerk for a Watermar pen, and I asked him, "Is this a Waterman's Ideal pen," and he

said, "I suppose so, as it is made by Waterman in New York." I purchased the pen.

By Mr. Stein: Answer objected to on the ground that it refers to a conversation.

Q6. What did you expect to receive when you asked for a Waterman Ideal Fountain Pen?

By Mr. Stein: Objected to as incompetent, irrelevant and immaterial and calling for the operation of the witness' mind.

1151 A. I expected to receive a pen similar to one owned by my friend, Mr. Charles G. Allen—

By Mr. Stein: Objected to as referring to conversation.

By Mr. Watson (to the witness): Will you please continue your answer when interrupted by Mr. Stein?

—which I had previously tried and which he told me was called a Waterman's Ideal Fountain Pen.

Q7. When you purchased this pen at Gilman's Drug Store, and asked for a Waterman Ideal pen, what did you receive? A. A fountain pen.

Q8. What were the marks on it? A. No marks on it at all.

Q9. Have you got the pen? A. Yes, I have it. I haven't it
1152 with me. I never looked for any marks on the pen.

Q10. Did the pen bear the name Waterman Ideal Fountain Pen? A. No, sir.

Q11. In what kind of a box was it contained? A. Well, as near as I can recall it was contained in a box having several compartments, each of which contained several styles of fountain pen.

Q12. When it was delivered to you—was it delivered to you in a box? A. Oh, no; it was taken from a box in the store window. What I call a box, it might be called a display box.

Q13. Did the clerk who sold you the pen call your attention to the fact that it bore the name Waterman on the pen? A.

No, he did not. I saw the name Waterman on the box in which the pens were kept.

Q14. And you remember whether that was L. E. Waterman or A. A. Waterman & Co., New York? A. It was A. A. Waterman & Co., New York.

Q15. Where is the pen now? A. At my residence.

Q16. Will you deliver that pen to the notary public tomorrow? A. I will; I have not a cap for it, but if I can find the cap I will bring that.

By Mr. Watson: The pen referred to by the witness is offered in evidence and the notary is requested to mark the same "Plaintiff's Exhibit 106." 1154

Q17. Did this pen prove satisfactory?

By Mr. Stein: Objected to as immaterial.

A. No, sir.

Q18. What was the matter with it? A. It wrote too coarse for me; it did not seem to feed properly.

CROSS-EXAMINATION by Mr. Stein:

XQ19. Mr. Allen how did you come to testify today? A. Mr. Watson asked me to testify in this case.

XQ20. And when did he first talk to you about testifying in this case? A. As near as I can recall about six or eight months 1155
ago, as I now remember.

XQ21. And when did you buy this fountain pen? A. Sometime in the winter of 1909 or 1910.

XQ22. About a year? A. Yes.

XQ23. Whom did you tell about your experience with this particular fountain pen? A. Mr. Charles G. Allen.

XQ24. Is he the friend you spoke of before? A. Yes.

XQ25. Is he in any way connected with Mr. Watson, or Mr. Raymond, or the firm of Watson & Raymond? A. Not that I know of.

XQ26. Has he any relations at all with anybody connected with the firm of L. E. Waterman & Co.? A. No, sir.

XQ27. Have you? A. No, sir.

XQ28. When did you complain to Mr. Charles G. Allen? A. I don't know that you could call it a complaint. I mentioned that my pen was not very satisfactory some month or two after I purchased it.

XQ29. What business is Mr. Charles G. Allen in? A. Lawyer.

XQ30. Do you know whether he has had anything to do with the fountain pen litigation of L. E. Waterman Co. at any time?
1157 A. He told me some time ago, I believe, that he had testified in this case.

XQ31. Do you know whether any of his other friends besides you have testified in this case? A. No, sir.

XQ32. What was the name of the fountain pen of Mr. Charles G. Allen that you used and that you were so pleased with? A. There was no name on it that I recall. My attention was directed to his pen because it had on its case a masonic square and compass, and we had previously joined a masonic lodge together and Mr. Charles G. Allen told me that his friend, Mr. Watson, of New York, had given him his pen in commemoration of this event.

XQ33. And was Mr. Watson, of New York, Mr. Samuel S. Watson, who is now here? A. Yes, sir.

1158 XQ34. You don't know what name was on this particular pen of Mr. Charles G. Allen's that you saw, do you? A. No, sir.

XQ35. You don't know whether it was an L. E. Waterman pen, or an A. A. Waterman pen, or a Conklin pen, or a Swan pen? A. No, sir.

XQ36. All you know is that you were pleased with a pen of Mr. Charles G. Allen's of whose manufacture or make you are in ignorance? A. Yes, sir.

XQ37. Well then, how was it that without knowing anything about that pen, or who manufactured it, or what name it bore, you asked the clerk in the store whether the pen there shown

you was a Waterman Ideal pen? A. I was at one time an assistant examiner in the United States Patent Office, and as such, I was familiar with the fact that a man by the name of Waterman was regarded as a pioneer inventor in the pen art, and from that time I had always associated in my mind the name of Waterman as the originator or a leading maker of fountain pens, and when Mr. Allen showed me his pen and told me it was a Waterman Ideal pen, I thought or believed that this must be made by the Waterman or his representatives whom I had learned about in the Patent Office as a pioneer inventor. I did not know what his initials were, or the initials of the Waterman Company that produced this pen, or any other Waterman pen, and I did not know what Waterman it was that made the Waterman Ideal pen. I did not know then that there was more than one Waterman Company till I compared my pen with Mr. Charles G. Allen's pen, and he told me that the Waterman Ideal pen was made by a New York firm called L. E. Waterman Co. 1160

XQ38. Do you know whether L. E. Waterman or A. A. Waterman was the pioneer inventor in the art? A. No, sir.

XQ39. Do you know today? A. No, sir.

XQ40. You wanted an Ideal pen, didn't you? A. Yes, sir.

XQ41. You did not care by whom manufactured? A. No, sir.

XQ42. Did the box or the pen that you actually purchased contain the name "Ideal"? A. No, sir. 1161

XQ43. What was the name on that pen? A. As I believe I said before I don't recall what name, if any, there was or is on my pen. I only recall that the name A. A. Waterman & Co., New York, was on the box in the drug store window in which the pens were displayed.

XQ44. What was the name of the clerk from whom you bought that fountain pen in Gilman's drug store? A. I don't know.

XQ45. Is he still there? A. I don't know. I don't think I have been in the store since.

XQ46. What sort of looking person was he? A. I don't know.

XQ47. Was he smooth shaven or did he wear a mustache? A. I don't recall that, because when I purchased that pen, it was about dusk in the evening and I don't recall how he looked.

XQ84. What month was it? A. I don't recall. It was some time in the winter of 1909 or 1910.

XQ49. Recalling your initiation or raising in masonry, can you place the time approximately? A. I don't think I could any nearer than to say it was some time in the winter of 1909 or 1910.

1163 XQ50. But you cannot aid us in any way in identifying the particular clerk at Gilman's Drug Store who sold this pen to you? A. No, sir; I don't think I could.

XQ51. The pen that you purchased at Gilman's I understand was too course for you? A. Yes, sir.

XQ52. Did you endeavor to have another pen or pen point inserted? A. No, sir.

XQ53. From your experience in the Patent Office you knew that the pen in a fountain pen could be removed and one of finer or coarser grade substituted? A. No, sir.

XQ54. Did you try this particular pen before purchasing? A. Yes, sir.

XQ55. And it then wrote smoothly or evenly enough to suit you? A. Yes, sir.

1164 XQ56. How long after the purchase did it develop this habit of writing too coarse for your purposes? A. Directly after I purchased the pen.

XQ57. How many days? A. Oh, I don't recall that.

XQ58. Was it a month? A. I cannot recall.

XQ59. Was it a week? A. I do not recall.

XQ60. Was it after you had used different kinds of ink in it, or had refilled the pen? A. I should say that I had refilled the pen several times with black ink, wherever I had found a supply.

XQ61. Have you ever heard that all fountain pens do their best work when filled with a blue ink? A. No, sir. My pre-

vious experience with fountain pens led me to believe that their chief function was to deposit the ink they contained in one's vest pocket.

XQ62. How much previous experience had you had with fountain pens? A. I had previously purchased two different types of pen at the solicitation of various friends of mine who were so unfortunate as to own them.

XQ63. And who tried to have you share their misfortune with them? A. Yes, sir.

XQ64. What were the names of them? A. One, as I recall, was a Caw pen and the other I don't remember the name of.

XQ65. And the fact that this particular pen bought at Gilman's wrote too coarsely for you, plus the fact that you had 1166
lost the cap of that pen, are the two things that you don't like about it? Is that correct? A. I think it is only fair to say that the pen I bought at Gilman's is capable of being used for writing purposes, and I frequently make use of this pen today. As I stated before, however, it seems to feed too freely and therefore write too coarsely, and I was immediately struck with the seemingly inferior work performed by this pen whenever I used the pen owned by my friend, Mr. Charles G. Allen, which I did quite frequently.

XQ66. How frequently did you use that pen? A. Perhaps several times a month.

XQ67. And still do? A. Whenever we are together and I wish to do any writing it is my practice to borrow his pen. 1167

XQ68. Have you bought a pen similar in manufacture, if not in ornamentation, to that owned by your friend, Mr. Allen? A. No, sir.

XQ69. Have you ever brought this pen to anybody to have the feed set right? A. No, sir.

XQ70. Do you know that that is merely a little mechanical detail that can be corrected in a minute or two? A. No, sir; I know nothing of the construction or operation of fountain pens, only in a general way.

XQ71. Does your general knowledge give you the fact that a slight readjustment is all that is necessary to have the feed

act properly? A. Now that you have asked me this question I readily see that perhaps an adjustment might remedy defects in the feed of the fountain pen.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ72. Do you remember when you lost the cap of this pen? A. I do not; perhaps I may be able to find it.

RDQ73. Was the fact that you lost the cap one of the reasons for your saying that the pen did not operate well? A. No, sir.

1169 Examination of witness closed.
(Signature waived.)

ROLLAND E. FLEHARTY, of lawful age, a witness produced on behalf of the plaintiff, being first duly sworn, testifies as follows, in answer to interrogatories by Mr. Watson:

Q1. Please state your name, residence and occupation? A. Rolland E. Fleharty; residence 1726 Kilbourne Place, Washington, D. C.; manager of R. P. Andrews Stationery Store, 1331 F Street, N. W., Washington, D. C.

Q2. How long have you been in the stationery business? A.
1170 About fourteen years.

Q3. How long have you handled and sold fountain pens? A. All the time—fourteen years.

Q4. What kind of fountain pens have you handled and sold? A. L. E. Waterman, Sterling, the Wirt, and the Moores.

Q5. How long have you sold the Waterman Ideal Fountain Pen? A. For fourteen years.

Q6. Has this pen proved generally satisfactory to your customers as far as the matter has come to your attention?

By Mr. Stein: Objected to as incompetent, immaterial and irrelevant.

A. It has.

Q7. What name do your customers use in asking for Waterman Ideal Fountain Pens? A. As a rule the Waterman.

Q8. And how long has this been a fact? A. Ever since I have handled the pen.

Q9. And how is the Waterman Ideal Fountain Pen referred to by the dealers that you have talked to about it?

By Mr. Stein: Objected to as immaterial, incompetent and irrelevant; no proper foundation laid.

A. As a rule it is referred to as the Waterman.

Q10. Have you ever spoken or talked with other dealers about Waterman Ideal Fountain pens and other fountain pens? A. Yes, sir. 1172

Q11. In your experience in handling fountain pens, which fountain pen, in your opinion, is the best on the market?

By Mr. Stein: Objected to as incompetent, immaterial and irrelevant.

A. L. E. Waterman.

Q12. Have you ever heard dealers express their opinion as to what fountain pen was the best on the market, in their experience?

By Mr. Stein: Objected to on the same grounds as before. 1173

A. Yes, I think most dealers will speak of the Waterman as the standard pen.

Q13. And what do you mean by the standard pen? A. Well, the pen that is called the standard is recognized as the best.

Q14. Have you ever sold or handled the pen marked A. A. Waterman & Co.? A. I have never sold them. I have handled them for repairs.

Q15. Have any instances or occasions come to your notice where there has been confusion in the minds of the public between the Waterman Ideal fountain pen and those stamped A. A. Waterman & Co.? A. Yes, sir.

1174 *Rolland E. Fleharty*

Q16. How did those instances come to your attention?

By Mr. Stein: Objected to as incompetent, immaterial and irrelevant.

A. Well, there was a man came into the store last week and was looking at the L. E. Waterman fountain pens, and made the remark that that pen was not like his. He said I thought I was buying the L. E. Waterman Fountain pen. I asked him to show me his pen, and he showed me the A. A. Waterman pen, and I explained the difference between the pens.

Q17. Did he say where he had bought his pen? A. I did not ask him.

1175

Q18. Did any other instances come to your attention? A. There have been several instances similar to that one as coming to my knowledge. Men have bought pens supposing they were buying the L. E. Waterman and afterward found out they had bought the A. A. Waterman. These men did not ask for the L. E. Waterman, but asked for the Waterman pen and supposed they were getting the L. E. Waterman pen.

CROSS-EXAMINATION by Mr. Stein:

XQ19. Can you give me the name of one man who said that he was misled or confused into buying A. A. Waterman for L. E. Waterman pens? A. The man was a stranger to me. I

1176

did not ask him his name. He was not buying a pen of me; he simply saw the case and asked about it.

XQ20. When were you first asked to testify in this matter? A. I think it was last Saturday.

XQ21. After this man had come into your place so confused? A. Yes, afterwards.

XQ22. How long since you bought any A. A. Waterman & Co.'s fountain pens? A. I never bought any.

XQ23. Ever handled any? A. None, except for repairs.

XQ24. How often do you repair them? A. As often as they come in in the course of business. We repair all kinds of fountain pens.

XQ25. How many A. A. Waterman fountain pens do you repair in the course of a week?

By Mr. Watson: Objected to as entirely immaterial.

A. None, as averaged by the week. Very few in the course of a year.

XQ26. And how many L. E. Waterman pens do you repair in the course of a week? A. Probably four or five.

XQ27. Have you made a critical examination of the A. A. Waterman fountain pen before you came here? A. Not recently; I have in times past.

XQ28. Have you examined any of them made by the A. A. Waterman Co. in the past year? A. Yes, sir. 1178

XQ29. I mean, have you examined any pens made by A. A. Waterman & Co. within the past year? A. I don't know when they were made. I examined them and they had the A. A. Waterman name on them.

XQ30. Were they self-filling pens? A. Some of them.

XQ31. Do you confine yourself wholly to the purchase and sale of fountain pens manufactured by L. E. Waterman and Co.? A. No, sir.

XQ32. What other ones do you buy and sell now? A. Moore's Non-Leakable, and a pen that is called Andrew's Special, and the Onoto.

XQ33. Can you give us any information at all that will lead to the identity of any of those persons whom you say came to 1179 you confused by reason of the similarity of names? A. No, sir; I made no note whatever of who they were or where they were from.

XQ34. Now this man who came in last week, looked at your pens, and said his pen was unlike yours, and that he thought he was buying an L. E. Waterman Ideal Fountain Pen. Was that right? A. That is right.

XQ35. Now did you look at his pen? A. I did.

XQ36. And did that pen have plainly marked upon it A. A. Waterman & Co.? A. It did.

1180 *Rolland E. Fleharty*

XQ37. Did it have any other name on it? A. Nothing that I could see.

XQ38. But without examining it carefully you could not overlook the fact that it had A. A. Waterman & Co., New York, prominently stamped on it? A. No, I could not overlook the fact that it had A. A. Waterman & Co. prominently stamped on it.

XQ39. But you did not look to see whether it bore any distinctive trade name, like "The Modern" stamped on any part of it? A. No.

XQ40. You testified I believe that people who came in with
1181 L. E. Waterman pens described their pens as Waterman. Is that right? A. Yes, sir.

XQ41. Now people who came into your place with A. A. Waterman pens to be repaired described their pens as Waterman, did they not? A. I don't believe they did.

XQ42. How do they usually describe them to you? A. As a rule they will bring a pen in and want to know if you repair fountain pens, and I tell them we do, and they hand me the pen. I look at the pen, and make no comments except telling what it will cost to repair the pen.

XQ43. But you can always tell whether that particular pen is of the manufacture of A. A. Waterman & Co. or L. E. Waterman & Co.? A. Yes, sir.

XQ44. You are never confused, are you? A. Never.

1182 XQ45. Do you know of any experienced dealers who are confused? A. I do not. I never heard them say that they were.

Examination of witness closed.

(Signature waived.)

CHARLES G. STOTT, of lawful age, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows in answer to interrogatories by Mr. Watson:

Q1. Please state your name, residence and occupation? A. Charles G. Stott; business address, 309 Ninth Street, N. W.; residence, 3108 Seventeenth Street, N. W., Washington, D. C.; paper dealers and stationers.

Q2. What is the name of the concern with which you are associated? A. Charles G. Stott & Co., at 309 Ninth St., N. W., Washington, D. C.

Q3. Do you handle and sell fountain pens? A. We do.

Q4. How long have you handled and sold fountain pens? A. 1184
Fifteen years, I will say, more or less.

Q5. What kind of fountain pens have you handled during this period? A. I have never handled any but the Waterman Ideal as a standard pen; and a cheaper pen, a pen that sells around a dollar.

Q6. Does the L. E. Waterman Co. make this cheaper grade of pen that you mention? A. The one that we are handling at present is made by the Aikin-Lambert Co.

Q7. By what name do your customers usually call Waterman Ideal Fountain Pens? A. Waterman.

Q8. And how long has that been a fact? A. As long as we have been handling them.

Q9. Is that the name by which they are commonly known 1185
and called for?

By Mr. Stein: Objected to as incompetent, irrelevant and immaterial and no proper foundation laid.

A. As far as my individual experience goes, I should say, yes.

Q10. Have the Waterman Ideal Fountain Pens, so far as the matter has come to your knowledge, proved satisfactory to your customers?

By Mr. Stein: Objected to upon the same grounds.

A. Highly so.

1186 *Charles G. Stott*

CROSS-EXAMINATION by Mr. Stein:

XQ11. The Aikin-Lambert Co., from whom you buy the cheaper grade of pens, is owned by L. E. Waterman Co., is it not? A. I am so advised. I have no technical knowledge to that effect.

XQ12. And prior to purchasing from Aikin-Lambert from whom did you purchase your cheaper pens? A. From Aikin-Lambert and others.

XQ13. Pens are a side line with you, are they not? A. No; under my knowledge as to what you mean by a side line.

1187 XQ14. They don't constitute your main branch of activity, do they? A. Nor does anything else in a retail way. Our main business is wholesale.

XQ15. Outside of this cheaper line, you have always purchased your fountain pens from L. E. Waterman & Co.? A. Yes.

XQ16. Have you any agreement with L. E. Waterman & Co., or understanding, that you were not to purchase any high priced or medium line of fountain pens from any other person or entity? A. No.

Examination of this witness closed.
(Signature waived.)

1188 It is hereby stipulated by counsel that the hearing at Baltimore, adjourned from this morning until tomorrow morning, April 5th, 1911, is waived and that neither counsel need appear.

And counsel also stipulate that if the witnesses William W. Norman and J. Edward Nunn, noticed for today, do appear in New York on notice to defendant's counsel they may be examined there on twelve hours' notice, at an hour to be agreed upon within the twelve hours.

L. E. WATERMAN COMPANY,
Plaintiff,
against
MODERN PEN COMPANY,
Defendant.

The deposition of Walter A. Buhrman, witness produced and sworn to before John R. Hinshaw, a notary public, of Henry County, Indiana, at New Castle, Indiana, on the 5th day of January, 1911, pursuant to the enclosed notice.

This deposition taken on the part of the plaintiff in a certain 1190
action now pending in United States Circuit Court, Southern District of NewYork, wherein, L. E. Waterman Company is plaintiff and the Modern Pen Company is defendant.

The said WALTER A. BUHRMAN, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by Walter B. Raymond, of counsel for plaintiff:

Q1. What is your name, residence and occupation?

Objection by Mr. Bacon of counsel for defendant.

I object to the taking of this testimony and to all of the testimony taken on this tour on the ground that more 1191
than ninety days have expired since the issue was formed by the service of the replication and the time has not been extended consent or order.

Mr. Raymond: I have a copy of a letter of Mr. Bacon, in which he requested us not to take any testimony until after the determination of the Appeal from the preliminary injunction, and insist upon the regularity of the taking of the present testimony on the ground that the

1192 *Walter A. Buhrman*

time for taking such testimony has been delayed and extended by mutual consent.

Mr. Bacon: I call for the production of the letter, and state that any suggestion contained in any similar letter was not acceded to.

A. Walter A. Buhrman; New Castle, Indiana; jeweler.

Q2. How long have you been in that business? A. Eighteen years in and out of it.

Q3. During what part of this time, if any, have you been handling fountain pens? A. In the last nine months.

Q4. What makes of fountain pens do you handle? A. I
1193 handle the A. A. Waterman, Conklin and Parker.

Q5. Will you state in your own words what occurred in your store on or about March 21st, 1910, in reference to a visit of a traveling salesman for fountain pens? A. The salesman called, saying that he had a line of fountain pens that he would like to show me.

Q6. How did he introduce himself to you? A. He did not introduce himself to me by name, and I asked him what line he had, he told me the Waterman.

Q7. What else did he say? A. He proceeded to show me his line.

Q8. How did he describe the pens to you in showing you the line? A. He said to me, "The Waterman line, you know they
1194 are the best."

Q9. Did he say that he represented A. A. Waterman & Company? A. No, sir.

Q10. Did he say that he represented the Modern Pen Co.? A. No, sir.

Q11. How did he describe these pens to you, by what name? A. Well, when he referred to them he called them the "Waterman Pen."

Q12. Did you know of any concern called the A. A. Waterman & Company? A. I did not.

Q13. Did you know of any make of fountain pens called or known as Waterman pens? A. I did.

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Q14. By whom are the fountain pens that you knew as Waterman pens manufactured? A. By the L. E. Waterman Company.

Q15. Were these the only pens that you knew as Waterman pens? A. Yes, sir.

Q16. Did you at the time this salesman called upon you, know the exact corporate title of the company manufacturing the pens you knew as Waterman pens? A. I did not.

Q17. By what name did you know that company? A. Well, I in my own words, would say, "The Waterman Pen Company."

Q18. Did you know the name of this salesman who called upon you? A. I did not. 1196

Q19. Can you describe him? A. I can as nearly as I remember.

Q19. Will you please do so? A. A man of five feet eight or ten inches in height, dark complexion, smooth shaven, I would say between thirty and thirty-five years of age.

Q20. Did you buy any pens from this salesman? A. I did.

Q21. Did this salesman give you any instruction as to the name under which these pens you bought should be sold? A. He did not.

Q22. Did you sell any of these pens? A. I did.

Q23. Under what name or representation did you sell these pens? A. As the genuine L. E. Waterman Pen.

Q24. When did you first find that you did not have the genuine L. E. Waterman Pens? A. Why, the first I knew was an 1197
advertisement—I noticed in a magazine of the L. E. Waterman Company, and in this I saw the cut of a pen, with what I would call their trade-mark on it; I had never noticed this trade-mark on the pens that I had in stock, and went to the show case to particularly see if they were the same as the advertisement, well this was dropped for the time being and was not brought to my mind again, until a representative of the L. E. Waterman Company called on me and I told him what I had noticed; he then told me of the existence of the A. A. Waterman Company, that I had not heard of before.

CLOSE IN CENTER

1198 *Walter A. Buhrman*

Q25. Previous to March, 1910, were you familiar with the different makes of fountain pens? A. I was not.

Q26. Had you heard of the Waterman Pens prior to that time? A. I had.

Q27. How did you know them by reputation or actually handling them? A. I knew them by reputation.

CROSS-EXAMINATION by Mr. Bacon, counsel for the defendant:

XQ1. Did this salesman sell you a bill of goods? A. He did.

1199 XQ2. You got them from New York? A. I believe that I got them from New York.

XQ3. You got a bill with the goods? A. I did.

XQ4. You saw the bill? A. I did.

XQ5. Have you got it here? A. Yes, sir.

Mr. Bacon: I offer this bill in evidence.

Received and marked Defendant's Exhibit "A," January 5th, 1911.

XQ6. When you saw this bill, you knew without any question that these were A. A. Waterman and Company Pens, did you not? A. No, I did not.

XQ7. Did you not read the bill? A. I did and checked.

1200 XQ8. You saw on this bill, did you not, in very large letters, "Modern Pen Company, sole selling agent for A. A. Waterman and Company"? A. Well, I should have seen that but I didn't pay any attention to it.

XQ9. Did you at any time, make any complaint to the New York office that you had not bought what you thought you were buying? A. I did not.

XQ10. You found the pens perfectly satisfactory? A. Not all of them.

XQ11. Have you made any complaint to the New York office or to anyone else? A. I did to the representative the last time he was here.

XQ12. When was that? A. Well, he was here twenty-four hours before Mr. Raymond was here, which was December 13th, 1910.

XQ13. How many pens did you buy? A. I don't remember how many, I can tell from the bill. (Here witness examines the bill, Defendant's Exhibit "A.") Upon examination of the bill I find I bought eighteen pens.

XQ14. Of different grades? A. Yes.

XQ15. You didn't send any of them back either to be fixed or exchanged? A. I did not.

XQ16. Was it the same salesman on December 12, that called on about March 21st, 1910? A. It was.

1202

XQ17. You didn't get his name on either occasion? A. I did not.

XQ18. When did you first see Mr. Raymond? A. On December 13th, 1910.

XQ19. He said that he was going around in this country to find evidence in this suit, did he? A. No, he did not tell me that.

XQ20. What did he tell you in relation to that subject-matter? A. He talked to me about having bought this bill of pens, about the conversation I had with the L. E. Waterman representative, and the way the salesman who sold me the pen, represented them to me.

XQ21. Did he not refer to your giving testimony? A. He did.

1203

XQ22. And the questions and answers of your testimony were taken down at that time, were they not? A. They were.

XQ23. When was the L. E. Waterman representative first here? A. Some weeks after I had received the pens, that I had bought.

XQ24. Did he threaten you with suit? A. He did not.

XQ25. Did he say anything about suing you if you sold these A. A. Waterman pens as Waterman pens? A. He did not.

XQ26. What was the name of the L. E. Waterman representative? A. I do not know.

1204 *Walter A. Buhrman*

XQ27. You have been giving Mr. Raymond assistance, with information, have you not? A. Well, I don't know how to answer that question, in fact I don't understand it.

XQ28. Repeat the question. (Question reread by notary.) A. I have.

XQ29. Have you made any arrangements either direct or indirect to handle the L. E. Waterman pens? A. I have not.

XQ30. You are very anxious for the L. E. Waterman people to succeed in this litigation, are you not? A. I can't say that I am anxious.

XQ31. But you would like to see them win? A. My answer to that will be, if it will keep others from being trapped as I was.

1205 XQ32. And yet you say that you made no complaint about the A. A. Waterman pens or treatment? A. My answer to that is, that I complained to the representative the last time he called, regarding a number of pens, that had not given satisfaction and he instructed me to send them in for repairs.

XQ33. And you haven't done it? A. No, I have not.

XQ34. The second time this man called on December twelfth, nineteen ten, did he tell you whom he represented? A. He did not.

XQ35. Did you say anything to him about his representing the A. A. Waterman and Company or the Modern Pen Company? A. I told him, that I didn't want any more of the pens and told him of the dissatisfaction a number of the pens had

1206 caused, and showed him one that I had in stock, that was broken, it was then he said, to send them in for repairs.

XQ36. What part of the pen was broken? A. The chamber as I would term it, the ink chamber.

XQ37. Do you mean the rubber sack? A. No, it was the screw on the end of the rubber holder, it would not work.

XQ38. Was that the only pen that was broken? A. Yes, that was the only one that was broken.

RE-DIRECT EXAMINATION by Mr. Raymond:

RDQ28. At the time you read this bill, the Defendant's Exhibit "A," were you familiar with the selling method of the L. E. Waterman Company? A. I was not.

RDQ29. Did you know whether or not the L. E. Waterman Company distributed its Waterman pens through the medium of a selling agent, or rather I should say, did you know whether or not, the pens that you then knew as Waterman Pens were distributed through the medium of a sole selling agent? A. I did not.

RDQ30. Did you know the initials "L. E." in connection with the word, "Waterman," at the time you ordered these pens from the salesman in question? A. I did not.

RDQ31. Did the initials "A. A." in connection with the word "Waterman" convey to your mind, at the time you read the bill in question, any distinctive kind or different kind of Waterman Pen from those which you knew under the name "Waterman Pens"? A. No, sir. 1208

RDQ32. Did this salesman give you any card? A. He did not.

RDQ33. I hand you an affidavit, verified by you December 13th, 1910, and ask you whether that is what you referred to in answer to Col. Bacon's question, that the written answer and question had been furnished you? A. It was.

Here the affidavit identified by the witness is offered and marked for identification, Plaintiff's Exhibit "1."

RE-CROSS EXAMINATION by Mr. Bacon:

1209

RXQ39. In March, 1910, you were unfamiliar or new to the fountain pen business? A. I was.

WALTER A. BUHRMAN.

1210 *Herbert Baker*

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Plaintiff,
against
MODERN PEN COMPANY,
Defendant.
} In Equity.

1211 Deposition of Herbert Baker, taken pursuant to the annexed notice, at the office of Myron B. Moore, notary public, in the City of Allegan, State of Michigan, on the 6th day of January, 1911.

Present:

Walter B. Raymond, of counsel for Plaintiff.
Alexander S. Bacon, of counsel for Defendant.

HERBERT BAKER, being called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Q1. What is your name, residence and occupation? A. Herbert Baker; druggist; residence is 419 Hubbard Street, Allegan, Michigan.

1212

Q2. How long have you been in the drug business? A. Since the 26th of March, 1910.

Q3. During what part of this time, if any, have you been handling fountain pens? A. Never handled them before until this order.

Q4. About what date? A. I have forgotten the date of that order, but it seems as though it was the 26th of August.

Q5. What occurred on or about the 26th day of August, 1910? Please state in your own words what occurred. A. Well, it was in the evening that a salesman called on me, representing

the Waterman fountain pen. I do not know as he said whether it was A. A. Waterman or L. E. Waterman, not being experienced in the business of handling fountain pens, although I knew of the Waterman pens by its extensive advertising and lots of people used them. It is considered a high grade pen. The Waterman and the Parker pens are considered to be the best high grade pens in the market.

Q6. What did the salesman say when he introduced himself to you? A. He said he was representing the Waterman Pen Company. As I said before, I don't know as he mentioned whether it was A. A. or L. E.

Q7. Did he show you any pens? A. He laid his display out on the show case and explained his assortment. 1214

Q8. How did he describe these pens to you? A. He described the quality of them.

Q9. By what name did he describe the pen? A. Waterman. Nothing to my knowledge said about being a branch or any thing of the kind.

Q10. Did he explain to you that these pens were made by A. A. Waterman & Co.? A. I don't remember whether he did or not.

Q11. Did he say anything to you about the Modern Pen Company? A. No, of course, I had no knowledge of any concern only one Waterman.

Q12. Did you buy any of these pens? A. I bought a two dozen assortment, $47. 1215

Q13. State just what occurred about the purchase of these pens and their delivery? A. We picked out—sorted up the pens, one or two stub pens and self-fillers to make up a nice assortment, as much as one could in a two dozen assortment. A display case was to come with the order free. It run along, I guess ten days or two weeks and I got the pens, and the case was on the invoice but it didn't come; and I waited along a week or ten days, and I wrote a letter to the Waterman Pen Company. I think they invoiced at 2% 10 days, 30 days net. I am in the habit of paying in cash and discounting my bills.

Q14. Where did you get the address that you wrote this letter to? A. Out of a catalogue that I had in the store. I ran across it in my desk.

Q15. Whose catalogue was this? A. It proved to be L. E. Waterman's.

Q16. Did you get any reply from the L. E. Waterman Co.? A. I wrote a letter and I got a letter saying they never had any order from me.

Q17. I hand you a letter addressed to you and bearing date September 22, 1910, and signed by stamp L. E. Waterman & Co., and ask you whether that is the letter received in reply to your letter? A. Yes, sir.

1217

I ask to have it marked in evidence.

Mr. Bacon: Objected to as immaterial, irrelevant and incompetent.

Plaintiff's Exhibit One of January 6, 1911, offered in evidence.

Q18. What did you do with this letter? A. I looked up my invoice, the bill that they had sent me of the pens, the statement itemized of the list of the pens that I purchased, and I answered the letter and sent the order right back so that they could see themselves just what kind of an order I had purchased.

Q19. Didn't you return the letter to them, Plaintiff's Exhibit One, to the L. E. Waterman Company with that bill? A. Yes,

1218 sir; I sent him the whole thing.

Q20. Then what did you do? A. Well I don't recollect whether I got an answer from them or not, but it wasn't but a short time until the representative salesman of the L. E. Waterman people called on me and explained the situation.

Q21. Did this salesman who called upon you explain to you that there was an A. A. Waterman & Company and L. E. Waterman & Company manufacturing fountain pens? A. No, I don't know as he did, I don't think he did.

Q22. Did he give you any instruction as to the name under which the pen that you bought should be sold? A. No, no, sir.

Q23. How did he describe these pens in speaking of them to you? By what name? A. The Waterman.

Q24. Had you ever heard of A. A. Waterman & Co.? A. I had not.

Q25. Did you know of any pen known as the Waterman prior to this time? A. Yes, sir.

Q26. Did you know it from handling them or from its reputation and advertisement? A. From its reputation.

Q27. Did you know the exact corporate title of the L. E. Waterman Co.? A. I knew nothing about it.

Q28. All that you knew was the name Waterman in connection with fountain pens? A. All I knew was the Waterman 1220
pen.

Q29. When you bought these pens did you believe that you were buying the pen—

Mr. Bacon (interrupting): I object to expression of belief, and ask that the witness be restricted to what was said and what was done.

Mr. Raymond: I will continue my question.

Q30. Did you believe that you were buying the pens which you knew as Waterman pens? A. I thought I was getting the Waterman pen.

Q31. That is, the pen which you knew as the Waterman pen? A. Yes, because I did not know any different.

Q32. Did you sell any of these A. A. Waterman pens which 1221
you purchased? A. I did not.

Q33. Did you try to sell any of them? A. No, I had no way of displaying them, consequently I did not put them on sale.

Q34. Did you ask this salesman whether these were the Waterman pen which you had seen advertised? A. I did not.

Q35. Did you have any conversation with him on the subject of the name Waterman? A. No more than we would naturally, only what anyone would talk in a line of goods against their competitors, there is always something said.

Q36. Did he mention the Waterman Ideal Pen Company as a competitor? A. No, as I said before, I do not recollect any

1222 *Herbert Baker*

statement being made about any particular Waterman or anything of that kind.

Q37. Did he introduce himself to you by handing you a card? A. I don't think he did. No, just simply introduced himself as a representative of the Waterman fountain pen, a salesman of the Waterman fountain pen.

CROSS-EXAMINATION by Mr. Bacon:

XQ38. Do you know the salesman's name? A. I can't speak it now.

1223 XQ39. Did he tell you his name? A. I think he did at the time.

XQ40. Did he give you any advertising matter? A. No.

XQ41. Can you give the conversation that passed between you and him as nearly accurate as possible? A. Well, as I made the statement before, he came in the store and said he was representing the Waterman Fountain Pen Company, wanted to know if he could interest me, wanted to know if I carried fountain pens. I told him I never had carried them.

XQ42. He showed you the pens? Showed you the name on the penholder? A. I don't remember that there was anything said about the name on the holder.

XQ43. You are not prepared to swear that he didn't tell you that he represented A. A. Waterman & Co.? A. No, I would

1224 not swear that he didn't.

XQ44. And you afterwards returned the pens to A. A. Waterman & Co.? A. Yes, sir.

XQ45. And the reason you did that was because the display case did not accompany the pens? A. Yes, sir.

XQ46. It was some accident or other that prevented it? A. There was no explanation, I never heard from them. I got a letter, I think, from the salesman in Cincinnati or Toledo. I answered it and he wrote me again, asking why I had returned the pens; he had received a letter from the house saying I had returned the pens. I did not write the house in explanation of

why I had returned the pens. They were taking it up with their salesman.

XQ47. Didn't you write the house in New York that you were returning the pens because the case did not come? A. Yes, I wrote the house.

XQ48. Have you got the letters from the salesman? A. I don't know whether I have or not.

XQ49. Describe the salesman. A. He was a large man, would weigh close to 200 pounds, good height, smooth face, a man as tall as Mr. Raymond.

XQ50. How tall is that? A. Close to six feet.

XQ51. Smooth face? A. Yes, sir.

1226

XQ52. You would not have sent them back if the case had accompanied the order? A. No, sir. I would not have known any difference between the A. A. Waterman and the L. E. Waterman.

XQ53. You are selling the L. E. Waterman pen now? A. Yes, sir.

XQ54. And did they send a salesman to you right away after they got your letter? A. Not right away, in eight or ten days.

XQ55. That salesman induced you to send back the others and take theirs? A. No, I would not call it that. I took it on my own business ability to order them, after I had learned the difference between the Ideal pen and the other pen, and the manner in which they done business. I was rather put out about it to think they would not fill the order.

1227

XQ56. Then it was because the display case did not come with the pens that disturbed you? A. Yes, sir.

XQ57. You did not know anything about the quality of pens, did you? A. No, nothing in particular, only a matter of judgment.

XQ58. You didn't know that the L. E. Waterman didn't make their pens at all? A. No, sir; I didn't know it.

XQ59. You did not know that the A. A. Waterman Co. manufactured every part of their pens with the finest material in the world and the most skilled workman that could be produced? A. I did not.

1228 *Herbert Baker*

XQ60. You are not prepared to say that the L. E. Waterman pen is a better pen than the A. A. Waterman pen? A. No, sir; I am not.

XQ61. You are not prepared to say that the salesman deceived you in any way by telling you they were Ideal pens or L. E. Waterman pens? A. I am prepared to say this, that they did not live up to their order in sending on the case. That was all. The A. A. Waterman pens are a much cheaper looking pen than the L. E. Waterman pen.

XQ62. You only say that the pen was a cheaper looking pen? A. No, but the case that they come in and the general appearance of the whole outfit.

1229 XQ63. You are not prepared to say that this salesman, whose name you don't remember, did not give you his card? A. No, I won't say he did or did not, because that would be taking up too much time to remember about selling things.

XQ64. You won't say that he didn't show you any advertising matter with A. A. Waterman & Co. on it? A. No, I won't say he didn't show me any advertising matter. It might have been L. E. Waterman.

XQ65. You are not prepared to say he did not show you advertising matter or catalogues of A. A. Waterman & Co.? A. No, I would not say he did not; did or did not, I don't remember.

XQ66. You don't remember what he said about whom he
1230 was representing? A. Not in particular about whether it was A. A. Waterman or L. E. Waterman, but I do know he represented the Waterman fountain pen.

XQ67. You are not prepared to say that he said that he represented the A. A. Waterman Pen Company? A. No.

RE-DIRECT EXAMINATION by Mr. Raymond:

RDQ68. Are you sure that he did not explain to you that there were companies, A. A. Waterman & Co. and L. E. Waterman & Co.? A. Well, if he did, I don't recollect whether he did or not.

1231

RDQ69. If he had explained that to you you would probably remember it? A. Well, I probably would, but it would not probably have made any difference.

RDQ70. If he had told you that the L. E. Waterman Co. was the original Waterman Co. would that have made any difference to you? A. Well, that is hard to tell whether it would or not. If I had known anything about a fountain pen, been interested in it before, why I would have been looking out to get the best one.

RDQ71. What pen, in your mind, was the best pen?

Mr. Bacon: Objected to as irrelevant.

1232

RDQ72. What pen had you determined that you wanted to carry? A. Those who are handling pens here have only one agent in town, and the Waterman I knew was a well known pen, and there was no agency here, and that is why I took it. There would be no use of my taking up or buying a few of some pens that were handled here when I could get some that were not handled here.

RDQ73. Did this salesman give you any instructions that these pens could be sold only as pens manufactured by A. A. Waterman & Co.? A. No, there was nothing said how they were to be sold.

RDQ74. Did you call these pens by name in the presence of this salesman? A. We talked of the Waterman pen and different pens, of course.

1233

RDQ75. Did he correct you when you said Waterman pen? A. No.

RDQ76. Tell you you should only call it A. A. Waterman & Co. pen? A. No, there was no restrictions.

RDQ77. Can you remember the name of the man to whom you wrote, this salesman? A. I can't recollect it now, but I have the name in the desk. I can look it up in the letter.

RDQ78. Was it Bartlett? A. That is the name, Bartlett.

1234 *Plaintiff's Exhibit 1*

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ79. You are not prepared to say that he did not tell you that these were the A. A. Waterman pens? A. No, I am not.

RXQ80. That you should sell them as such? A. No, he did not give me any instructions to sell them as any particular Waterman pen.

RXQ81. He did not say anything about it? A. Not to my knowledge. I don't remember that he did.

RE-DIRECT EXAMINATION by Mr. Raymond:

1235

RDQ822. But you spoke of these pens in his presence and called them the Waterman pen? A. Yes.

HERBERT BAKER.

Plaintiff's Exhibit 1, of Jan. 6, 1911.

(Referred to in Witness Baker's testimony.)

Letterhead of

1236 L. E. WATERMAN COMPANY

173 Broadway,

New York, N. Y. Sept. 22, '10.

Mr. Herbert Baker,
Allegan, Michigan.

Dear Sir:

We beg to acknowledge the receipt of your letter of the 14th, and to report that we have carefully looked thru our records, but cannot locate your order. We therefore, write to ask if

you will kindly give us the date of this order, so that we can give it proper attention. We regret very much if we have given you cause for complaint.

Thanking you in advance for your early advice, we remain,

Yours very truly,

L. E. WATERMAN CO.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1238

L. E. WATERMAN COMPANY,
Plaintiff,
against
MODERN PEN COMPANY,
Defendant.
} In Equity.

Depositions taken before H. H. Beecher at Delaware, Ohio, pursuant to notice hereto annexed, on the 3rd day of January, 1911.

Appearances: 1239

Walter B. Raymond, of counsel for Plaintiff.
Alexander S. Bacon, counsel for Defendant.

FRANK N. SELL, being duly sworn and called as a witness on behalf of the plaintiff and first duly sworn, replied as follows:

Direct-examination by Mr. Raymond:

Q1. What is your name, residence and occupation? A. Frank N. Sell, Delaware, Ohio, proprietor stationery store.

1240 *Frank N. Sell*

Q2. How long have you been in the stationery business? A. A year and a half.

Q3. Have you been handling fountain pens during this time? A. Yes.

Q4. What makes of fountain pens do you handle? A. Waterman Ideal, William Bolles' Standard self-filling pen; O. E. Weidlich & Company.

Q5. Did a salesman call upon you several months ago? A. Yes.

Q6. Will you state just what occurred when this salesman called upon you? A. The salesman in reference—you mean who he was?

1241

Q7. Who he was, what he said to you and what you said to him? A. He introduced himself to me as selling Waterman pens.

Q8. Did he say that he was selling A. A. Waterman & Company pens? A. No, he didn't.

Q9. Did he say that he had any connection with the Modern Pen Company? A. Not to my knowledge.

Q10. Just how did he introduce himself to you? What words did he use as near as you can recollect? A. As I said before that he was selling Waterman pens, in the introduction.

Q11. Did he show you the line of pens that he was carrying? A. Not for some time after his arrival, just prior to leaving the store.

1242

Q12. Did you have any other conversation with him, about who he was or who he was representing? A. He—I asked what had become of a Mr. Hudson that had previously represented the Waterman people in this territory, and who had called upon us about a year previous, and he said that he was a new man over the territory, but didn't make any special reference to Mr. Hudson.

Q13. When he showed you this line of pens how did he describe them to you—under what name? A. The only reason that I gave him any attention and subsequently allowed him to show me his assortment of fountain pens was because I was under the impression—

Mr. Bacon: Objection to any impressions of the witness and demand that the testimony be what was said and what was done.

Q14. I suppose this was very short? A. Yes, I was just telling my impressions.

Q15. What did you gather your impressions from? A. From his style of introduction mostly.

Q16. Did you look at his pens? A. Yes, I did.

Q17. How did he describe these pens to you? A. Well—

Q18. What name did he give them? A. There was no description given but the only thing that I can remember then was that I happened to notice the inscription on the barrel of 1244
the pen.

Q19. Did he call your attention to it? A. No, he didn't, I called his attention to it.

Q20. Did he call them the Waterman pen? A. He did, I am certain, at the start.

Q21. What did he say when you called his attention to the initials A. A. on the pen? A. To the best of my knowledge he said that didn't make any difference.

Q22. Then what did he do? A. Of course then, I ceased to take any more interest in the line as we were not looking to take on any new lines, and then as I did not give any more attention he excused himself.

Q24. Is this paper published in your town? A. Yes, sir. 1245

Q25. Do you subscribe for it? A. Yes, sir.

Q26. Did you receive that in the ordinary course of mail? A. This issue?

Q27. Yes? A. We did; our name is on the back of it.

Mr. Raymond: I ask to have this marked and offered in evidence.

Marked Plaintiff's Exhibit 1 of Jan. 3, 1911.

CROSS-EXAMINATION by Mr. Bacon:

XQ28. When was it this gentleman called? A. Well, you know I haven't got the exact date, while I have not got it clear

in mind just at what time, but from my recollection I would imagine that his visit was here in September, I think.

XQ29. 1910? A. 1910; I am not certain, it was not of enough import to me to remember his call.

XQ30. Do you know his name? A. No, I don't know his name; he was introduced to me without a card.

XQ31. He introduced himself? A. Yes, sir.

XQ32. Did he say whom he represented? A. No, he didn't.

XQ33. Did he at any time during this conversation say he represented the Modern Pen Company or A. A. Waterman Company? A. To my recollection the only reference he made was that he was selling Waterman pens.

1247 XQ34. Did he say anything about A. A. Waterman & Company? A. Not until after I had called his attention to the name—the inscription on the barrel of the pen.

XQ35. What did he say then? A. That it made no difference, was his expression; his answer I took it might have implied that his pen was just as good.

XQ36. Do you remember the exact words that he used? A. To the best of my knowledge that is what I remember of his having said.

XQ37. Please give us the exact words that he used? A. I have just before.

XQ38. No, you haven't; what you said and what he said? A. I just told you what I said and what he said.

1248 XQ39. I will ask you again to begin at the beginning of his call and say everything that he said and everything that you said? A. I can't say everything that he said and everything that I said.

XQ40. As nearly as you can remember it? A. He introduced himself—

XQ41. What did he say? A. He says I am selling Waterman pens, after greeting him, shaking hands, I remarked if he knew what had become of Mr. Hudson, who had previously called upon us in the interest of the Waterman Company, and he remarked that he himself was a new man on the territory, and then after some chatting about the fountain pen conditions

here at Delaware, and so forth, I can't remember exactly the words of our conversation between that and when he said, "Let me show you my samples of pens that I have with me;" and I consented and he displayed his assortment of pens in front of me on the show case; the next that I can remember was my discovery of the name on the pens that he was showing me and I remarked that they were not L. E. Waterman & Company's pens, and his remark to me was that that made no difference.

XQ42. You were already selling L. E. Waterman & Company pens? A. Yes, sir.

XQ43. You never had any business with the A. A. Waterman Company or the Modern Pen Company? A. I really didn't know of the company in existence. 1250

XQ44. You weren't deceived by anything that he said? A. Because I didn't take advantage of his so-called bargains, possibly.

XQ45. You knew they were A. A. Waterman Company's pens? A. After I discovered it myself.

XQ46. He didn't give you his name? A. I think he did when he introduced himself.

XQ47. Did he say he represented the Modern Pen Company? A. He possibly did sometime during his conversation before he left the store.

XQ48. You don't know whether he did or not? A. I won't say whether he did or not during his visit, but I am certain—

XQ49. I am asking you what he said; did he say he represent A. A. Waterman Co.? A. Not before my discovery of the line of pens that he handled. 1251

XQ50. Did he then? A. He possibly did before he left the store, I couldn't say.

XQ51. You are not even certain of that? A. I am not certain of the name he gave of the company he was working for, after that.

XQ52. After what? A. After my discovery of the name on the pen; he remarked they were made by A. A. Waterman after I noticed it.

1252 *Frank N. Sell*

XQ53. But he did not say who he represented? A. Yes, sir; he said he was selling Waterman pens; that means he represented them.

XQ54. Did he say that he represented any particular party? A. I can not say exactly that he did or did not.

XQ55. Do you know Wells & Hardin, the book sellers of this town? A. Yes, sir.

XQ56. Is it not a fact that they sell L. E. Waterman & Company pen? A. I do not know but I rather think they do. I have been under the impression that they do.

XQ57. L. E. Waterman & Company have a pen that is called the non-leakable, do they not? A. I think from seeing their
1253 advertisements that they have.

XQ58. And is it not a fact that the A. A. Waterman Company do not have a pen that they call the non-leakable? A. I do not know.

RE-DIRECT EXAMINATION by Mr. Raymond:

RDQ59. By what names do customers ask you for pens of the manufacture of L. E. Waterman Company? A. I should imagine the majority seeking the L. E. Waterman Company's Ideal pens ask for Waterman's pen.

RDQ60. That is your experience? A. Yes, sir, or Waterman's Ideal pen.

1254 RDQ61. Or Waterman's fountain pen? A. Yes, Waterman's fountain pen, Waterman's Ideal pen; some of them call for Ideal pens.

RDQ62. Do you have many calls simply for Ideal pens? A. No, not many; the word is not often used in asking for that certain brand.

RDQ63. Can you give a description of this salesman who called upon you? A. Not a very exact one as he was there only a short time.

RDQ64. Give me some kind of a description of him? A. If I remember correctly he was a man that would stand about possibly 5 feet 10½ to six feet, I am not certain of his height.

RDQ65. How old was he? A. I should imagine about from 30 to 32 years old.

RDQ66. How heavy? A. He would be a man not quite as heavy as you Mr. Beecher, about 165 or 170.

RDQ67. Smooth shaven? A. To my recollection he was smooth shaven.

RDQ68. Dark or light complexion? A. I believe dark.

RDQ69. Was your brother present at this time? A. My brother was present when he came into the store but he turned him over to me as I do all the buying in the stationery department.

RDQ70. What is your brother's name? A. Orrie Paul Sell.

RDQ71. Where is your brother today? A. He is at home sick. 1256

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ72. How long was he in your store? A. I don't know because I didn't get to see him when he first came in; I was busy and I don't know how long it was.

RXQ73. How long did you see him? A. From the time I met him until he left I should imagine not to exceed a half hour.

RXQ74. And what you have said is all that you can remember of that half hour's conversation? That is so, is it? A. I was just trying to think; that is all I can recollect.

1257

The signing of this deposition is hereby waived.

1258 *Donald D. Bradford*

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,
against
MODERN PEN COMPANY,
Defendant.

1259

Deposition of Donald D. Bradford and Henry R. Brink, taken pursuant to notice hereto annexed; it being however stipulated between the attorneys attending this hearing that the above depositions be taken on the 7th day of January, 1911, instead of on the 9th day of January, 1911, as set forth in said notice.

DONALD D. BRADFORD, being called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Q1. What is your name, residence and occupation? A. D. D. Bradford, Holland, Mich.; druggist.

1260 Q2. How long have you been in that business? A. About nine years.

Q3. During what part of that time have you handled fountain pens? A. Practically all of that time except about a year in Holland.

Q4. How long have you been in Holland? A. A year and a half.

Q5. What makes of fountain pens do you carry in Holland? A. The Waterman.

Q6. By whom are the pens manufactured that you call Waterman pens? A. By L. E. Waterman Company.

Q7. How long have you carried L. E. Waterman Company pens? A. Since about Dec. 10th, 1910.

Q8. Had you handled these pens prior to that time? A. Not here, except by mail order.

Q9. How long had you known the L. E. Waterman Company pens and by what name did you know them? A. I have known them for a long time as the Waterman pen.

Q10. And when you heard the name Waterman in connection with fountain pen, what make of pen did it suggest to you? A. The L. E. Waterman Ideal.

Q11. Now, will you state in your own words what occurred in your store during the month of August, 1910? A. A salesman who stated he was the Waterman representative called and tried to sell me a line of pens but I was not interested at the time and did not buy. 1262

Q12. How did he introduce himself to you? A. As the Waterman representative. And I said another Waterman representative? That is a mistake, it was the last representative to whom I said that.

Q13. Did this representative who called on you in August, hand you any card? A. He did not.

Q14. Did he say he was representing the Modern Pen Co.? A. He did not.

Q15. Did he say he was representing A. A. Waterman & Co.? A. He did not.

Q16. State as nearly as you can what he did say. A. That was practically all with the exception that I told him we ordered Waterman pens by mail. 1263

Q17. Did he show you the line of pens? A. No he did not.

Q18. Do you know the name of this representative? A. I do not.

Q20. Can you describe him? A. He was of medium height, dark and smooth-shaven, that is all the description I can give.

Q21. How old was he? A. I should judge about thirty.

Q22. Was he slight or heavy? A. About medium.

Q23. Now will you state what occurred in Oct., 1910, in your store? A. Well, another representative stating he was the Waterman's representative called on me. I said, what another Waterman representative? His answer was no, the Waterman

1264 *Donald D. Bradford*

representative. I then told him that one of his men had called on me a couple of months before. He said, no that was not an L. E. Waterman man.

Mr. Bacon: I object to any conversation with the representative of plaintiff.

A. But stated that I was not the—

Q24. What did he say with being the sole representative in this territory?

Mr. Bacon: I object to any conversation with plaintiff representative on the ground that it is irrelevant and
1265 self-serving.

A. Said he was the sole representative of L. E. Waterman Co.

Q25. Are you positive Mr. Bradford that the man who called upon you in August did not say he was representing A. A. Waterman & Co.? A. He did not.

Q26. When you told him you were ordering Waterman pens by mail order, did he ask you whether you were handling pens made by L. E. Waterman Co. or A. A. Waterman & Co.? A. He did not.

CROSS-EXAMINATION by Mr. Bacon:

1266 XQ27. When this man called in August, he didn't get so far as to talk business with you, did he? A. No, we didn't talk business.

XQ28. He simply asked you if you were in the market for pens and you told him— A. Yes, after he had introduced himself in the manner stated before.

XQ29. He didn't show you any pens? A. He did not.

XQ30. You don't know of your own knowledge what line of pens he carried? A. I do not.

XQ31. So far as you know he might have been carrying the pens of the L. E. Waterman Co.? A. Yes, he might have.

XQ32. I suppose the whole conversation was over in a minute or two? A. Very short.

XQ33. He darted in and then went right out when he saw there was nothing doing? A. Yes.

DONALD D. BRADFORD.

HENRY R. BRINK, being called as a witness on behalf of the plaintiff, and being first duly sworn, testifies as follows:

Q1. What is your name, residence and occupation? A. H. R. Brink, Holland, Mich.; book seller and stationery. 1268

Q2. How long have you been in this business? A. About nine years.

Q3. During what part of this time have you carried fountain pens? A. The entire time, or very nearly so anyway.

Q4. What makes of fountain pens do you carry? A. Moore's Non-Leakable; Rapid Writer; Faber's Self-Filling; A. A. Waterman.

Q5. Now will you tell us in your own words what occurred in your store on or about Aug. 26, 1910? A. An agent came in.

Q6. How did he introduce himself to you? A. Selling Waterman Fountain Pen. He showed us his line, explained the merits of them and we ordered a dozen and a half I think, or two dozen of his pens to be sent in a display case. 1269

Q7. How did he describe these pens to you when he was selling them to you? A. I don't know as he explained the difference between the two companies, he said he was an A. A. Waterman.

Q8. Did he give you any instruction under which name these pens should be sold? A. Not to my knowledge.

Q9. In speaking of these pens how did he describe them, as Waterman pens or A. A. Waterman pens? A. Well, sir; I don't remember.

Q10. Had you heard of Waterman pens before? A. Oh, yes.

Q11. How did you know of Waterman pens previous to this

1270 *Henry R. Brink*

time? A. I have seen the Waterman pens and have received circulars from Waterman Co. as an inducement to give them a trial.

Q12. Was the company you had received circulars from A. A. Waterman & Co.? A. No, sir; L. E. Waterman Co.

Q13. Did you yourself know at the time when you bought these pens that the pens you were buying were different from the pens you knew as Waterman pens? A. No, I knew there was two companies.

Q14. At the time you bought these pens? A. Yes.

Q15. At the time you bought these pens, did you speak of them as Waterman pens in presence of salesman? A. I don't
1271 remember.

Q16. You understand what I mean, did you call these pens Waterman pens? A. I don't know as I gave them any name or mentioned the name.

Q17. Under what name did you try to sell these pens?

Mr. Bacon: Objected to as immaterial and not binding on the defendant.

A. Why, we sold one pen under the name of A. A. Waterman.

Q18. Did you sell any under the name of Watermen pen? A. I am not sure of that.

Q19. Did the salesman tell you these pens were different
1272 from the pens made by L. E. Waterman Co.? A. I think he said something with reference to the other company but I don't know as he gave any instructions as to the name under which these pens should be sold.

Q20. When this salesman came in to see you, are you sure he said he represented the Waterman pen? A. Yes, I am quite sure he did.

Q21. Did he hand you a card? A. I don't remember.

Q22. Can you describe the salesman? A. No, sir; I could not.

Q23. Did you get the name of the salesman on the bill which you received for these pens? A. I don't know.

Q24. Was his name Bartlett? A. I don't remember.

Q25. Now, isn't it true, Mr. Brink, that you were trying to sell these pens under the name Waterman and that the salesman who sold the pens to you gave you no instruction that you should sell them only as A. A. Waterman & Co. pens? A. I remember no conversation about that.

Q26. At the time I visited you in December, weren't you or the young lady in the store trying to sell these pens as Waterman pens? A. I guess yes.

Q27. Didn't I speak to you about it? A. Yes.

Q28. Would you have tried to sell those pens as Waterman pens if that salesman had told you to sell them only as A. A. Waterman & Co. pens? A. No, I guess not. I would have followed the instructions. Or at least investigated the meaning of that explanation. 1274

Q29. Did the salesman mention the name Modern Pen Co. to you? A. Not that I know of.

CROSS-EXAMINATION by Mr. Bacon:

XQ30. You wrote this letter to the Modern Pen Co.? A. Yes, sir.

XQ31. And got an answer, of which that is a copy? A. Yes, sir.

XQ32. You wrote this letter and mailed it on or about its date? A. As far as I remember. 1275

XQ33. And received the second letter very shortly after December 19, 1910? A. I received it the 21st.

Letter of December 15, 1910, H. R. Brink to Modern Pen Co., marked for identification Exhibit A, Jan. 7, 1911.

Letter of Dec. 19, 1910, marked Defendant's Exhibit B for identification, Jan. 7, 1911.

XQ34. When this salesman called in August, 1910, you knew of the existence of the L. E. Waterman Co. and A. A. Waterman and Co. as rival manufacturers of fountain pens? A. Yes, sir.

XQ35. This salesman told you he represented A. A. Waterman & Co.? A. I think so.

XQ36. You knew you were buying the A. A. Waterman & Co. pen? A. Yes, sir.

XQ37. You saw that name on the barrel of the pens he displayed? A. I think so.

XQ38. Did he show you any printed matter? A. I don't remember.

XQ39. You discussed with him the fact that there were two Waterman companies? A. There must have been very little said in regard to that for I don't remember the conversation.

1277 XQ40. But there was no question but what he was selling A. A. Waterman & Co. goods exclusively? A. Oh, no.

XQ41. Mr. Raymond came to see you just before you wrote this letter of Dec. 15, 1910, Exhibit A for identification? A. Yes, sir.

XQ42. Did he try to buy an A. A. Waterman pen of you? A. I don't remember—the clerk waited on him.

XQ43. Did he try to get a receipt and get you to mark it Waterman? A. Not of me.

XQ44. Did he of the clerk? A. I don't know that.

XQ45. Did he threaten you with suit if you sold these pens as Waterman pens? A. He said we were liable to have trouble.

XQ46. Did he tell you that the pens that the agent had sold
1278 you in August were being sold in New York for $.85? A. I don't remember.

XQ47. Did he tell you you were liable to get into trouble if you sold A. A. Waterman & Co. pen and that you better send them back? A. He said if we sold them as only Waterman pens we would be liable to have trouble.

XQ48. Did he advise you to send back your stock? A. Not exactly.

XQ49. What did he say about that? A. We are not after you to send these pens back. He said this—that he had bought pens at different places as Waterman pens—I think he warned us we should be careful as the manufacturers of these pens

1279

had no right to use the name Waterman, as this name could only be used by L. E. Waterman Co.

XQ50. Did he tell you that A. A. Waterman & Co. had no right to use that name? *i. e.* the name A. A. Waterman & Co.? A. I think so.

XQ51. Did he ask you to testify in this case at that time? A. Well, only in his presence.

XQ52. He asked you to make a written affidavit, didn't he? A. He wrote a paper.

XQ53. Did he tell you if you would be a witness in this case they wouldn't trouble you with any suit? A. I told him I didn't like to get into trouble, and he said he didn't want to get me into trouble only he was investigating these cases. 1280

He also mentioned the conversation with the Gerber Drug Co., on whom the agent called on the same day.

XQ54. Did he say he was investigating these matters to get evidence in this case? A. I think he said he was attorney for L. E. Waterman Co.

XQ55. What further did he say along that line? A. I don't remember.

XQ56. Did he say he had been all over the country trying to buy A. A. Waterman & Co. pen under the name of Waterman and getting a receipt to that effect? A. Yes, he said he done that.

RE-DIRECT EXAMINATION by Mr. Raymond: 1281

RDQ57. Do you remember when your clerk called you down to where I was standing in your store, at the time of my first visit? A. I heard the conversation at the same time the clerk looked at me and I walked to the front.

RDQ58. Didn't you tell me I was just the man you wanted to see about these pens, that some one had told you previously that you would have trouble if you sold them? A. Yes, sir.

RDQ59. State what you had been previously told about these pens and by whom A. The agent selling Moore's pens told me that these pens were being sold in New York as low as $.85 and

1282 *Henry R. Brink*

had trouble with the L. E. Waterman Co. I then informed him that we had written for evidence in regard to this trouble to avoid later trouble in selling them.

RDQ60. Didn't this man tell you something about a lawsuit? A. It seems to me there was an injunction was served by L. E. Waterman Co. against A. A. Waterman & Co.

RDQ61. Didn't you ask me about that injunction? A. Yes, sir.

RDQ62. What did I do? A. Showed me a copy, stating that no other company could use the name Waterman than L. E. Waterman Co.

1283 RDQ63. Didn't you then tell me you would have to send the pens back? A. I said I preferred to do that rather than have trouble.

RDQ64. What did I tell you to do? A. That you weren't as much after me to return the pens but you wanted to get this information.

RDQ65. Didn't I tell you to write to the company and find out whether you could sell the pens as Waterman pens? A. I don't remember, it is possible.

RDQ66. Didn't I tell you not to take my word for anything but to investigate the matter with the company before you sent the pens back? A. I think so.

RDQ67. Did you do that? A. Yes, sir.

1284 RDQ68. Have you a copy of the letter you sent the company? A. I think so.

RDQ69. Is that letter of Dec. 15th, the letter you sent to the company? A. I think so, I didn't look up the date, but think so.

RDQ70. Did you ask the company whether you had the right to sell the pens under the name Waterman? A. I don't remember that.

RDQ71. Now, what did you know about these two concerns at the time the salesman first called upon you? A. Why, I knew there was two companies.

RDQ72. Did you know which was the oldest concern? A. I don't think I did.

RDQ73. Had you any knowledge or information but that A. A. Waterman & Co. was the oldest and longer established concern? A. No, sir.

RDQ74. Didn't this salesman tell you that the line of pens he was handling was the genuine Waterman pen? A. He said it was the A. A. Waterman pen.

RDQ75. Didn't he say it was the genuine Waterman? A. Not to my knowledge.

RDQ76. Did he always use the initials A. A. in describing the pens to you, or did he simply say Waterman? A. I don't remember.

1286

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ77. Did you have any information that A. A. Waterman & Co. was the oldest concern? A. No, sir.

HENRY R. BRINK.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

1287

L. E. WATERMAN COMPANY,
Plaintiff,
against
MODERN PEN COMPANY,
Defendant.

Testimony on final hearing in the above entitled action taken before E. S. Douton, a Notary Public, in and for the County of Niagara, State of New York, at No. 16 Falls Street, Niagara

1288 *Arthur Cummings*

Falls, Niagara County, New York, under the rules of equity and the revised statutes, pursuant to notice hereto annexed, on the 7th day of April, 1911.

Appearances:

Walter B. Raymond, of counsel for plaintiff.
Alexander S. Bacon, solicitor for defendant.

It is stipulated by counsel that the above testimony shall be taken before E. S. Douton, Notary Public, on the 7th day of April, 1911, in the place and stead of Frederick Chormann, as specified in the notice of hearing hereto annexed.

1289

ARTHUR CUMMINGS, a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct-examination by Mr. Raymond:

Q1. What is your name, residence and occupation? A. Arthur Cummings, 420 10th Street, clerk.

Q2. Are you in charge of the Snyder Cigar Store in the City of Niagara Falls? A. Yes.

Q3. How long have you carried fountain pens in that store? A. About four years.

Q4. What kind of pens have you carried? A. Onoto, Waterman, Willrite.

1290

Q5. When did you purchase the so-called Waterman pens? A. About three years ago.

Q6. What pens were these, A. A. Waterman pens or L. E. Waterman Company pens? A. I don't know.

Q7. When did you purchase the pens that you now have in stock? A. About one year ago.

Q8. Will you state what occurred at the time you purchased these pens? A. At the time he had these pens, he had three or four different lines of pens. I think J. Sandusky and Company, N. Y., was the concern he represented.

Q9. What did he say to you about these pens? A. I don't remember, I just remember that this lot referred to were the pens bought.

Q10. Did he call them Waterman pens? A. I don't remember.

Q11. Did he call them A. A. Waterman pens in speaking of them? A. I don't remember.

Q12. How did you come to buy these pens? A. They looked good to me, so as it was an every day occurrence, I purchased them.

Q13. Did you previous to that time, know of Waterman pens? A. Yes.

Q14. How did you gain your knowledge of Waterman pens? A. I carried one of them.

Q15. What kind of a pen did you carry? A. One of those self-filling pens. This is about all the description I can give you of it. 1292

Q16. Do you know how the pen was marked? A. No, I don't.

Q17. Is that the way you had any knowledge of Waterman pens? A. Only by seeing them advertised.

Q18. You mean the advertisements in the magazines? A. Yes.

Q19. You mean the big back page advertisements in magazines? A. I don't know as it was back page advertisements, I saw the advertisements in magazines.

Q20. Did you at the time you purchased these pens, think that you were buying the Waterman pens you had seen advertised? A. I don't remember now that I knew they were even marked Waterman. 1293

Q21. Didn't the man who sold you the pens call them Waterman pens? A. I can't remember.

Q22. You didn't buy them from a catalogue? A. No, right from samples.

Q23. Did he tell you under what name these pens were to be sold to the public? A. No.

Q24. Under what name did you sell them to the public? A. Well, I don't remember. I myself didn't sell any of them. I don't know under what name the other clerks sold them. None of the clerks are here now.

1294 *Arthur Cummings*

Q25. Did you always call them Waterman pens? A. No, I don't know as I have, I never had any occasion to. Don't know as I sold them.

Q26. When did you first learn that the pens that you had were not the pens advertised in magazines as Waterman's and Waterman's Ideal Fountain pens? A. About four weeks ago.

Q27. Did you up to that time think you had the pens that were advertised in all the magazines as Waterman's Ideal Fountain pen? A. Yes, I supposed so.

Q28. And you had bought the pens, thinking they were the pens that were advertised and widely known as Waterman pens? A. No.

1295 Q29. You bought them without any reference to the name? A. I don't know as there was any reference made to the name.

Q30 But you thought they were the Waterman pens you had seen advertised after you got them, didn't you? A. Yes, after, but I didn't know until some time after they were marked Waterman.

CROSS-EXAMINATION by Mr. Bacon:

XQ31. How much did these pens retail for? A. $2.50 to $5.00.

XQ32. How much do the A. A. Waterman pens retail for? A. $1.50 to $3.00.

1296 XQ33. Have they been perfectly satisfactory as far as you know? A. Yes.

It is stipulated between counsel that the signature of the witness be waived.

Joseph Louis Hebert 1297

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

against

MODERN PEN COMPANY,
Defendant. 1298

Testimony taken before Edmund L. Desaulniers, notary public, at his office, number 17 Place d'Armes Hill, in the City of Montreal, Province of Quebec, Dominion of Canada, under a Commission issued out of the above Court, dated March 10th, 1911, pursuant to an order entered and filed in said Court on March 3rd, 1911, the said testimony being taken subject to due notice to defendant's counsel on the sixteenth day of March, nineteen hundred and eleven, beginning at nine o'clock in the forenoon, which time and place was named and set by the Commissioner herein.

Appearances: 1299

Samuel S. Watson, Esq., attorney for the Plaintiff.
Alexander S. Bacon, Esq., attorney for the Defendant.

JOSEPH LOUIS HEBERT, who resides in the Town of Lachine, in the Province of Quebec, Canada, and is a stationer, aged twenty-one years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, place of residence and occupation? A. My name is Joseph Louis Hebert; I reside at the

1300 Town of Lachine, in the Province of Quebec, and I am in business as a stationer.

Q2. Where is your place of business? In what town? A. In the Town of Lachine.

Q3. And how far is that from Montreal? A. About thirteen miles.

Q4. Do you deal in fountain pens? A. Yes, sir.

Q5. How long have you been dealing in them? A. I have been handling the Waterman pen for eight years. I have been in business as a stationer for nine years.

Q6. Did you at any time buy some pens from Granger Freres? A. I did. The first lot I bought was from Granger Freres.

1301 Q7. And what kind of pens did you think you were buying?

Mr. Bacon: Objected to as immaterial. Granger Freres are not connected with the defendant, and I call for the conversation.

A. I thought I was buying the pen that I am handling now.

Q8. And what pen is that? A. The L. E. Waterman pen.

Q9. You thought you were buying? A. The best kind.

Q10. The genuine pen, and what is that? A. Of course, I did not know the difference. When people came in and asked me for Waterman pens, I found it was the best goods on the

1302 market, so I tried to buy the pen.

I deal with Granger Freres, and they told me that they handled it, so I bought a dozen of pens there, and I just found out after a while that they were not the pens that I was being asked for by my customers.

Q11. Not the pens you expected you were buying? A. No.

Q12. Do you know whether Granger Freres represented themselves to be the agents of the makers of these pens which are marked "A. A. Waterman & Co."?

Mr. Bacon: Same objection.

A. Yes. They represented themselves to be the agents, because he said if a pen got broke, they would send it to New York to be repaired, and one pen was broken and I came in to get it repaired. It was a self-feeder with a rubber attachment, and the rubber was rotten, and I came in to their store to get it fixed.

The pen was never in a condition to be sold; it was leaking; and I went in there to get it repaired. They said they would have to send it to New York, and I waited eight days, fifteen days, and three weeks, and then they told me it would cost around a dollar to have it fixed—to put a new rubber in—seventy-five cents or a dollar, I think, was the cost, so I brought it back and I have got it at home yet. It has never been fixed. 1304

Q13. How long have you been handling the genuine Waterman's Ideal Fountain Pen? A. About eight years.

Q14. And what was it that led you to be deceived by the pens which were sold to you by Granger Freres as genuine Waterman pens?

Mr. Bacon: Objected to the question as leading, suggesting to the witness that these are genuine Waterman pens.

A. After I sold a few pens of my stock of that dozen that I bought, I found that the pens were being returned to be repaired, and they were always kicking about having to repair the pens. First they put me off, and after that, when I got repairs made I had to pay for the repairs. 1305

During that time I heard that L. E. Waterman was on St. James Street, on the second floor up. They had only one room there, and that is what I found out, that the L. E. Waterman was selling at that place on St. James Street.

Q15. And was that the first time that you discovered that the pens that Granger Freres had sold you were not Waterman's Ideal Fountain Pens, when you went to St. James Street? Was that the first time you discovered it? A. I thought that there was no difference at all between A. A. Waterman and L. E. Waterman. I wanted to buy the Waterman pens first, and I

found out that Granger was keeping Waterman's pens, and I wanted the best pens, because I will buy only the best for my store.

I heard from some people that the Waterman pens were the best, and I went to Granger Freres and I asked them if they sold the Waterman pens, and they said yes, so I bought a dozen there, and I paid for them, and it was just around that time that I discovered that I was wrong—that it was only an imitation,—that there was another firm making what they called "Ideal" fountain pens, and I found out (I do not know whether it was by the telephone books or the directory), that their
1307 place was on St. James Street, and I went there to visit first. I did not do my first buying there.

I gave him my name, and the agent came to my place afterwards, and I bought for one hundred and five dollars worth then, and since then I have kept them in stock.

CROSS-EXAMINATION by Mr. Bacon:

XQ16. When did you buy this dozen of A. A. Waterman pens? What year? A. The first year I was in my store, and I have been in business nine years.

XQ17. And you have not bought any since? A. No.

XQ18. Who are Granger Freres? A. They are wholesale stationers.

1308 XQ19. In Montreal? A. In Montreal.

XQ20. Did you buy this dozen of pens eight or nine years ago in Montreal, at the store of Granger Freres? A. Yes, sir.

XQ21. What was the name of the man who sold you the pens? A. One of the Granger Freres.

XQ22. Do you know his first name? A. It was the tall brother. I am not sure of his first name.

XQ23. Give us the exact conversation that passed between you and the tall Mr. Granger?

Mr. Watson: Objected to as calling for an impossibility at this length of time.

A. When I went there first to buy pens, I was thinking—

By Mr. Bacon (interrupting):

XQ24. Never mind what you were thinking. Just relate what was said by each of you? A. I went in there to buy pens, and I said, "I heard that the Waterman pen was the best." He said, "I am handling it," so I asked him the question whether they were guaranteed, or if they broke, whether I could bring them back, and he said, "Yes," so I decided to buy a dozen, and the first pen was leaking.

XQ25. I only asked for the conversation? A. When he told me that everything was guaranteed on the pens, I decided to buy a dozen. 1310

XQ26. Did he tell you that they were A. A. Waterman pens? A. I don't remember whether he told me that they were A. A. Waterman pens, or L. E. Waterman pens. I bought thinking I was getting the best.

XQ27. Did he tell you at any time during this first conversation that these pens were made by A. A. Waterman & Company? A. I only remember in my mind that he said, "This is the Waterman pen."

XQ28. You are not willing to swear that he did not tell you that they were A. A. Waterman & Company pens?

Mr. Watson: The form of the question is objected to, as counsel well knows that that is improper. 1311

Mr. Bacon: Counsel does not know anything of the kind.

A. I cannot swear that, because I was thinking I was buying the best pen—the Waterman.

XQ29. And you do not know whether he told you that they were A. A. Waterman pens or not? A. I cannot remember.

XQ30. In this first conversation, when you bought these pens of Mr. Granger, did he tell you that he was the agent of A. A. Waterman & Company? A. I am positively sure that he told me that he was the agent for A. A. Waterman, or L. E. Waterman, or that he was the agent for the Waterman pens. He

1312 *Joseph Louis Hebert*

always told me that he was the agent, and that if there was anything wrong I could bring the pens to him, and he would have them repaired, and it was only after that that I found he did not keep his word.

XQ31. When you had the first conversation with him, when you bought the pens, did he say anything about his being agent for A. A. Waterman & Company, or was it later when you found that one of them was defective? A. When I bought the pens first, he told me that he was the agent for the pens.

XQ32. Just agent to sell? A. Agent to sell.

XQ33. Just as he sold any other goods in his store? A. I do not know whether he is the agent for any other goods.

1313

XQ34. When you brought back this defective pen, did he say that he would have it repaired? A. At first, yes.

XQ35. And then he afterwards did not do it? A. I waited three weeks, and after that he wanted to charge me seventy-five cents, and I brought the pen back home.

XQ36. And that is the reason you did not deal with him any more? A. That is the reason I did not deal with him.

XQ37. And that is the only reason that you went to St. James Street, and bought L. E. Waterman pens? A. I was trying to get the best pen. I was looking for the best pen. It was after that that I found out there was another Waterman pen.

XQ38. You have never manufactured pens? A. No.

XQ39. You do not know anything about the quality of pens, whether one is good or bad? A. I only take the word of the person who sells them to me.

1314

Mr. Bacon: I move to strike out all of this testimony on the ground that the entire transaction sworn to by the witness occurred years before the organization of this defendant, and the present firm of A. A. Waterman & Company.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ40. Did you have any trouble with more than one of these pens of this dozen? A. I had trouble in having one repaired, and I lost two.

1315

RDQ41. How did you lose them? What do you mean by losing them? A. Well, they were self fillers. In one of them the rubber was rotten, and they wanted to charge me seventy-five cents to have it repaired, and I did not have it repaired. I just brought it back, and I have it at home now.

The other two opened in the middle, and there was no thread at all to tighten them, so they would not hold together, and I could not sell them.

RDQ42. Have you found the Waterman Ideal Fountain Pens which you have handled satisfactory to your customers?

Mr. Bacon: Objected to as immaterial and impossible for this man to know.

1316

A. Yes.

By Mr. Watson:

RDQ43. You have received no complaints regarding these pens? A. Never.

RDQ44. If Granger Freres had told you that they sold Waterman pens—if they had mentioned that they sold A. A. Waterman pens, or L. E. Waterman pens, would you have known the difference? A. I would not know the difference until I was told by somebody.

RDQ45. All you knew was "Waterman pens"? A. Yes.

RDQ46. And Waterman pens in your mind meant the best? A. Yes.

1317

RDQ47. And what do you consider the best? Which ones?

Mr. Bacon: Objected to as immaterial. He is not an expert, and has nothing to show he has sold other pens excepting these two.

A. The L. E. Waterman pen.

RDQ48. Have you ever sold any other kind of pens than these two kinds you have mentioned? A. I did. I sold one that they called the cheap pen, one dollar and twenty-five cents, made by the Waterman Company. I think they called it the "Climax" pen. I bought it at Waterman's. I do not know if they made it.

1312 *Joseph Louis Hebert*

always told me that he was the agent, and that if there was anything wrong I could bring the pens to him, and he would have them repaired, and it was only after that that I found he did not keep his word.

XQ31. When you had the first conversation with him, when you bought the pens, did he say anything about his being agent for A. A. Waterman & Company, or was it later when you found that one of them was defective? A. When I bought the pens first, he told me that he was the agent for the pens.

XQ32. Just agent to sell? A. Agent to sell.

XQ33. Just as he sold any other goods in his store? A. I do not know whether he is the agent for any other goods.

1313

XQ34. When you brought back this defective pen, did he say that he would have it repaired? A. At first, yes.

XQ35. And then he afterwards did not do it? A. I waited three weeks, and after that he wanted to charge me seventy-five cents, and I brought the pen back home.

XQ36. And that is the reason you did not deal with him any more? A. That is the reason I did not deal with him.

XQ37. And that is the only reason that you went to St. James Street, and bought L. E. Waterman pens? A. I was trying to get the best pen. I was looking for the best pen. It was after that that I found out there was another Waterman pen.

XQ38. You have never manufactured pens? A. No.

XQ39. You do not know anything about the quality of pens, whether one is good or bad? A. I only take the word of the person who sells them to me.

1314

Mr. Bacon: I move to strike out all of this testimony on the ground that the entire transaction sworn to by the witness occurred years before the organization of this defendant, and the present firm of A. A. Waterman & Company.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ40. Did you have any trouble with more than one of these pens of this dozen? A. I had trouble in having one repaired, and I lost two.

1315

RDQ41. How did you lose them? What do you mean by losing them? A. Well, they were self fillers. In one of them the rubber was rotten, and they wanted to charge me seventy-five cents to have it repaired, and I did not have it repaired. I just brought it back, and I have it at home now.

The other two opened in the middle, and there was no thread at all to tighten them, so they would not hold together, and I could not sell them.

RDQ42. Have you found the Waterman Ideal Fountain Pens which you have handled satisfactory to your customers?

Mr. Bacon: Objected to as immaterial and impossible for this man to know.

1316

A. Yes.

By Mr. Watson:

RDQ43. You have received no complaints regarding these pens? A. Never.

RDQ44. If Granger Freres had told you that they sold Waterman pens—if they had mentioned that they sold A. A. Waterman pens, or L. E. Waterman pens, would you have known the difference? A. I would not know the difference until I was told by somebody.

RDQ45. All you knew was "Waterman pens"? A. Yes.

RDQ46. And Waterman pens in your mind meant the best? A. Yes.

1317

RDQ47. And what do you consider the best? Which ones?

Mr. Bacon: Objected to as immaterial. He is not an expert, and has nothing to show he has sold other pens excepting these two.

A. The L. E. Waterman pen.

RDQ48. Have you ever sold any other kind of pens than these two kinds you have mentioned? A. I did. I sold one that they called the cheap pen, one dollar and twenty-five cents, made by the Waterman Company. I think they called it the "Climax" pen. I bought it at Waterman's. I do not know if they made it.

1318

By Mr. Bacon:

RXQ49. Have you ever sold any other pens? A. Only that Climax pen.

RXQ50. And the L. E. Waterman pen? A. And the L. E. Waterman pen.

RXQ51. And you have not sold any A. A. Waterman pens since July first, 1905, that is, six years ago? A. No, not since six years ago, sure.

Mr. Bacon: I renew the motion to strike out all of this evidence on the ground that it does not relate to any transaction that occurred after the organization of this defendant, or the A. A. Waterman Company.

1319

Examination taken and reduced to writing on this sixteenth day of March, nineteen hundred and eleven, the signature of the said witness to the foregoing deposition being waived by agreement of counsel for both parties.

PAUL THEOPHILE FELIX JOUSSE, who resides in the Town of Vankleek Hill, in the Province of Ontario, Dominion of Canada, and is a watchmaker and jeweller, aged twenty-one years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

1320

Direct-examination by Mr. Watson:

Q1. Please state your name, place of residence and occupation? A. My name is Paul Theophile Felix Jousse; I reside at Vankleek Hill, in the Province of Ontario, and I am a watchmaker and jeweller by occupation.

Q2. Where is your place of business? A. In Vankleek Hill.

Q3. Do you deal in fountain pens? A. Yes.

Q4. And how long have you dealt in fountain pens? A. It must be about nine years.

Q5. And during that time what kind of fountain pens have you dealt in? A. The McLaughlin, the A. A. Waterman "Modern," and the "Ideal" Waterman.

Q6. How long have you been handling the Waterman Ideal Fountain Pen? A. About six years.

Q7. What is the name that your customers usually call for Waterman's Ideal Fountain Pen? What do they call it? A. They generally come in and ask for a Waterman pen, and when I show them the pen they ask if it is an Ideal.

Q8. Have you ever bought or dealt in A. A. Waterman & Co. fountain pens? A. Yes, sir.

Q9. Will you please state the circumstances of how you happened to deal in these pens, and how you happened to buy them? 1322
A. Certainly. I was handling the McLaughlin pen, and there were quite a few people coming in and asking for the Waterman pen.

I was hunting around to get the Waterman pen, and a stationer in town told me that Macfarlane, Sons & Hodgson, handled the Waterman pen. I wrote to them and I asked them in the letter if they handled the Waterman pen, and they answered, "Yes, they did."

Mr. Bacon: Objected to, as the letters are the best evidence.

Witness (continuing): They said they handled the "Modern" Waterman, but not the "Ideal." I bought some from them, 1323
not knowing that there were two Waterman's. I thought both pens were made by the same company.

Q10. When did you find that out, and how? A. Customers came in and asked me if I had the Waterman pen. I said "Yes," and I showed it to them. They would say it was not the Ideal, and I would say, "No, it is the 'Modern,'" and I sold some, but others would not take them at all, and after having refusals and losing a few sales, I made enquiries, and found there were two Waterman firms.

Q11. When you commenced handling the Waterman pens, did you expect to get the Waterman pens that you had seen

advertised, and which you had call for previously? A. Yes.

Q12. And what you got were not those? A. Well, not as far as I know.

Q13. Now, since you have been selling the Waterman Ideal Fountain Pens, have you found that your customers have been satisfied with them, so far as it has come to your knowledge? A. Well, I cannot say that I had any complaints at all.

CROSS-EXAMINATION by Mr. Bacon:

XQ14. How long is it since you have sold any A. A. Waterman pens? A. Between six and seven years.

1325 XQ15. And everything you have sworn to relates to a period more than six years ago? A. Yes, sir.

XQ16. You have not sold any A. A. Waterman pens at least since the first of July, 1905? A. No.

XQ17. And everything you have sworn to related to a period before July first, 1905? A. Yes, sir.

By Mr. Watson:

XQ18. You found the L. E. Waterman Ideal Fountain Pens that you have sold during all the period that you have been selling them, satisfactory to your customers, as far as you know? A. Yes, sir.

XQ19. You are still selling them? A. Yes, sir—selling more,

1326 too.

By Mr. Bacon:

XQ20. Does anybody else in your town sell the A. A. Waterman pen? A. I don't think so; not to my knowledge.

XQ21. So you have not had an opportunity of comparing the L. E. Waterman or "Ideal" fountain pen, with a really first class A. A. Waterman "Modern" fountain pen? A. I have to a certain extent, with customers coming in with the other pen, got from outside.

XQ22. You have to have a lot of L. E. Waterman pens repaired, don't you? A. We have to have a few when they let

them fall, or break them, but I can say on the average there is no complaint any other way.

XQ23. There are no L. E. Waterman's repaired, or McLaughlin's? A. I don't think there are as many.

XQ24. Just about the same? A. Just about the same so far as breaks are concerned, but there are no other causes of trouble.

By Mr. Watson:

XQ25. Do you have any A. A. Waterman pens that are unsatisfactory or defective for any reason? A. Well, we have got them coming in out of order, points broken, the same as in the other. 1328

By Mr. Bacon:

XQ26. If any fountain pen is run through a threshing machine, it is apt to get injured? A. Well, generally.

Examination taken and reduced to writing on this sixteenth day of March, nineteen hundred and eleven, the signature of the said witness to the foregoing deposition being waived by agreement of counsel for both parties.

WILLIAM FOSTER BROWN, who resides in the City of Montreal, Province of Quebec, Dominion of Canada, and is a book seller and stationer, aged twenty-one years and upwards, 1329 being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, place of residence and occupation? A. My name is William Foster Brown; I reside in Montreal, and I am a book seller and stationer.

Q2. Where is your place of business? A. 432 St. Catherine Street, West Montreal.

Q3. How long have you been in the stationery business? A. In my own behalf since eighteen hundred and eighty-nine—twenty-two years.

Q4. All of the time in Montreal? A. All of the time in Montreal.

Q5. Have you handled and sold fountain pens A. Yes, sir.

Q6. And how long have you sold fountain pens? A. I will have to ask a question about that myself. I sold fountain pens ever since they were made, that is, in the old days of the McKinnon fountain pen. That was the first one, but how long the Waterman pen has been on the market I do not know.

1331 I sold the first Waterman pen that was sold in Montreal. That was in eighteen hundred and ninety or eighteen hundred and ninety-one. I do not know if that time is correct or not. That is the time I have in my head.

Q7. And what kind or makes of fountain pens have you dealt in? A. Since the Waterman?

Q8. At any time? A. Oh, the McKinnon pen; that was the first fountain pen made; and there was the L. E. Waterman fountain pen, and the A. A. Waterman fountain pen, and the Sterling fountain pen, and then the Parker fountain pen, and others.

Q9. And you began to sell the Waterman fountain pen "Ideal" about twenty years ago A. It would be all of that.

Q10. And since that time have you sold the Waterman Ideal
1332 fountain pen? A. I have always had them in stock.

Q11. What is the name by which your customers usually call for Waterman's Ideal fountain pen? A. The Waterman fountain pen. "Have you got Waterman's fountain pen?"

Q12. And how long has that been the fact? A. Well, it has always been the fact, because there never was any other pen but the Waterman fountain pen when they first came out.

Q13. And that is so today? They ask for the Waterman pen? A. That is so today. There was no other Waterman fountain pen on the market, and naturally they asked for the Waterman fountain pen.

Q14. And that has been the fact since the A. A. Waterman fountain pen has been on the market also, has it not? A. Oh, yes.

Q15. Did it ever come to your knowledge that a person or customer came in to your store, and asked for a Waterman fountain pen, and expected to get A. A. Waterman pens?

Mr. Bacon: Objected to, as this witness cannot tell what expectations were in the mind of the customer.

A. No.

Q16. None of these customers in any way conveyed to your mind, when asking for a Waterman fountain pen, that they expected to get an A. A. Waterman pen? A. Well, hold on a 1334
moment. I take the same ground as this gentleman, Col. Bacon. I do not know what the customer is going to ask for. I do not know what is in his mind when he comes in to ask. I know what I am going to sell. If a man comes in and asks for a Waterman pen, I sell him an L. E. Waterman Ideal fountain pen. If he wants the contrary, he will ask me for an A. A. Waterman pen.

Q17. And in asking you for a Waterman fountain pen, and you showing him a Waterman Ideal fountain pen, made by the L. E. Waterman Company, did any customer ever give you to understand that he expected an A. A. Waterman pen when he asked for a Waterman fountain pen? A. No.

Q18. Have you found the Waterman Ideal fountain pen 1335
prove generally satisfactory to your customers, so far as the matter has come to your knowledge?

Mr. Bacon: Objected to as immaterial, irrelevant and incompetent.

A. Yes.

CROSS-EXAMINED by Mr. Bacon:

XQ19. Is there an L. E. Waterman factory in Montreal? A. Not in Montreal, not to my knowledge.

XQ20. Where is it, do you know? A. St. Lambert's.

XQ21. Where is that? A. Across the river from here, in another municipality.

XQ22. How far from here? A. I suppose it is four miles—four or five miles.

XQ23. Do you carry the A. A. Waterman & Company fountain pen? A. Not now.

XQ24. How long is it since you have carried them? A. Oh, it must be about seven or eight years.

XQ25. You have not carried any A. A. Waterman & Company pens since July first, nineteen hundred and five, six years ago? A. You see, I have been sworn to state facts, and I cannot
1337 say that that is the fact. It is a good long while ago.

XQ26. It is at least six years ago? A. At least six or seven years.

XQ27. And did you sell many of them before that? A. They were put on the market for sale. We were trying to introduce them as the A. A. Waterman pen, and we found they were not satisfactory, and we dropped them.

XQ28. And when was that? When you first took them up? A. When they were first put on the market.

XQ29. About eighteen hundred and ninety-eight? A. A. A. Waterman came to us first with them.

XQ30. And you think it was when they were first put on the market? A. Well, on his first trip to Montreal we took
1338 stock of them.

XQ31. And how long did you carry them? A. I do not think we carried them for more than three years.

XQ32. Well, it may be that you have not carried any since nineteen hundred and two? A. Well, it might be. I have not carried them in my present store, and I dropped them before I left my old store. It might have been nineteen hundred and two. Time goes by pretty quickly.

XQ33. If a man owned an A. A. Waterman pen, he would always speak of it as a Waterman pen, would he not? A. No.

XQ34. You never had anybody come to you, and try to sell you A. A. Waterman pens, and call them anything else except

A. A. Waterman pens? A. Well, I never dealt with anyone but A. A. Waterman himself.

XQ35. And he always carefully designated his pens as the A. A. Waterman pen? A. Yes, the A. A. Waterman pen.

XQ36. And the fact that there is an L. E. Waterman factory right here makes that pen the principal pen sold in Montreal, does it not? A. It does not follow. It was the principal pen sold in Montreal before the factory was here at all.

XQ37. The L. E. Waterman pen? A. Yes, the L. E. Waterman pen.

XQ38. You never had anything to do with the manufacture of pens? A. No, sir.

1340

XQ39. You do not call yourself a pen expert? A. No, sir.

XQ40. And you have not compared the A. A. Waterman pen manufactured since July first, nineteen hundred and five, with any L. E. Waterman pens manufactured since that date? A. I cannot say that I have not, because these pens have been brought in to me to be repaired. If you could show me a pen manufactured since that date, I could tell you.

XQ41. You don't remember? A. I don't remember. It may be the same pen manufactured now as since I was in the business.

XQ42. All kinds of pens come to you for repairs? A. Yes.

XQ43. All kinds of pens are subject to get out of order, and need repairing? A. Yes, sir. All things human do the same.

1341

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ44. What was the reason that you discontinued the sale of A. A. Waterman & Company fountain pens? A. Because it was not a good pen.

RDQ45. Were there any cases of people being deceived or confused by the marks of these pens? A. Yes, sir.

RDQ46. And do you have pens offered to you now, which are marked "A. A. Waterman & Company, New York," and have people state to you that they believed they had a genuine Waterman Ideal fountain pen? A. Well, I have had customers

come into the store with pens to be repaired. I would say to them, "I do not repair these pens, because they are not L. E. Waterman Ideal fountain pens."

Their reply would be, "Now, that is very odd. I bought them for a Waterman fountain pen, expecting to be getting an Ideal fountain pen."

I said, "I can't do it. The Ideal Waterman fountain pen people wont repair these, and I cannot get them repaired here. I will have to send these pens to Boston." That has happened many, many times.

By Mr. Bacon:

1343 RDQ47. When? How late? A. Last week.

RDQ48. Can you give me the name of any person who said that? A. No, I could not offhand. I would have to look up my documents and things, to see when I sent it to the Boston house to get it fixed.

RDQ49. And all these A. A. Waterman pens, concerning which you have testified, you have sent to Boston to be repaired? A. Yes. There is no other place for them to be repaired.

RDQ50. And if it be a fact that there has been no Boston place to repair these pens in over six years, you have not had such an incident occur within six years? A. Yes, I had, too, and there is a place (I wont say whether it is Boston or New York), but there is a place where they repair A. A. Waterman pens.

1344 RDQ51. Where? A. It is either by the Sterling people in New York, or the Sterling people in Boston.

RDQ52. Well, have you sent any to the Sterling people within what time? A. I certainly sent them there within a month, I think, to the Sterling people. It used to be the old Sterling, but now it is the Davidson, I think.

RDQ53. What is their address? A. I could not tell you that. I think it is Boston. The office is down on State Street. I was there several years ago, when they had their office in Boston.

The customers come to me personally for to have their pens repaired, and the clerk sends the pens off to be repaired; but they are generally brought to me to be examined to see what can be done with the pens.

RDQ54. Well, really what you have been testifying to, is what others in your employ have done, and the conversations that you have spoken of are conversations between the customer and some of your employees? A. No. The conversation would be between the customer and myself, because the employee would not know anything about it.

RDQ55. Would you want to modify your testimony, Mr. Brown, if I should tell you that for over six years the A. A. Waterman factory have had no place for repairing these pens in Boston?

Witness: Where have they got it?

Counsel: In New York, 22 Thames Street? 1346

A. I know we sent the pens some place.

RDQ56. But you do not say that you sent them to Boston? A. It is like this. I say these pens come in to be repaired. The original office was in Boston, was it not?

RDQ57. Not within ten or twelve years, I do not think? A. I have been selling the pens since eighteen hundred and ninety-two. That is a good deal more than ten or twelve years.

RDQ58. I do not think there has been a Boston factory or office since about nineteen hundred A. That is ten years ago.

RDQ59. That is eleven years ago? A. That is the time as you say when I used to buy the pens. That is when I used to get them, and we got them in, I do not say often and often, but I know they came in, because the pens were pretty generally sold all over the country, and if a man is in a certain town, and his 1347 pen gets out of order, he goes into a store to have it repaired. He does not wait to go to the store where he bought the pen, because he is travelling. He is away from home.

RDQ60. And if an A. A. Waterman pen comes to be repaired, you do not take it? A. I wont take it now.

RDQ61. For how many years? A. When I said, "I do not take it," I meant now. I said a little while ago that I took an A. A. Waterman pen to be repaired not later than last week.

RDQ62. Why? Have you changed your methods within the week? A. No, I have not changed my methods within a week. I have changed my methods within the last minute.

1348 *William Foster Brown*

RDQ63. Why would you take one a week ago, when you would not take one now? A. Because I would not want to have anything to do with the A. A. Waterman pen now. I have changed my mind since beginning my evidence.

RDQ64. Why have you changed your mind since beginning your evidence? A. I do not think it is a profitable business to be in. Your questions have changed my mind.

RDQ65. If I should tell you that the A. A. Waterman Company manufacture every part of their pen, including the penholder, and the pen points, out of the very best material that can be obtained, by workmen paid the highest wages, and should also tell you that the L. E. Waterman Company do not make
1349 their pens at all, but merely assemble their parts—get their parts from different people—would you change your mind again? A. To that I will reply that I knew the L. E. Waterman pen when they went into an office, and had only one man in their employ, when A. A. Waterman was their traveller, the first traveller that they had on the road.

I do not think that he would ever have been in the fountain pen business if he had not the name of Waterman. He had the name A. A. Waterman, and then he went into the business, and then he bankrupted the business.

Then he went into another company, and bankrupted that business. Whether A. A. Waterman himself is dead or alive today, or in any business, personally I do not know.

1350 RDQ66. Don't you know that Mr. A. A. Waterman was the inventor of the pens? A. No, indeed, I do not.

RDQ67. Don't you know that he took out a number of patents of his own invention, and that the A. A. Waterman pens, under the present patents, are very different from what they were in eighteen hundred and ninety-eight and nineteen hundred? A. Well, I am not conversant with patents. He took out one patent that he thought was going to be a great improvement, but I think it ruined his pen.

RDQ68. When? A. That was when he invented the pen, with one joint slipping into the other. The joint was altogether too weak, and if it fell it broke.

RDQ69. That pen was abandoned many years ago? A. I cannot say, but still it is on the market today.

RDQ70. Have you known one of this kind of pens to be sold within the last five or six years? A. I do not sell them. I cannot answer that question.

RDQ71. You never heard of one being sold? A. I do not know anything about that. If you asked Granger Freres, of Montreal, they would know. They are the agents of the A. A. Waterman pen.

RDQ72. But you do not know? A. I do not sell them, so I cannot say personally.

Examination taken and reduced to writing, on this sixteenth day of March, nineteen hundred and eleven, the signature of the said witness being waived by agreement of counsel for both parties. 1352

GEORGE J. BONENFANT, who resides in the City of Montreal, Province of Quebec, Dominion of Canada, and who is a dealer in tobaccos, candies and stationery, aged twenty-one years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows: 1353

Direct-examination by Mr. Watson:

Q1. Please state your name, residence and occupation? A. My name is George J. Bonenfant; I reside at 64 Beaver Hall Hill, in the City of Montreal, and I deal in tobaccos, candies and stationery.

Q2. Your place of business is in Montreal? A. Yes, 328 Dorchester Street, west.

Q3. And do you handle and sell fountain pens? A. I do.

Q4. How long have you handled fountain pens? A. Something like three and a half years.

Q5. Now, what kind of fountain pens do you handle at present? A. A. A. Waterman.

Q6. How long have you handled A. A. Waterman fountain pens? A. That is the only pen I ever handled.

Q7. Have you ever handled Waterman's Ideal fountain pens? A. No, sir.

Q8. Will you please state the circumstances of how and where you bought the A. A. Waterman fountain pens? A. Well, just at the time that I put in fountain pens—it would be about three and a half years ago, it may be more or less—Warwick Brothers and Rutter, of Toronto, had their representative come in to
1355 me, and proposed that I should sell fountain pens, seeing that I was selling stationery. When I only knew about one Waterman pen, I could not tell exactly now whether he told me it was the L. E. Waterman or what it was, but he told me it was the Waterman pen, and as I only knew of one Waterman pen I bought it, and I sold the pens for real Waterman pens until I found out different.

Q9. When did you find out different? A. Oh, some fifteen or eighteen months afterwards, when a pen was brought in to me for repairs, and I brought it to L. E. Waterman & Company, and they refused to repair it. That was the first time I woke up to the fact.

Q10. You had seen the Waterman Ideal fountain pens generally advertised before you put in this stock of pens? A. Yes,
1356 sir.

Q11. And when you bought these pens, did you think you were buying the Waterman Ideal fountain pen? A. I was told that this was a special, put up specially for Warwick Brothers & Rutter, of Toronto. This pen is called the "Lincoln."

I was left under the impression that I had the real Waterman pen, put up for a special firm in Canada here.

Q12. And you were given to understand that these pens were made by the same people who made the Waterman Ideal Fountain pen? A. No, I will not say that; I will not say I was told, but I was left under the impression that it was the L. E. Waterman pen, the only pen that I knew of. I was never told it was a different concern.

CROSS-EXAMINATION by Mr. Bacon:

XQ13. Do you sell any other pens except the Lincoln? A. No, sir.

XQ14. This Lincoln pen does not have A. A. Waterman & Company's name on it at all, does it?

Witness: On the pen?

Counsel: Yes.

A. Yes.

XQ15. It is the "Lincoln pen manufactured by A. A. Waterman & Company"? A. Yes.

XQ16. And do you know who the representative of Warwick Brothers & Rutter was? A. Well, I do not quite remember his 1358
name.

XQ17. Do you remember his description? A. Yes, very much.

XQ18. Can you describe him? A. Yes. He is a short fellow, slim, dark complexion, dark hair—a young fellow I should judge about twenty-five or twenty-eight years of age.

XQ19. Did he give you a bill, or any advertising matter, when he sold the pens to you? A. No advertising matter whatsoever. The bill came along as "3 dozen Waterman pens, "Lincoln," so much.

XQ20. Well, the bill had A. A. Waterman & Company on it? A. No, sir, "Lincoln" pens. There was no mention of A. A. 1359
Waterman & Company at that time, because I would have found out before.

XQ21. Was not the name of A. A. Waterman & Company on the pen itself? A. Yes. I said so before.

XQ22. And you saw that the moment you got it? A. Not necessarily. I found out afterwards.

XQ23. How long afterwards? A. When my attention was called to it, when I brought an A. A. Waterman pen to L. E. Waterman for repairs.

XQ24. Well, how long had you carried the pens without seeing the name of A. A. Waterman & Company on them? A. Well, as I am telling you, about fifteen or eighteen months.

1360 *George J. Boncnfant*

XQ25. Can you tell us the conversation you had with the representative of Warwick Brothers & Rutter, when he first sold the pen to you? A. I believe I have said enough about that. I was told it was a special pen put up for Warwick Brothers & Rutter, of Toronto.

XQ26. Did he not tell you it was made by A. A. Waterman & Company? A. No, sir.

XQ27. Are you willing to swear that he did not? A. I believe I have taken my oath.

XQ28. Is your memory sufficiently accurate during those years to know that he did not say that it was the A. A. Waterman &
1361 Company people who had made it? A. I said before that I would not swear that he said it was the L. E. Waterman Company, but he did not say it was the A. A. Waterman Company.

XQ29. Well, are you sure of that? A. Well, I should be when I take my oath.

XQ30. Did he give you his card?

Witness: His card in reference to—

Counsel: His business card?

A. Well, I knew him before. I had bought from the man before. He did not have to give me his card every time he called on me.

XQ31. That is the first time you had ever bought any stationery from him? A. No, I had a stationery business before that. I had a stationery business before I bought the pens. He in-
1362 duced me to go into dealing in fountain pens, on account of my doing a stationery business.

XQ32. Well, now, will you give us the whole conversation, as nearly as you can remember, when he first sold you the pens? A. Well, the conversation was this, that I might as well handle pens so long as I was in the stationery business, although it was on a small scale, and he gave me the explanation that this pen, the Waterman pen, was put up under the name of "Lincoln," as a speciality for Warwick Brothers & Rutter, of Toronto, and he guaranteed that they were the same pen.

XQ33. Did these pens come in little boxes? A. Yes, all separate. I believe I have the empty boxes at the store at the present time.

XQ34. And those boxes had printed matter on them? A. es.

XQ35. And very plainly on the outside of the box it states that ey are manufactured by A. A. Waterman & Company? A. ell, I could not say yes or no. I believe Warwick Brothers & utter had their own advertising on the box.

XQ36. Will you produce one of those boxes? A. I could, s, sir. I have some of the empty boxes at the store, I be- ve.

XQ37. You will do so today? A. I will do so today, yes.

XQ38. About how often does that representative come to see u? A. Well, he has not been near me since.

1364

XQ39. But you have kept selling them ever since? A. Cer- inly; I have got to get rid of them.

XQ40. And they are wholly satisfactory? A. No.

XQ41. How many did you buy? A. Three dozen.

XQ42. And you never bought any since? A. No.

XQ43. And are those the only pens that you sold? A. The ly pen.

XQ44. And in three years and a half you have not sold the ree dozen pens? A. No, I have not. I sold some of them hen I could talk to a client, and tell him that that was "the pen." fter I found out it was not, I could not have the nerve to tell a an that it was "the pen."

XQ45. Well, could you not have the nerve to tell him it was a Lincoln" pen? A. I did not have to tell him that. He could e it for himself. That is what they told me afterwards. They id I was asleep.

1365

XQ46. Didn't you know that the Lincoln pen is a cheap grade f pen, that is sold under that name simply because it has a ery cheap price, and is not recommended as the best pen?

Witness: Known as cheap pens?

Counsel: Yes.

A. They must have robbed me, then.

XQ47. How much do you sell them for? A. $1.50, $2.50, 3.00, $3.50, $4.00 and $4.50.

XQ48. Those $4.50 pens are decorated on the outside? A. Not at all, they are plain. I never got a decorated pen from Warwick Brothers.

XQ49. And you say that this representative has not seen you since? A. Not since, not,—not since the time I have discovered that the pen was not the one I supposed I was buying. I saw him afterwards, but he never told me—he never put me wise; but from the time I found out that the pen I was selling was not the pen manufactured by the real Waterman people I have not seen him.

XQ50. By whom do you mean the real Waterman pen? A.
1367 I only knew of one Waterman, and that was L. E., but I did not know the initials then. If I did I would have found out before. I was under the impression that that was the object. I was looking for the Ideal pen. That was the time he told me that this pen was put up specially for these people, being their own representatives for Canada.

XQ51. Did he tell you who put them up? A. He did not tell me it was A. A. Waterman or L. E. Waterman. He told me it was the pen put up for them specially.

XQ52. Then, he did not designate between the two? A. No, no.

XQ53. You never have had any communication direct or indirect with the Modern Pen Company? A. No, sir.

XQ54. Or A. A. Waterman & Company? A. No, sir.

1368 XQ55. And you never had any representative of A. A. Waterman & Company, or the Modern Pen Company, call on you? A. No, sir.

XQ56. You do not know anything about them directly or indirectly? A. Indirectly I do.

XQ57. How? A. When I found out that A. A. Waterman & Company were not the people I was supposed to have the pen from. That is indirectly, I believe.

XQ58. Then, have you ever handled the "Modern" pens, so-called? A. No, sir.

XQ59. Manufactured by A. A. Waterman & Company? A. No.

XQ60. Their high grade pens? A. No, sir.

XQ61. Have you ever handled the self-filling pen? A. No, sir.

XQ62. These Lincoln pens are not self-filling? A. No, sir.

XQ63. They are not middle joint? A. I do not quite understand what you mean by "middle joint."

XQ64. Well, will you go to your store and produce here the original first bill for these pens that you bought? A. I do not know if I could do that.

XQ65. Will you produce the box? A. I will produce the box. I am positive I have that.

XQ66. Each pen has a box? A. Yes, under separate cover. 1370

XQ67. And will you produce that? A. I will.

XQ68. I presume it was a bill of Warwick Brothers & Rutter? A. The first and only bill that I received was under the heading of Warwick Brothers & Rutter, and I think it billed so many Lincoln Waterman pens.

The box referred to by the witness Bonenfant is produced and offered in evidence by the defendant, together with the printed "Hints to users," and these are marked Defendant's Exhibits "F" and "G" respectively.

Mr. Watson: I object to the production of these exhibits as immaterial and irrelevant.

Examination taken and reduced to writing, on this sixteenth day of March, nineteen hundred and eleven, the signature of the said witness being waived by agreement of counsel for both parties. 1371

1372 *Arthur Edward Bennett*

ARTHUR EDWARD BENNETT, who resides in the City of Montreal, Province of Quebec, Dominion of Canada, and is a clerk, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, residence and occupation? A. my name is Arthur Edward Bennett; I am a clerk, and I reside here in Montreal.

Q2. What is your business, Mr. Bennett? A. Well, I am with the James Coristine Company, fur manufacturers.

1373 Q3. You had some transactions recently with Granger Freres, in purchasing a fountain pen. Will you please relate what took place at that time? A. In the first instance I purchased a Sterling fountain pen, but I was not satisfied with it, so I returned to the store—

Mr. Bacon: Objected to this evidence as irrelevant, immaterial and incompetent, Granger Freres not being legally connected in any way with the defendant.

Witness (continuing): I returned to the store, and expressed my desire to purchase a Waterman fountain pen. I was shown two pens, and I believed them to be the Waterman fountain pens.

1374 One I was told was an improvement upon the other, inasmuch as it unscrewed in the middle, and had other advantages, which made it the modern Waterman fountain pen.

I thought it a little funny that there should be two kinds of pens, and I mentioned this to the salesman at the store, and he told me that they were the same firm, and the same pen, but one was an improvement upon the other. The old fashioned type unscrewed near the nib, but the modern unscrewed in the middle, and for the reason that one's fingers would not be stained, that was an improvement.

Q4. Did you buy either one of these pens? A. I bought the old fashioned type, which I believe to be the only one, as a matter of fact.

Q5. And was that a Waterman Ideal fountain pen that you purchased? A. In the end, yes.

Q6. And the pen that had the middle joint, which the salesman called the "Modern" pen, what did the salesman say to you regarding the makers of these two pens? A. That they were the same firm, one operating in New York, and the other in Montreal, Canada; one selling pens under the name of A. A. Waterman & Company, and the other selling pens under the name of Waterman, but the initials I do not recollect.

Q. And the pen that had the middle joint was the A. A. Waterman pen? A. Yes. That was the improved one.

Q7. And the salesman told you that these concerns were the same, one operated in New York, and the other in Montreal, and one name was used in New York, and the other name was used in Canada? A. Precisely. 1376

CROSS-EXAMINATION by Mr. Bacon:

XQ8. He did not tell you, did he, that the New York firm was A. A. Waterman & Company? A. Yes, sir.

XQ9. And that the Canadian was L. E. Waterman & Company? A. I could not be sure about these initials, but they were the same firm. They were the same people, but one operated in New York, and the other in Montreal.

XQ10. You remember that he told you that one of them was an A. A. Waterman & Company pen? A. Oh, yes, most decidedly, because I went to the Waterman store and queried it when I wanted to change the nib. It was not exactly to my satisfaction, so I went to the store, and they explained this to me. 1377

XQ11. To what store? A. To the Waterman store on St. Francis Xavier Street (Montreal).

XQ12. And there they told you what? A. Well, I told the story to them, and asked the question whether there were actually two firms manufacturing Waterman pens, and they said no.

XQ13. Do you know the name of the salesman at Granger Freres? A. No. I had never seen him before in my life.

XQ14. Have you given us the exact conversation? A. Precisely.

XQ15. Repeat it, will you? A. In the first place I went to the store, and I bought a Sterling fountain pen. I was not satisfied with it, so I expressed my desire to buy a Waterman fountain pen, and he showed me two kinds of Waterman fountain pens, one supposed to be an improvement upon the other for the reason that it unscrewed in the middle—an improvement upon the old fashioned type which unscrewed near the nib, so as not to soil your fingers, or anything of that description.

He mentioned these improvements, and he mentioned that
1379 they were the same firm, one operating in America, and the other in Montreal, Canada.

I thought it was rather curious, so he said they were absolutely the same firm, only that one pen was an improvement upon the other. They were the same people.

XQ16. And did he say that the New York firm was A. A. Waterman & Company? A. A. A. Waterman & Company? Well, yes, he did. He actually said that.

XQ17. Did he say one of the pens was the "Ideal," and the other was the "Modern"? A. He said one was the "Modern" pen for the reason of the improvement.

XQ18. Did he call the other the "Ideal"? A. No, he did not call it the "Ideal." He called one the "Modern" pen, which was the improved pen over the other one.

1380 XQ19. And what you actually did buy was an Ideal Waterman pen? A. In the end, yes.

XQ20. And then Granger Freres sell both kinds, do they? A. Oh, yes.

XQ21. But you have no way that you can identify the man that you say sold you this pen? A. I could identify him, most decidedly.

XQ22. You cannot give his name? A. No. It was simply a matter of a purchase.

XQ23. How long ago was this? A. You see, in the first place I purchased the pen the day before I went into the hospital,

and that would be the eleventh of January of this year. I came out of the hospital on the fourteenth of February. I would not be sure about that date, but at all events I got this Ideal fountain pen about two or three days afterwards.

XQ24. When you were just out of the hospital? A. Yes.

XQ25. You were pretty sick then, were you? A. Yes.

XQ26. What were you in the hospital for? A. I was in the hospital for an operation for an ulcerated and perforated stomach.

XQ27. You were pretty sick when you bought the pen? A. Oh, no.

XQ28. That was two or three days after you got out of the 1382
hospital?

Witness: When I bought the Ideal?

Counsel: When you bought the Ideal?

A. I was jolly well, then.

XQ29. And that was two or three days after you got out of the hospital? A. Yes.

XQ30. And you are absolutely certain that this salesman, whoever he was, told you that it was the same people in New York that manufactured the "Modern," that manufactured the "Ideal" in Canada? A. Yes.

XQ31. You could not be mistaken about that? A. I could not be mistaken. I am sure I am not mistaken about that.

XQ32. Will you go around to Granger Freres, and find out 1383
the man who told you this?

Mr. Watson: No, he won't.

By Mr. Bacon:

XQ33. I ask you again if you are willing to go to Granger Freres, and identify the man who sold you this Ideal pen? A. Of course, I am not in a legal position to say. Mr. Watson says no.

XQ34. If it was not for what he has just said, you would have answered "Yes," would you? A. Well, I don't know that I should. I know what I say is perfectly true.

1384 *Arthur Edward Bennett*

XQ35. And you are not willing to give us any information that will permit us to identify the man who told you this, so that we can corroborate it or disprove it by him? A. If the man comes here, most decidedly I would say that was the man.

XQ36. How can we know who he is? You do not give his name? A. I can give you the dates. I do not give you his name for the simple reason that I do not know it. I only know that he sold me the pen, and apart from that he is no friend of mine, and I had never seen him before, and have never seen him since.

1385 XQ37. And you are not willing to go to Granger Freres to find out his name, and come back here and testify to who he was? A. No.

XQ38. You are not willing to do that? A. No.

By Mr. Watson:

XQ39. Can you give a general description of this man, as best you remember? A. Yes. He is rather thin. Well, I should imagine he would be about twenty-five years of age, light hair, I think, about five feet five or six inches tall, so far as I remember.

By Mr. Bacon:

XQ40. That is all the description you can give? A. Yes.

1386 XQ41. How many salesmen are there in Granger Freres? A. I really could not tell you. I do not know.

XQ42. Is it a large store? A. Fairly. I have only been in it twice, you know.

XQ43. In the two days, you could see whether it was large or small? A. It seemed to be quite a fair store.

XQ44. A good many salesmen? A. I only saw one. The others were girls, so far as I could see. I did not take much interest in anything but buying the fountain pen.

XQ45. You do not know how many salesmen they have? A. No, I do not.

XQ46. Where is Granger Freres' place? A. On Notre Dame Street, by Notre Dame Church. It is on the north corner of Notre Dame Street, and the square.

Examination taken and reduced to writing, on this sixteenth day of March, nineteen hundred and eleven, the signature of the said witness being waived by agreement of counsel for both parties.

It being now twelve-thirty of the clock, the commission adjourned to half past two of this clock in the afternoon.

1388

The commission reconvened at 2:30 o'clock P. M.

Mr. Bacon: Before we swear the next witness, I want to make a motion. I move to strike out the evidence of the last witness, Bennett, on the ground that it is irrelevant, immaterial and incompetent, and especially on the ground that Granger Freres are not agents of the defendant, except in the sense that they buy pens of them, and sell them again, just as they buy pens from the plaintiff and sell them again.

I ask Mr. Watson to waive the formality of an order, and all technicalities, and now and here, before this Ref- 1389
eree, take the testimony of Joseph O. Pineault, on the part of the defendant, and state that during the recess for lunch I have visited the retail store of Granger Freres, and find that in that store they employ fifty-six employees, twenty-two females and thirty-four males; that the store is about seventy-five feet by sixty feet, four stories and basement, and that Mr. Joseph O. Pineault seems to correspond more than any other person to the description given by the witness Bennett.

I make this request to take his testimony, and also the testimony of Mr. Alphonse Auguste Granger, the

1390 *James Southerland*

partner in charge of this retail store, so as to save another trip to Montreal.

Mr. Watson: I state on the record that it is entirely irregular for the defendant to introduce any testimony prior to the time plaintiff has closed its testimony in chief, and as we have no notice of this witness prior to this time, and particularly on the ground of the irregularity of the proceeding, we decline to interrupt the conduct of this testimony for the purpose counsel for defendant requests.

1391 JAMES SOUTHERLAND, who resides at Montreal, Canada, and is in the stationery business, aged twenty-one years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, place of business and occupation? A. My name is James Southerland, and I reside at 2359 Mance Street, in the City of Montreal, Canada. I am manager of C. F. Dawson, limited.

Q2. What is Mr. Dawson's business? A. Manufacturing stationer.

Q3. And where is his place of business? A. 239-241 Notre Dame Street, West, Montreal, Canada.

1392 Q4. How long have you been connected with Mr. Dawson? A. For the past six years.

Q5. And how long have you been in the stationery business? A. Eighteen years.

Q6. During what part of this time have you been handling and selling fountain pens? A. For eighteen years.

Q7. And have you during this period been generally familiar with the fountain pens on the market? A. Yes, I think I have.

Q8. During this period what fountain pens have you handled and sold? A. I have sold the L. E. Waterman and the Sterling, principally.

1393

Q9. How long have you been selling the L. E. Waterman Ideal fountain pen? A. Well, I should say about twelve years, as near as I can recollect.

Q10. When customers come in and ask for Waterman's Ideal fountain pen, what do they usually call for? A. Waterman's fountain pen.

Q11. And when customers called for Waterman's fountain pen, to your knowledge have you ever discovered that they expected to buy any other kind than Waterman's Ideal fountain pen?

Mr. Bacon: Objected to as impossible to be answered by this witness.

1394

Mr. Watson: I said within his knowledge.

A. I think they generally mean L. E. Waterman's pen when they ask for Waterman's fountain pen.

Q12. So far as your knowledge goes, what is the name by which Waterman's Ideal fountain pens are known among the trade and public? A. Waterman pens.

Q13. And have you found in your experience, so far as the matter has come to your personal knowledge, that the Waterman Ideal fountain pen has generally given satisfaction to your customers? A. Entirely.

Mr. Bacon: Objected to as impossible for this witness to know.

1395

CROSS-EXAMINATION by Mr. Bacon:

XQ14. Have you ever handled the A. A. Waterman & Company pen? A. No, sir.

XQ15. You do not know anything about it? A. I know there is an A. A. Waterman pen on the market, but I do not know the pen.

XQ16. You never had occasion to compare it with the L. E. Waterman pen? A. I have had them brought to me for repairs.

XQ17. That is all? A. Yes.

XQ18. All kinds of pens have to be repaired? A. Certainly.

XQ19. And if a man had an A. A. Waterman pen, he would be as apt to call it a Waterman pen as anything else, would he not? A. I suppose he would, yes.

By Mr. Watson:

XQ20. And when he called it a Waterman pen, he called it so because he thought it was an Ideal Waterman fountain pen? A. Yes. I do not think they would know the difference. The ordinary customer comes into the store, and asks for a Waterman
1397 pen.

XQ21. And you personally have had a great many people come into your store, with a pen marked A. A. Waterman & Company, and tell you that they thought it was a genuine Waterman Ideal fountain pen? A. Yes, I have.

By Mr. Bacon:

XQ22. Can you name any person that has ever told you that the A. A. Waterman & Company pen that they had was an Ideal fountain pen? A. Well, I cannot recollect any particular man, but I can recollect this, that there have been customers come to me with an A. A. Waterman pen to have it repaired. I would look at the pen, and say, "No, I cannot repair it, as we only
1398 handle the L. E. Waterman pen." The customer would say, "That is funny. That was sold to me as an Ideal fountain pen."

XQ23. They are all marked "Modern," are they not? A. Yes, but the ordinary customer never looks at that. Waterman is the name that sells the pen.

XQ24. But you cannot name a single person—A. (interrupting) There are too many people going through my hands in a day to recollect any particular party.

XQ25. And how many pens during the last six years have you ever repaired, bearing the name of A. A. Waterman & Com-

pany? A. Well, I do not take A. A. Waterman pens for repairs. I refuse them.

XQ26. How many pens have ever been presented to you during that period to be repaired? A. Well, I can't tell you exactly how many pens were offered for repair, but I would say I suppose in a year we would have anywhere from fifteen to twenty-five, at least.

XQ27. In the year? A. In the year.

XQ28. How many L. E. Waterman pens during that time were presented to you for repairs? A. I could not tell you, because they are coming in continually all day long, sometimes to be filled and cleaned, and washed out and fixed up. It only takes 1400
five minutes to do the job. We have a boy doing nothing else.

XQ29. Hundreds in a week? A. No, not hundreds.

XQ30. A hundred in a week? A. No.

XQ31. How many? A. I would say on an average to be filled and cleaned we would clean from five to ten every day right in our place, without sending them to the factory.

XQ32. And how many to be repaired? A. Well, I should say about ten a week.

Examination taken and reduced to writing on this sixteenth day of March, nineteen hundred and eleven, the signature of the said witness being waived by agreement of counsel for both parties. 1401

Mr. Watson: Counsel for plaintiff states on the record that he has concluded the examination of witnesses under the commission issued to Edmund Desaulniers, notary public, and counsel for plaintiff also states on the record, for notice to defendant's counsel, who is now present, that the testimony under the commission issued to the Honorable J. H. Denton, at Toronto, will be gone on with on Saturday morning, the eighteenth instant, at 9:30 o'clock, at his chambers in the City Hall, Toronto, Canada.

EDMUND DESAULNIERS.
Commissioner.

UNITED STATES CIRCUIT COURT,

DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY, Plaintiff, against MODERN PEN COMPANY, Defendant.	In Equity.

1403 Testimony taken under the Commission issued to The Honorable J. H. Denton by the United States Circuit Court for the Southern District of New York, United States of America, dated Tenth day of March, 1911, pursuant to an order of the United States Circuit Court entered and filed on Third day of March, 1911, said Commission being annexed to these depositions pursuant to such order. Said testimony was taken in the City Hall, City of Toronto, Province of Ontario, Canada, beginning March 18th, 1911, at 9:30 o'clock in the forenoon pursuant to due notice to opposing counsel.

Appearances:

Samuel S. Watson, Esq., for the Plaintiff.

1404 Alexander S. Bacon, Esq., for the Defendant.

A. G. Newall, of Thomas Bengough & Co., sworn in as stenographer.

NORMAN A. SINCLAIR, who resides in Toronto, Canada, and whose occupation is Stationer, age 21 years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed and examined on the part of the plaintiff doth depose and say as follows:

Q1. Please state your name, place of residence and occupation? A. Norman A. Sinclair, wholesale stationer, Toronto, Canada.

Q2. With what concern are you connected? A. Warwick ros. & Rutter, Limited.

Q3. Where is their place of business? A. 401 King Street, 'est, Toronto.

Q4. And how long have you been connected with that con- ern? A. Twenty years.

Q5. Is it a Corporation or a partnership? A. Corporation.

Q6. Who are the Officers of that Company? A. George R. Varwick is President and C. F. Rutter, Vice-President, and harles E. Warwick, Secretary-Treasurer.

Q7. And what are your duties in this business? A. I am the anager of the Stationery Department.

1406

Q8. And as manager you have general management of the hole business? A. The Stationery Department.

Q9. Of the whole Stationery Department? A. Yes, sir.

Q10. Does that include the buying and selling of the merchan- ise handled in that department? A. Yes.

Q11. And how long has that been your duties? A. Approxi- nately ten years.

Q12. And in that department you handle and sell fountain ens? A. Yes, sir.

Q13. Do you handle and sell fountain pens which are marked . A. Waterman & Co., New York? A. I do not know that hey are marked A. A. Waterman & Co., New York; they are narked A. A. Waterman & Co.

1407

Q14. How long has your concern been handling fountain ens? A. Approximately 40 years, 30 years.

Q15. Ever since you have been connected with the business? . Before that.

Q16. And during that time what kind of fountain pens have ou handled? A. All kinds; I can hardly tell you—we have so nany kinds.

Q17. What kind of fountain pens do you handle and sell ow? A. Numerous kinds.

Q18. Will you enumerate some? A. Mostly our own im- printed lines.

1408 *Norman A. Sinclair*

Q19. And what are the imprints on those lines? A. "Perfect" is one name; "Vice Regal"—"Vice Roy," I mean; "University" and "Imperial" in two or three styles, and those made by the A. A. Waterman & Company.

Q20. And how are those pens marked or stamped which you sell which you get from A. A. Waterman & Company? A. Marked with their imprint and some patent number underneath the name.

Q21. They bear the name of A. A. Waterman & Company? A. Yes.

Q22. And how long have you handled those pens? A. I think it is about three or four years.

1409

Q23. Do you have the charge of the buying and selling of fountain pens as well as other stationery goods in your department? A. Yes, sir.

Q24. And where did you buy these pens which are marked and stamped A. A. Waterman & Company? A. From A. A. Waterman & Company or Modern Pen Company, under the two names.

Q25. Where is their place of business? A. I think it is 22 Thames Street, New York, if I am not mistaken.

Q26. Have you been dealing extensively in these pens that you got from A. A. Waterman & Co., New York? A. Oh, we have sold quite a few.

Q27. Do you advertise quite extensively? A. Not much; some; Oh, well, fairly good amount.

1410

Q28. You represent yourself as the Canadian Agents of A. A. Waterman & Co.? A. No, I do not think we do, we are agents for the "Lincoln" pen.

Q29. You have never represented yourself to the trade in any way as being agents of the A. A. Waterman & Co., New York? A. No.

Q30. You are prepared to say that you have not put out any advertisements or any advertising matter that shows that you hold yourself out as the agents of the A. A. Waterman & Co., New York? A. No.

Mr. Bacon: I object to the evidence as immaterial, irrelevant and incompetent.

Q31. You sell these goods which you get from A. A. Waterman & Co., as Waterman Pens, Waterman Fountain Pens? A. We have been selling them as "Lincoln" fountain pens.

Q32. Never sold them as Waterman pens? A. No.

Q33. Never supplied them on orders which called for Waterman pens? A. Well, I could not—to the best of my knowledge I could not—I don't know that we have or we have not. You know how this is. A traveller orders a Waterman pen—they abbreviate everything that they order in our business; the articles are so numerous they abbreviate everything, every article. If 1412
they call for Waterman pens at all they would not put A. A. on the order; generally they would put "Wat" perhaps "Lin" for Lincoln; that is generally the way; the salesmen put down "Wat" or "Lin;" of course I do not see all the orders; they are sold as Lincoln fountain pens.

Q34. Not sold as Waterman pens? A. Not sold as Waterman pens.

Q35. Not advertised as Waterman pens? A. No, sir; recently, I might say, that we have left off the stamp or "Lincoln" name on the barrel, and I think on the box; that is the last six or eight months.

Q36. What do they stamp them now? A. A. A. Waterman & Company, New York. When I made the contract—when I 1413
started taking up the line, I think it was the "Lincoln" fountain pen made by A. A. Waterman & Company, New York, and consequently our case and everything is labelled "Lincoln Fountain Pen;" at least, sold them under that name, although the stamp "Lincoln" is left off the barrel.

Q37. You have never billed them out of your establishment as Waterman pens? A. I could not say; the girls make a direct copy of what the salesman puts down in his order sheet. If he abbreviates the proposition, and puts "Wat" pens, they will put "Wat" pens; they put whatever the traveller puts down.

Q38. You say you never sold these as Waterman pens? A. We never instructed the salesmen or sold them ourselves as Waterman's pens.

Q39. You don't do that because you considered that that name belongs to the L. E. Waterman Company?

Mr. Bacon: I object as immaterial, irrelevant and incompetent what he considered.

Q40. Is it not a fact that Waterman's Ideal Fountain Pens have been known and called for in the trade as Waterman's pens for twenty years? A. I do not know.

1415 Q41. Never heard? A. I have heard of the Ideal pen.

Q42. Have you not heard them called Waterman's pens, Waterman's fountain pens? A. These we do sell are called Waterman's fountain pens.

Q43. You sell Waterman's Ideal Fountain Pens? A. No. We do not sell Waterman's Ideal Fountain Pens.

Q44. You do not handle them? A. No.

Q45. You never knew them in the trade? A. I think we sold them some ten years ago, had one case in for a time; I have forgotten, but I think we did.

Q46. You never advertise these pens you got from A. A. Waterman & Company as Waterman's pens? A. No, sir.

Q47. And you never billed them out as Waterman pens? A. I don't think so, as far as I can remember.

1416 Q48. You never billed them out in answer to an order for Waterman pens as Waterman pens—never supplied them as Waterman pens? A. No, no; if they send in an order to us, one of our customers that we had supplied these pens before to, they would send in an order for one of those pens, call it Waterman pen; we would naturally sell them the pen if we had sold them goods before.

Q49. I show you copy of the "Bookseller & Stationer" for October, 1910, and published in Toronto, Canada, an advertisement which appears on the inside of the front cover, and ask you if that advertisement was inserted by Warwick Bros. & Rutter, Limited, with which you are connected? A. Yes, sir.

Mr. Watson: The advertisement identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 23.

Mr. Bacon: Objected to as immaterial, irrelevant, incompetent and in no way connected with the defendant; no connection between the defendant and this firm.

Q50. Will you please look at the advertisement which I have just shown you, Plaintiff's Exhibit No. 23, and over the name of the concern Warwick Bros. & Rutter, Limited, appear the words "Canadian Agents." What do you understand that means? A. It means this, "Waterman's Lincoln" (witness points to top of page of Plaintiff's Exhibit number 23). 1418

Mr. Watson: It is stipulated that the advertisement appearing on the inside cover of the magazine identified by Mr. Sinclair may be used without the rest of the contents or advertisements of the magazines.

Q50½. I show you cover of "Bookseller & Stationer" for October, 1909, and the advertisement appearing on the inside cover of that magazine, and ask you if that advertisement was also inserted by Warwick Bros. & Rutter? A. Yes, sir.

Mr. Watson: The advertisement identified by the witness is offered in evidence and the same is marked Plaintiff's Exhibit number 24; it is stipulated in this case, as in the other, that the advertisement appearing on the 1419
inside cover of the magazine identified by Mr. Sinclair may be used without the rest of the contents or advertisements of the magazine.

Mr. Bacon: Make that stipulation cover all of those magazines.

Mr. Watson: It is stipulated that the inside cover of both of the magazines, Plaintiff's Exhibits numbers 23 and 24 may be used only and the balance of the magazine omitted from the record.

1420 *Norman A. Sinclair*

CROSS-EXAMINATION by Mr. Bacon:

XQ51. Mr. Sinclair, do Warwick Bros. & Rutter, Limited, do more than buy these pens of A. A. Waterman & Company or the Modern Pen Company and sell them again? Are they agents in any other sense than they buy and sell? A. No.

XQ52. Does the Modern Pen Company or A. A. Waterman & Company have anything to do with these advertisements offered in evidence? A. No, sir.

XQ53. Did they know anything about them? A. No.

XQ54. Did they pay for them wholly or in part? A. No,
1421 sir.

XQ55. As far as you know they have never seen them to this day? A. No, sir.

XQ56. When you sell an A. A. Waterman pen do you sell them as A. A. Waterman & Company's pens or merely as Waterman pens? A. Sell them for A. A. Waterman & Company's pens; the advertisements show that.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ57. When you take these orders or salesmen take these orders for the pens, do not you send those orders to the A. A. Waterman & Company to have them filled and shipped direct to
1422 the customers? A. No, sir.

RDQ58. Do not you ever do that? A. No, sir.

RDQ59. They do not know who you sell the goods to at all? A. No, sir.

RDQ60. And these pens are all in little boxes? A. Yes, sir.

RDQ61. They are supplied by A. A. Waterman & Company, New York? A. Yes, sir.

RDQ62. And have their name "A. A. Waterman & Company, New York"? A. Yes, on the box.

RDQ63. And have your name on it? A. No, sir.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ64. In any instance have you ever bought goods from A. A. Waterman & Company or Modern Pen Company that your name has been placed on the goods or on the box? A. I think not.

RXQ65. In other words, you buy from them just as anybody else buys from them? A. Yes.

RXQ66. And you are not agents in any sense whatever except that you purchase from them? A. Well, excepting that we have an arrangement they would not sell the "Lincoln" Fountain Pen to anybody else in Canada, fountain pen stamped "Lincoln," that 1424
is all.

RXQ67. And in your instructions to agents, you instruct them to sell these as "Lincoln" pens or A. A. Waterman & Company? A. A. A. Waterman & Company's pens.

RXQ68. That is your invariable instruction? A. Yes.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ69. You do have some agreement or special arrangement with A. A. Waterman & Company for the sale of these goods? A. Well, the "Lincoln" fountain pen, they are not allowed to sell to anyone else. I have not the details; at the time of the contract which I made some three or four years ago, they were not to sell the Lincoln fountain pen or fountain pen stamped "Lin- 1425
coln" to anyone except ourselves other than in Toronto, Montreal and Quebec City, I think it was; it was an imprinted pen, the "Lincoln," they were not to sell those; they could sell those in those three cities; I don't know that I would have it in writing; the thing has passed into history; I think now "Lincoln" is left off them.

RDQ70. Was that agreement in writing? A. I think it was in writing; I think the man from the Modern Pen Company may have wrote a letter to that effect.

RDQ71. Will you produce that letter? A. If I can find it I will. May I just send you the letter if I can find it; I don't

know that I have it; it is three years ago now, and it was a matter of no moment to us.

Mr. Watson: If you send it down and Colonel Bacon accepts it, I will.

Mr. Bacon: Yes, I will.

WALTER WOODS, who resides in Hamilton, Canada, and whose occupation is merchant, aged 21 years and upwards, being duly and publicly sworn pursuant to the direction annexed
1427 hereto and examined on the part of the plaintiff doth depose and say as follows:

Q1. Please state your name in full, and your place of residence and your occupation? A. Walter Woods, Wholesale Merchant, Hamilton, Province of Ontario, Canada.

Q2. And where is your place of business in Hamilton? A. McNabb Street, Hamilton.

Q3. And what line of business are you in? A. Wholesale wooden-ware and general sundries.

Q4. In connection with this business, have you ever had occasion to handle and sell fountain pens? A. We have.

Q5. I show you a letter and ask if that emanated from your house, addressed to L. E. Waterman & Company, Montreal?
1428 A. Yes, this is from our house.

Mr. Watson: Letter, dated October 11th, 1910, identified by the witness, is offered in evidence, and marked Plaintiff's Exhibit No. 25.

Mr. Bacon: Objected as immaterial, irrelevant, incompetent and in no way connected with the defendant.

Q6. I show you another letter, which is dated October 19th, 1910, addressed to L. E. Waterman & Company, Montreal, and ask if that came from your house? A. Yes.

1429

Mr. Watson: The letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit Number 26.

Mr. Bacon: The same objection.

Q7. From whom did you secure the fountain pens which you were seeking at that time? A. Brown Bros., Toronto.

Q8. What did you order for them? A. Waterman fountain pens.

Q9. How many? A. One dozen, I think.

Q10. And did you receive from them an invoice of those goods? A. Yes, sir.

Q11. Have you got that invoice? A. Yes, sir. 1430

Q12. Will you please produce it? A. Here it is, dated October 25th, 1910.

Q13. Annexed to this invoice I note carbon copy of letter? A. That is carbon copy of order; that is just the order as sent in which was attached to the invoice.

Mr. Watson: The letter dated October 19th, 1910, from Walter Woods & Company, to Messrs. Brown Brothers, Toronto, and the invoice produced by the witness are offered in evidence and the same marked Plaintiff's Exhibit 27.

Mr. Bacon: Objected to as immaterial, irrelevant, incompetent and no connection shown between Brown Bros. and the defendant. 1431

Q14. Do you know what kind of pens were shipped on account of that order, bill? A. Nothing any further than the invoice.

CROSS-EXAMINATION by Mr. Bacon:

XQ15. Do you know whether they were made by L. E. Waterman or A. A. Waterman? A. I do not know anything about it.

1432 *Walter Woods*

RE-DIRECT EXAMINATION by Mr. Watson

RDQ16. When you ordered Waterman pens whose manufacture of pens did you expect to get?

Mr. Bacon: Objected to as immaterial, irrelevant and incompetent.

A. I only knew one; I didn't know that there was a second make at all.

RDQ17. Whose was that? A. Just the Waterman pen; the order came to me in the regular course of business and I ordered it in the regular way.

1433

RDQ18. Did that mean Waterman Ideal Fountain Pens? A. No, I did not know anything about "Ideal" because I did not order "Ideal," I only knew one Waterman pen, and I ordered.

RDQ19. From the L. E. Waterman—the same as your letter is addressed? A. Just the same.

RDQ20. That is the only concern you knew of that made Waterman pens? A. That is the only one I knew of.

Mr. Bacon:

RDQ21. And you do not know what pens you got? A. No, because they were sent direct to my customer.

1434

Plaintiff's Exhibit 25. 1435

(Letter head of Walter Woods & Co.)

Hamilton, Ont., October 11th, 1910.

Messrs. L. E. Waterman Co.,
136 St. James St.,
Montreal, Que.

Gentlemen:

One or two of our men are asking for fountain pens and one has sold 12 assorted (Medium and Fine points) Blk. mottled and chased at $2.50, the regular discount to retail trade to come off this and we presume we can get a profit. 1436

If you have such a pen, please mail for our account to W. H. Taylor, Cochrane, Ont., and send us particulars of prices of such lines as we can sell to the country trade and perhaps to the city trade.

Thanking you in advance for early attention, we are

Yours truly,

WALTER WOODS & CO.

Plaintiff's Exhibit 26.

(Letter head of Walter Woods & Co.) 1437

Hamilton, Ont., Oct. 19th, 1910.

Messrs. L. E. Waterman & Co.,
Montreal, Que.

Gentlemen:

Responding to yours of October 18th, please note that we have procured and sent forward Waterman Pens to fill our order.

Yours truly,

WALTER WOODS & CO.

1438 **Plaintiff's Exhibit 27.**

Oct. 19, 1910.

Messrs. Brown Bros.,
Stationers, etc.,
Toronto, Ont.

Gentlemen:

Please send, cheapest way, for our account, to W. H. Taylor, Cochrane, twelve (12) Waterman Fountain Pens bbls Mottled and Chased, Medium and Fine Points at $2.50 each discount to us 30% as quoted and oblige,

Yours truly,

1439 WALTER WOODS & CO.

Toronto, Oct. 25, 1910.

Messrs. Walter Woods & Co.,
Hamilton, Ont.

To The Brown Brothers, Limited,

Stationers, Paper Dealers, Bookbinders,
Manufacturers of Account Books, Leather Goods, etc.

12 Waterman Pens	32	2.50	30.00
1440		30%	9.00
			21.00
		Charges	.15
			$21.15

Express Prepaid
To
W. H. Taylor, Cochrane
63
O. K. 2052
(Stamped) Walter Woods & Co.
Received Oct. 27/10/
Invoice No. 7600
Hamilton, Ont.

CHARLES E. WARWICK, who resides in Toronto, Canada, and whose occupation is a merchant, aged 21 years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed, doth depose and say as follows:

Q1. Please state your name, address and occupation? A. Charles E. Warwick, Treasurer and Secretary, Warwick Brothers & Rutter, Limited, Toronto, Canada. House address 407 Markham Street, Toronto.

Q2. What are your duties in connection with Warwick Bros. & Rutter? A. Secretary and Treasurer.

Q3. Do you have anything to do with the buying and selling of the merchandise? A. I have a little to do with the selling, 1442
nothing to do with the buying.

Q4. Have you at any time made any arrangements for the purchase of fountain pens? A. No, sir.

Q5. Have you ever anything to do with the advertisements? A. No, sir.

Q6. Did you ever see any of these advertisements? A. Yes, sir, I have seen them.

Q7. These same advertisements, Plaintiff's Exhibits 23 and 24, which I show you, appeared in several copies of this "Bookseller & Stationer" did not it? A. I believe it did, yes.

Q8. And your concern holds itself out, represents itself as the agents of A. A. Waterman & Company, New York? A. Yes, sir. 1443

Q9. And you have been doing that to the trade for some time? A. Quite a little while, yes.

Q10. About 3 years? Two or three years? A. I don't know; I would presume about that time.

Q11. And you had some arrangement with them to sell certain of their goods exclusively in Canada? They could not sell them to anybody else?

Mr. Bacon: Objected to as leading.

A. Yes, sir.

1444 *Charles E. Warwick*

Q12. You are here under subpoena, are you not? A. Yes, sir.

Q13. And you never had any talk with me or anybody representing the L. E. Waterman Company regarding this testimony? A. No, sir.

Q14. And you are not very particularly anxious to aid the L. E. Waterman Company in this controversy? A. Not to aid them; the A. A. Waterman & Company are the people that we represent.

Q15. And you sell these goods that you get from the A. A. Waterman & Company as Waterman Pens? A. We sell them as Lincoln pens.

1445

Q16. Do not you sell them as Waterman's pens? A. Well, A. A. Waterman & Company's "Lincoln" pen.

Q17. In this advertisement, in big letters, it appears "Waterman's Lincoln;" there is no "A. A."?

Mr. Bacon: Objected to as the advertisement speaks for itself, and shows it does have in big letters "A. A. Waterman & Company."

Mr. Watson: Counsel objects to interruption of defendant's counsel as evidently intended to prompt the witness.

Witness: A. A. Waterman is on each box.

Q18. I call your attention to the second line of this advertisement, Plaintiff's Exhibit Number 23, where appears the words "Waterman's Lincoln;" there is no "A. A." in connection with that, is there? A. Not in that; there is on the line below.

1446

Q19. Your salesmen go around to the trade under your instructions and pretty well cover Canada, do not they? A. Yes, from Halifax to Vancouver.

Q20. And your instructions to them is to sell these goods?

Mr. Bacon: I object.

Q21. Your instructions to them is to sell these goods as Waterman pens?

Mr. Bacon: Objected to as leading and wholly improper on direct-examination.

Witness: We sell them as A. A. Waterman pens.

Q22. And you do sell them right along as Waterman pens? A. Waterman's "Lincoln" pen.

Q23. And you make quite a point among the trade that you are the agents of A. A. Waterman & Company, New York, do not you? A. Oh, not particularly.

CROSS-EXAMINATION by Mr. Bacon:

XQ24. You do not have anything to do personally with instructions to agents, do you? A. No, sir. 1448

XQ25. Do not have anything to do personally with the selling of fountain pens? A. No, sir.

XQ26. Do not know anything about it personally—absolutely out of your department? A. Yes.

XQ27. Have anything to do with any advertisements? A. No, none whatever.

XQ28. Have you ever had any communication verbal or written personally with any member of the firm of A. A. Waterman & Company or anybody in connection with The Modern Pen Company?

Mr. Watson: Objected to as immaterial.

1449

Witness: None whatever.

XQ29. Do you know what business relations exist between your company and the Modern Pen Company or A. A. Waterman & Company? A. Not particularly.

XQ30. Do you know of any relations except that you buy pens from them and afterwards sell them to who ever you please? A. That is all.

XQ31. That is the only sense in which you are agents? A. Yes.

XQ32. And is that the only sense in which you represent yourself to be the agent? A. Yes.

1450 *Charles E. Warwick*

XQ33. That you sell the pens manufactured by them? A. That is all.

XQ34. As far as you know, the defendant had nothing to do with these advertisements and never knew anything about them? A. No.

XQ35. Never paid for them? A. No.

XQ36. As far as you know, all your salesmen both at home and on the road, are instructed at all times to sell these pens as A. A. Waterman's pens? Are they not? A. A. A. Waterman's "Lincoln" pens.

XQ37. A. A. Waterman's "Lincoln" pens at all times? A. Yes.

1451

XQ38. Those are the instructions given to your representatives? A. Yes.

XQ39. That they are to be very careful and use the words "A. A. Waterman" in connection with those pens? A. "Lincoln" Fountain Pens.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ40. Why do you find it necessary to instruct these men so particularly to use the name "A. A. Waterman"? A. Why?

RDQ41. Yes? A. We do not find it necessary; we sell them as "Lincoln" fountain pens; in fact, they are sold as "Lincoln" fountain pens in a great many cases.

1452

RDQ42. You just stated that you particularly instructed your salesmen to call them A. A. Waterman; why do you find it necessary to ask them to use A. A. Waterman? A. I have no reason why they should use the words "A. A. Waterman."

RDQ43. Or why they should use "A. A." at all? A. No.

RDQ44. You call them in this advertisement "Waterman's Lincoln," do you not? A. Yes.

RDQ45. And you sell them largely under that name, do not you? A. "Waterman's Lincoln Fountain Pen."

RDQ46. And you have not been particularly careful to use the initials, "A. A." have you? You just called them "Water-

POOR COPY

man's Lincoln," did not you? A. We have used the initials "A. A."

RDQ47. Why do you find it necessary to use the initials "A. A."? A. Well, that is the name of the pen.

RDQ48. Are you familiar with the Waterman's Ideal fountain pen? A. Not particularly.

RDQ49. Ever hear of it? A. I have heard of it.

RDQ50. Ever handle it; ever sell it? A. Not of late years; I handled it about 15 or 20 years ago.

By Mr. Bacon:

RDQ51. The purchase or sale of fountain pens does not come under your personal observation at all? A. No. 1454

RDQ52. And you do not know anything about the quarrel between the plaintiff and the defendant? A. Not anything at all.

WILLIAM J. C. WILSON, who resides in Toronto, Canada, merchant, aged twenty-one years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

Q1. Please state your name, place of residence and occupation? A. William J. C. Wilson, 72 King Street West, Toronto, Canada, Wilson Stationery & Printing Company. 1455

Q2. And how long have you been in the stationery business? A. About 22 years, in Toronto, Canada.

Q3. During what time have you been handling and selling fountain pens? A. About fifteen years.

Q4. And during this period have you been familiar generally with the fountain pens on the market as a merchant usually is? A. Yes.

Q5. And during this period what makes of fountain pens have you handled and sold? A. We have only handled Waterman's "Ideal" fountain pen.

1456 *William J. C. Wilson*

Q6. When your customers come into your store enquiring for Waterman's Ideal fountain pens, what do they call for? A. They generally ask for a Waterman fountain pen.

Q7. And how long has that been a fact? A. Since ever we started to handle those pens, 15 years ago.

Q8. Do you know whether that is the common name among the trade and public for Waterman's Ideal Fountain pens? A. Yes.

Q9. And has that been so ever since you have been familiar with these goods? A. Yes, sir.

Q10. Can you state whether or not it is a fact that this name
1457 now is better known than ever? A. Yes, sir.

Q11. As far as the matter has come to your personal knowledge, has Waterman's Ideal Fountain Pens proved satisfactory to your customers?

Mr. Bacon: Objected to as immaterial, incompetent, from this witness.

Q12. As far as the matter has come to your personal knowledge, has Waterman's Ideal Fountain Pens proved satisfactory to your customers? A. Yes.

Q13. What is the reputation among the trade of Waterman's Ideal Fountain Pens? A. As far as I know, there are no complaints about them; they are very satisfactory.

1458 *CROSS-EXAMINATION by Mr. Bacon:*

XQ14. You deal in the Ideal pen exclusively? A. Yes, sir.

XQ15. Never dealt in anything else? A. Nothing else.

XQ16. You have never handled the A. A. Waterman & Company's pens? A. No, sir.

XQ17. Do not you know that if any man owns an A. A. Waterman pen, he is apt to call it a Waterman pen as anything else? A. Yes.

By Mr. Watson:

XQ18. Why does he call it a Waterman pen? A. Because a Waterman pen seems to be the only known pen over here.

XQ19. And when he has an A. A. Waterman pen, and he calls it a Waterman pen, is it because he thinks he has an Ideal Waterman's fountain pen? A. Yes, sir.

By Mr. Bacon:

XQ20. How do you know that any man who has an A. A. Waterman & Co's pen generally thinks that he owns an Ideal? A. Because we have found that quite a common occurrence, people coming in with their pens—we had a case two weeks ago, a gentleman coming to the store with an A. A. Waterman pen and asking my clerk to change the point; we told him that was an A. A. Waterman pen, that the L. E. Waterman point would not fit this, and he said, "I understood it was a Waterman Ideal fountain pen I had," and he said he never knew of any other pen on the market; this occurs about every other month. 1460

XQ21. And there are a good many people who have Ideal pens that perhaps think they have the A. A. Waterman pen? A. I never came across any case of that.

HUBERT H. BROWN, who resides in Toronto, Canada, and whose occupation is Shipping Clerk, aged 21 years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed and examined on the part of the plaintiff, doth depose and says as follows: 1461

Q1. Please state your name and place of residence and occupation? A. Hubert H. Brown, Toronto, Canada, Shipping Clerk.

Q2. With whom are you connected? A. Brown Bros, Limited.

Q3. And where is their place of business? A. 51 Wellington Street West, Toronto, Canada.

Q4. And what is their line of business? A. Stationery, paper.

Q5. Do they handle and sell fountain pens? A. Yes.

Q6. How long have you been connected with this concern? A. About twenty years.

1462 *Hubert H. Brown*

Q7. And how long have you been shipping clerk? A. About fifteen years I guess, twelve to fifteen.

Q8. Do the orders, goods that are shipped by Brown Bros. all come under your department and under your supervision? A. They do.

Q9. I show you the Plaintiff's Exhibit "27" and ask you if you had charge of the shipment of these goods? A. Yes, I did.

Q10. And what did you ship?

Mr. Bacon: Objected to as immaterial, irrelevant and incompetent.

1463

Q11. And what did you ship? A. The Waterman pen referred to there; you are wanting to know what Waterman pen we shipped, I presume?

Q12. Yes? A. It was A. A. Waterman pen.

Q13. And you shipped it in response to that order, did not you—order attached to Plaintiff's Exhibit 27? A. Yes, sir, we did.

Q14. And you shipped the A. A. Waterman & Co's pens in response to that order? A. Yes, we shipped the pens we carry.

Q15. You do not carry Waterman's Ideal Fountain pen? A. No.

Q16. And you did ship in answer to that order pens marked A. A. Waterman & Co.? A. Yes.

1464

Q17. Where did you get those pens from? A. I don't know.

Q18. Those pens are marked A. A. Waterman & Co., New York? A. I would not be sure of that.

Q19. You got them from New York? A. I could not tell you where we got them from.

CROSS-EXAMINATION by Mr. Bacon:

XQ20. Do Brown Bros., Limited, have any business relations with The Modern Pen Company or A. A. Waterman & Co. as far as you know? A. All I know about it is I see the lists of the pens which we sell are imprinted The Modern Pen Company.

XQ21. You do not know whether they buy them from The Modern Pen Company or Warwick Bros. & Rutter, Limited? A. No, sir, I do not know where they buy them; I have nothing to do with that part.

XQ22. Were these marked "Lincoln" these pens? A. Well, as a matter of fact I did not examine them; I did not examine the pens; as a matter of fact what I did was simply to check them over by the box, the label; I did not see the pens themselves, of course, you understand.

XQ23. Is this bill, Plaintiff's Exhibit "27," made out in your handwriting? A. No, sir; it is not mine.

XQ24. How do you know that it was A. A. Waterman pens 1466
that were sent out under the order? A. Well, the boxes in which they are packed are imprinted with A. A. Waterman.

XQ25. Do you remember this specific order at all? A. Oh, I remember that order, yes.

XQ26. This small order to Walter Woods & Company, of Hamilton, Ontario? A. Yes, I remember the occasion of it going.

XQ27. And do you remember personally having examined these packages to see that they were A. A. Waterman & Co.'s pen? A. Yes, that is my duty to check them according to the order.

XQ28. But this does not indicate what kind of pens went? A. No; we charge them out of course the way they are ordered; that is our rule, you know. If a man orders Waterman pens 1467
we bill them Waterman pens.

XQ29. And if A. A. Waterman pens you bill them as A. A. Waterman pens? A. Yes, that is our rule, unless there is some special reason for not doing so, substitution made or something like that; we would call them different.

XQ30. This order accompanies your bill and you make the bill conform in its phraseology to the order? A. That is the rule, yes, sir. I can give you an instance. A man would order these brush erasures, erasures with brush attached to them—one man might call them brush erasures and we would bill them that, and another man would call them Erasure 1087 and we would

1468 *Hubert H. Brown*

bill them that and a man looking for his order would identify them by his own description.

XQ31. Have you handled L. E. Waterman's pen at all? A. Never seen them in the store.

XQ32. Or the Ideal Waterman pen? A. The Ideal I have not seen.

XQ33. Do you retail at all? A. We retail; yes, sir.

XQ34. And the A. A. Waterman pens have always been satisfactory so far as you know? A. Yes, sir.

XQ35. And you never heard of an Ideal pen? A. Oh, yes, I have heard of them but I never seen them in the store.

1469 XQ36. Did you send these to Walter Woods & Company or direct to their customer? A. Direct to their customer.

XQ37. Where is that indicated here? A. Usually at the bottom of the invoice.

XQ38. Sent to W. H. Taylor, Cochrane? A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ39. You are here under subpoena? A. The order of the Judge.

RDQ40. And you had no conversations with me regarding this matter prior to your examination here? A. No.

RDQ41. Never seen me before? A. No, sir.

RDQ42. Have you talked with anybody connected with the
1470 L. E. Waterman Company in regard to your testimony today? A. No, sir.

RDQ43. You are here as a hostile witness? A. Yes, sir.

RDQ44. Your interests are entirely with A. A. Waterman & Co. in this matter? A. We are not with A. A. Waterman at all; my interests is with Brown Bros. just now.

RDQ45. And Brown Bros. sell A. A. Waterman & Co.'s pens? A. I believe so.

RDQ46. And they do not sell Waterman's Ideal Fountain pens made by L. E. Waterman Company? A. Not at all.

By Mr. Bacon:

RDQ47. Have you ever talked with anybody from the Modern Pen Company or A. A. Waterman & Co? A. No, sir.

RDQ48. Never seen me before? A. No, sir.

RDQ49. You are not hostile to the L. E. Waterman Company? A. No, sir; I am not.

RDQ50. Why did you say you were? A. Hostile to them?

RDQ51. Yes. A. I don't think I said that.

RDQ52. Why they made you say that? A. Did they?

RDQ52½. Yes. A. I did not—I was not aware of it.

By Mr. Watson: 1472

RDQ53. You have no interest in aiding the L. E. Waterman Company in this controversy? A. No, sir; I have not.

RDQ54. And you did not come here voluntarily to give your testimony? A. No, sir; I was ordered by the Court.

By Mr. Bacon:

RDQ55. You have no interest in A. A. Waterman & Co.? A. No, sir; I have no interest in A. A. Waterman & Co.

RDQ56. You do not know that your people buy from them at all? A. From the A. A. Waterman Company?

RDQ57. Yes. A. I do not know where they buy; it is not my business.

1473

OLIVER B. STAUNTON, who resides in Toronto, Canada, occupation is a merchant, aged 21 years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed and examined on the part of the plaintiff, doth depose and say as follows:

Q1. Please state your name, place of residence and your occupation? A. Oliver Butler Staunton, 13 Simpson Avenue, Toronto, Canada; stationer.

1474 *Oliver B. Staunton*

Q2. Where is your place of business? A. 50 Yonge Street, Toronto, Canada.

Q3. How long have you been in the stationery business in Toronto? A. Since December, 1889.

Q4. During this period what part of it have you handled and sold fountain pens? A. Oh, I suppose we bought some fountain pens within six or eight months after being in business.

Q5. You handled and sold them ever since that time? A. Yes, sir.

Q6. For the last twenty years you have handled and sold fountain pens? A. Quite that.

1475 Q7. During that time have you been generally familiar as a merchant with the fountain pens on the market? A. With many of them.

Q8. During this period what makes of fountain pens have you handled and sold? A. The first we had I think it was Moore's Non-leakable; as a matter of fact, we only handled the odd makes, as we called them, for a few months, perhaps a year, and then a representative of the Waterman Company, Waterman Ideal Company, called on us and we laid in a stock of his pens. We got rid of all the other makes that we had and we have practically sold only the Waterman pen since then; I mean Waterman's Ideal pen—I call it the Waterman pen, leave off the "Ideal."

1476 Q9. At the present time you sell Waterman's Ideal fountain pen? A. I do.

Q10. And by what name do your customers generally ask for Waterman's Ideal fountain pen? A. They usually ask for a Waterman pen or simply, "Give me a Waterman."

Q11. And how long has that been the situation? A. Well, as the public have grown familiar with seeing the advertisements, I suppose, of the L. E. Waterman Company. It seems to me it is growing continually; at first, 20 years ago or 15 or 18 years ago, I do not think the Waterman pen was as well known; it could not be as the advertising money was not spent, and in those days I do not remember how it was asked for, but latterly the pen is often, very often, asked for simply as a Waterman pen; occasionaly some one says, "Ideal."

Q12. Has it ever come to your knowledge or brought to your personal attention in any way that a customer or person asking for a Waterman pen expected to get an A. A. Waterman & Co. pen? A. I have no recollection of such a case.

Q13. Have you found that as far as the matter has come to your knowledge that Waterman's Ideal Fountain pen has proved satisfactory to your customers? A. It has proved satisfactory with the minimum of exceptions in an article that we handle as many of.

Q14. You sell a great many pens? A. I think the books of the Company would show that we handle quite a number; I think one year we were told that we had sold the largest number of any dealer in Canada; I think that is correct. 1478

CROSS-EXAMINATION by Mr. Bacon:

XQ15. When did you first see Mr. Watson? A. It would be two weeks ago, three weeks ago; I should think about three weeks ago.

XQ16. He called on you here in Toronto? A. Yes, at my office.

XQ17. Told you what testimony he wanted? A. I don't know as I could put it that way; he stated in outline his business here and asked me a few questions, some of which he has asked now and which I gave the same answers to.

XQ18. He told you that he wanted to prove that people called for the Waterman pen? A. I would not like to use the word "prove" but I suppose that his object was to do so or he would not have called at my office. 1479

XQ19. And you saw him yesterday? A. Yes, sir.

XQ20. And you went over the thing with him yesterday? A. I would not say go over the ground; he asked me a few questions and I stated some of the answers I have given now because it is all a matter of truth.

XQ21. And he asked them as leading questions and he said, these things are so, are they not? A. I do not think he put it quite that way. The answers which I give are simply facts

which when your question was asked I would answer in the same way.

XQ22. How long have you sold L. E. Waterman pens exclusively? A. We sold them exclusively with perhaps an occasional pen that we might procure, like a Wirt pen—if you call that exclusively—we have sent out and got a Wirt pen; we have sent to New York and got a Sandford & Bennett pen—but you might say we have sold the Waterman pen exclusively for 18 years; we have got a couple or three dozen Swan pens on our desk because we do an English trade with some English tourists and they occasionally come in and ask for one, but in
1481 my recollection I have sold two Swan pens because two people have come in and asked for Swan pens.

XQ23. But for 18 years you have sold substantially no pen except the L. E. Waterman? A. Put it that way, yes.

XQ24. Never sold A. A. Waterman pens? A. Not to my knowledge; I do not recollect a single sale.

XQ25. Never dealt in them at all? A. Yes, we have dealt in them by taking them in exchange; sent one to Montreal I believe last week.

XQ26. You deal direct with the Montreal factory? A. Now.

XQ27. And you know this gentleman here? A. Yes, Mr. Casson.

XQ28. The manager of the Montreal factory? A. Yes, I have known him for some years.

1482 XQ29. And you have talked to him about this testimony? A. Well, simply stating the one or two answers that I have given but not in any detail; not by way of coaching or anything like that kind because it is simply bald truth.

XQ30. You knew what they wanted you to swear to beforehand? A. They stated why they were here and so I would know.

XQ31. You said that "latterly" the Ideal pen has been known more generally as Waterman—how long a time would you consider as covered by the word "latterly?" A. Well, I would think within the last few years. I only know that people do come in—how long they have been coming in and asking for it I don't

know—but we are about to have a comparatively expensive advertisement made and we are simply going to use the words "Waterman's Ideal Fountain Pens." The word "Waterman's" is going to be, I think, the clearer; I think that is the largest word on the sign, and from that style of advertising (which is the style of advertising the Company does, I believe) from this advertising I have seen I think the public get accustomed to using the word "Waterman."

XQ32. You are going to have these big words under instructions of Waterman Company? A. No, my own; I am getting the design all myself; I am not submitting it to them; at least I don't think I will submit it to them unless they are there.

1484

XQ33. You have not answered my question: How long a period is covered by word "latterly?" A. That will be a difficult question to answer but I would think a good while; I cannot give you instances, therefore it is not evidence I suppose, but I would think for years some might have come in and asked for a Waterman pen but within the last few years I am very positive that they have come in and asked for Waterman pen.

XQ34. How many years are included in the word "few?" A. I cannot answer that because I cannot give you definite instances; I only know—

XQ35. Three or four years? A. I should judge quite that.

XQ36. That is about right? A. I don't know that is right; it might have extended over eight or ten years. I think of it myself so much as a Waterman pen and in dealing with a customer I do not use the word "pen" very often; I simply use the word "Waterman."

1485

XQ37. Is not that because you deal in that exclusively? A. Well, familiarity may make it so so as to save time.

XQ38. If you dealt in A. A. Waterman's pens you would speak of one as L. E. Waterman and one as A. A. Waterman, would not you? A. I never dealt in A. A. Waterman's so I would not undertake to say that. I would certainly expect to draw some distinction so that the public might know what they are getting, because we have people calling on us asking us to repair a pen and they have—

1486 *Oliver B. Staunton*

Mr. Bacon: This is not an answer to any question.

Mr. Watson: I insist that the witness be allowed to finish his answer.

Mr. Bacon: What is the question? (Reporter reads question.) If you dealt in A. A. Waterman's pens you would speak of one as L. E. Waterman and one as A. A. Waterman, would not you?

Mr. Bacon:

XQ39. That can be answered yes or no. A. I would answer that, yes: because I would not wish the public to get one
1487 article thinking it was the other, whether it was L. E. or A. A.

Mr. Watson: Counsel for plaintiff desires it to appear on record that counsel for defendant declines to allow time for witness to finish his answer to the last question.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ40. Has any instances or occasions come to your attention where there has been any confusion between the Waterman's Ideal fountain pen and those marked A. A. Waterman & Co.? A. Yes, sir.

RDQ41. And how have those instances of confusion come to your attention; please state the circumstances as they sometimes
1488 occur in your store? A. I can give at least one that came to me personally. A party came in asking for some repair to be made and I said, "I will have to send this away," and their answer was, "Why, I thought you could do it right here." I said, "No, this is not one of the "Ideal" or of the L. E. Waterman pens; this is an A. A. Waterman pen," and their answer, I remember very distinctly the substance of it without remembering the words, that they had bought it thinking they were getting the Ideal or Waterman pen that was best known and I remember I was greatly annoyed at the time; I do not speak positively but I think that I took the pen back at the usual 25% off or whatever the discount was when that pen came in and supplied

the party with an Ideal Waterman. That has occurred more than once, but this one particular instance I have a very distinct recollection of; it is not an isolated case.

By Mr. Bacon:

RDQ42. Can you give the name of that person? A. I cannot.

RDQ43. Can you give the name of any person that has ever mistaken an A. A. Waterman for an L. E. Waterman pen? A. No. The reason for that would be that as a rule all of our customers from our advertising and the advertising of the Company when they come into us are acquainted with the pen that we handle and these misunderstandings of the pens that the 1490
parties carry occurs with people who are perhaps not on our list of customers or they may be strangers in the city or things of that kind that drop in seeing our sign up.

RDQ44. Do you refuse to repair the A. A. Waterman pen? A. No, we always offer to repair it but we refuse to repair it in our own office because we have no means of doing so. I have been given to understand that the points of the L. E. Waterman pen are made to fit their particular barrels and if we place an L. E. Waterman pen in an A. A. pen it will not give satisfaction and therefore we do not attempt to do it but if the L. E. Waterman pen comes in for repairs we repair it at once if it is at all possible; that is, exchange the point, but if it requires to put in a new point section or barrel we do not 1491
do that. We always offer—I think we can say that without exception—we always offer for to send a man's pen to Montreal whatever make it is for repairs.

Mr. Watson: Counsel by express stipulation waive the signatures of all the witnesses who have been examined under this commission.

Mr. Watson: It is stipulated that the copy of Exhibit "28" may be used with all force and effect as the original and that that is the letter referred to by Mr. Sinclair in his testimony regarding the arrangement between

1492 *Exhibit 28*

Warwick Bros. & Rutter, Limited, and the Modern Pen Company.

Mr. Bacon: I consent to that.

Exhibit 28.

THE MODERN PEN COMPANY

sole selling agent

1493 for

A. A. WATERMAN & CO.

Makers of
Fountain Pens

New York, U. S. A.

22 Thomas St., Cor. Greenwich

Feb. 28, 1908.

Messrs. Warwick Bros. & Rutter, Ltd.,
Toronto, Canada.

Dear Sirs:

1494 Confirming conversation held with your Mr. N. A. Sinclair yesterday, we have to say that in consideration of your purchasing from this Company at once a stock of Lincoln fountain pens of the type branded "A. A. Waterman & Co., New York," same to consist of some of all numbers and to the amount of $1,000 net in Canada; and also in consideration of your continuing to purchase these pens regularly, maintaining on hand at all times a stock of not less than $1000 net worth in Canada; and also in consideration of your using every possible endeavor to sell these goods extensively and widely and secure the maximum business possible upon same in the Dominion of Canada by all the means at your disposal; and also in consideration of your carrying in stock, selling, or offering for sale, directly or indirectly, no other

Exhibit 28 1495

line of fountain pens of similar grade and price, we make you discounts from the list prices of said Lincoln fountain pens as follows:

On the	#103,	American	List	Price	$1.00, 33⅓ & 15%
" "	#303,	"	"	"	$1.50, 50% & 15%
" "	#503,	"	"	"	$2.00, 50% & 15%
" "	#603,	"	"	"	$2.50, 50% & 15%
" "	#703,	"	"	"	$3.00, 50% & 15%

The above list prices are for plain stock only, plain black, mottled or chased black. Gold mounted pens will be furnished in this line, in all of the numbers if desired, the same to be mounted two 3/16" bands on holders at $1.00 each in addition to any 1496
of the above list prices; for two 3/8" bands mounted upon the holders $1.50 each in addition to the above list prices.

Terms upon all shipments strictly thirty days net; f. o. b. New York, no duty or transportation charges paid by this Company.

A special allowance will be made you of 5% of your net purchases to be used by you solely for the purchase of show cases to be furnished to customers purchasing this line of fountain pens from you—for the display of such fountain pens.

It is understood that should any, or all, of the above conditions of this sale not be carried out by you entire, this special offer immediately lapses and becomes void at the option of this 1497
Company.

As to delineation of territory in which these goods are to be sold, we have to say that our own travellers will visit all trade, selling all of our lines, at our own prices and conditions, in the cities of Quebec, Montreal, Ottawa, Hamilton, London and Toronto; but this does not preclude you from operating in this same territory. Other towns which will be made by our travellers in the Dominion, selling our Modern line of pens and sundries alone and excluding the Lincoln line, will be Brockville, Kingston, Belleville, Coburg, Port Hope, Peterborough, Lindsay, Brantford, Galt, Guelph, Berlin, Stratford, Woodstock, St.

1498 *Exhibit 28*

Thomas and Chatham, thereby leaving these towns open to you for general sale upon the Lincoln line.

The Company does not hold itself responsible in any way as to ultimate disposition of goods, the intent of this offer being not to sell Lincoln pens directly in the towns excepted herein or to sell indirectly where the ultimate disposition of the goods is known.

The said Lincoln goods herein specified are subject to a guarantee against obvious defects in workmanship and material, the interpretation of such defects remaining with the experts of this Company. These goods are straight sale goods and are not sub-
1499 ject to return, or exchange, except at the option of this Company.

The above arrangement may be terminated at any time on notification of either party to the other.

This arrangement contemplates merely the line of "Lincoln" pens branded "A. A. Waterman & Co., New York" and does not in any sense conflict with, or restrict, the sale of Modern or other pens within the Dominion.

Yours truly,
THE MODERN PEN CO.
(Sgd.) C. E. Marling (?)
Vice-President.

Dict. to N. H.
Feby 28th, 1908.
1500 The above arrangement accepted
for Warwick Bros. & Rutter, Ltd.
by N. A. Sinclair.

Depositions under this commission have now been closed.

Vol. II

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1914

No. [illegible]54

L. E. WATERMAN COMPANY, APPELLANT,

vs.

MODERN PEN COMPANY.

FILED SEPTEMBER 7, 1912.

No. [illegible]72

MODERN PEN COMPANY, APPELLANT,

vs.

L. E. WATERMAN COMPANY.

FILED DECEMBER 10, 1912.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

(23,350 and 23,451)

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1501

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK,

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

vs.

MODERN PEN COMPANY,
Defendant.

1502

Testimony taken on the final hearing of the above entitled action pursuant to the rules of equity, and Revised Statutes in such cases provided before John W. McCarron, a Notary Public, in and for the County of Crawford, State of Ohio, at his office at 115 and 1/2 West Main Street in the City of Galion, Crawford County, Ohio, on the 6th day of April, A. D., 1911, pursuant to notice hereto annexed.

Appearances:

Walter B. Raymond, of Counsel for Plaintiff.
Alexander S. Bacon, Solicitor for Defendant.

1503

CHARLES W. BECHTOL, witness for plaintiff, being first duly sworn, deposes as follows:

Direct-examination by Mr. Raymond:

Q1. What is your name, residence and occupation? A. Charles W. Bechtol, residence, Galion, Ohio, and by occupation a jeweler.

Q2. How long have you carried or handled fountain pens? A. About seven or eight years.

Q3. What kind of fountain pens? A. I used to handle Beltzer & Wilson, and have a few of them on hand yet.

1504 *Charles W. Bechtol*

Q4. Did you buy any fountain pens during the fall of last year? A. Yes, sir.

Q5. How long and how have you known of the Waterman's Ideal fountain pens? A. I read of them four or five years ago in the trade papers.

Q6. Under what name did you know of the Waterman's Ideal fountain pens? A. I think the L. E. Waterman, I don't know anything else.

Q7. Did you know and call these pens, Waterman pens?

Objected to as leading.

1505 A. "Waterman" was stamped on the tube. I couldn't call them anything else.

Q8. Will you state in your own words what occurred when you bought fountain pens in October last? A. I don't remember anything more than that they were Waterman pens, and it didn't need any argument.

Q9. Did the man who sold you these pens call them Waterman pens?

Objected to as leading.

A. Yes, when he came in as an agent, he said he had the Waterman pens for sale.

Q10. Did you give him an order? A. Yes, I gave him an order.

1506 Q11. Did you receive the pens at the time you gave the order, or how long after? A. It usually takes about a week from New York. It might have been longer than that. I did not pay any special attention to that.

Q12. Under what name did you sell these pens to the public?

Objected to as immaterial.

A. As the Waterman pen. That was marked on the barrel, and I couldn't sell them as anything else.

Q13. Did the man who sold you these pens instruct you as to the name under which they should be sold to the public?

Objected to as immaterial.

A. No, not that I remember of.

Q14. Did he call these pens "Waterman pens" in speaking of them to you? A. Yes.

Q14½. Did he call them "A. A. Waterman pens" in speaking of them to you? A. He may have done that, I could not say.

Q15. All that you remember then is the use of the word "Waterman?" A. That is all.

Q16. Did the salesman say that he represented the Modern Pen Co.? A. I do not remember.

Q17. When and how did you first learn that you did not have "Waterman's Ideal Fountain Pen?" A. I think that the first 1508
that I knew of it, was a man came along selling fountain pens, I don't know who he represented. He said that what I had was not the original "Waterman Fountain Pen."

Q18. Did you up to that time believe that you had the genuine Waterman pen? A. I thought there was only one make of that name.

Q19. The salesman who sold you did not tell you there were two? A. I don't remember that part of it.

Q20. If he had told you that they were not the original Waterman pen, would you have bought them? A. I don't know whether I would or not; that is a question.

Q21. As a matter of fact, however, knowing the name "Waterman" you bought the pens without any question? A. Yes, 1509
that is it, exactly.

CROSS-EXAMINATION by A. S. Bacon:

XQ22. Did the man who sold you these pens hand you his card? A. I don't remember.

XQ23. Did he tell you that he was selling the "A. A. Waterman" pens? A. He might have said that, but I was not particularly acquainted with the initials. I thought there was only one Waterman pen.

XQ24. Did he leave with you a memorandum of sale, partly written and partly printed? A. I do not remember. They

most all do. When the goods come I check them up with the memorandum of sale, and then throw it away.

XQ25. Then in this instance there must have been a memorandum of sale left by the salesman? A. Well, I don't know about that. It is too long ago.

XQ26. Did you not see on the bottom of this memorandum of sale in very large letters, the words "Modern Pen Co., sole selling agents, of A. A. Waterman & Co.?"

Objected to on the ground that it does not appear affirmatively that any memorandum of sale was given the witness.

1511 A. I don't remember about that.

XQ27. Was the second salesman who came to you a representative of the L. E. Waterman & Co.? A. I think he was a representative of Beltzer & Wilson.

XQ28. Did Mr. Raymond here present come to see you sometime ago? A. Yes, sir.

XQ29. It might have been a couple of months ago? A. I am not sure as to the exact time.

XQ30. Did he ask you to testify in this case? A. Yes.

XQ31. What did he say to you? A. I think he wanted to know if I had the original Waterman fountain pen. He wanted me to make affidavit as to my purchasing the other pen, and what I have here testified to.

1512 XQ32. Did he tell you what kind of testimony he wanted you to give? A. I am not sure, but I think that he wanted to see the bill. I did not have this.

RE-DIRECT EXAMINATION by Mr. Raymond:

RDQ33. Did these pens that you purchased as Waterman pens prove satisfactory to your customers? A. No, sir.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ34. What did they retail for? A. $1.50 and $2.50.

1513

RXQ35. Did you send any of them back for repairs? A. No, sir; I have two laying on the counter now.

RXQ36. How many did you buy in all? A. I believe that it was one dozen.

RXQ37. Were the others all right? A. All the others were all right, three or four I have not sold yet.

CHARLES W. BECHTOL.

CHARLES E. TRORY, a witness on behalf of the plaintiff, being first duly sworn, deposes as follows:

1514

Direct-examination by Mr. Raymond:

Q1. What is your name, residence and occupation? A. Charles E. Trory, Crestline, Ohio, and a druggist by occupation.

Q2. What makes of fountain pens have you carried and how long have you carried them? A. I have had Mooney, the Parker, and the A. A. Waterman, and I have carried fountain pens for about eight years.

Q3. How long and how have you known Waterman's Ideal fountain pens? A. About ten years. I first became acquainted with the Waterman's Ideal fountain pens at Fostoria, Ohio, where I carried them in stock.

Q4. Under what name did you know "Waterman's Ideal Fountain Pens?" A. Under the regular name "Waterman's Ideal Fountain Pen."

1515

Q5. Under what name were these pens usually asked for by customers? A. Waterman.

Q6. Now, will you tell in your own words all of your experiences with the A. A. Waterman pens from the time that you first purchased them to the present? A. A man came along at first and I was looking for a self-filling pen, and it appealed to me. He said that it was a Waterman, and I thought at first it was a genuine Waterman, until he explained to me, that it was not, and went under the name of "Modern Fountain

1516 *Charles E. Trory*

Pen." My experience with it was not very pleasing as the pens were entirely unsatisfactory. Most of them being returned by the purchasers, as they got out of order very easily. After carrying them in stock for a short time I decided they were not the kind of pens that I wanted.

Q7. Did this salesman explain to you that the pens he was selling were not the genuine Waterman pens voluntarily, or did you ask him? A. I asked him, and he told me that this was the A. A. Waterman, instead of the L. E. Waterman.

Q8. Did the salesman give you any instructions as to the name or style under which the A. A. Waterman & Co. pens should be sold to the public? A. I don't think he did.

1517 Q9. Did you while you were handling these pens have many calls for Waterman pens? A. Some.

Q10. How did you sell the A. A. Waterman & Co. pens to the public?

Objected to as immaterial.

A. As a self-filler Waterman pen.

Q11. Did you have any customers who inquired whether the pen you were selling was the genuine Waterman pen? A. I did.

Q12. And what did you tell them? A. Well, I always explained it away by saying that these pens were self-fillers, and that I did not have the pen they wanted.

Q13. When a customer inquired for a Waterman pen, what
1518 kind of a Waterman pen, did you in your experience find that they were asking for?

Objected to as impossible for witness to tell what was in the mind of customer.

A. Well, that is a little hard to answer. Because most people just call for a fountain pen, and I only had these pens in stock a short time, because I felt as I was not selling the people what they wanted.

Q14. What percentage of the A. A. Waterman pen you sold, were returned to you as unsatisfactory? A. About one-third of them.

1519

Q15. What was the matter with them? A. The little sack seem to twist in two.

Q16. Was that the only trouble you found? A. Sometimes the little end which was used for filling would break off.

Q17. What did you do with the pens that were returned to you in an unsatisfactory condition? A. Some of them I sent in, for them to fix which they did, and some others I just left in stock, and just put them back as being no good.

Q18. Have you any of those pens now? A. I have.

Q19. Can you produce them? A. I can. (Here witness produces one pen.) I have some more, but cannot now find them.

Q20. Now, were these pens that you speak of returned to you as unsatisfactory? A. They were

1520

Q21. For what reason did you discontinue the sale of the A. A. Waterman & Co. pen? A. Because they did not seem to give the satisfaction that I thought they ought to, and another reason was that they put in another agency here. But when anything was wrong, they were always willing to make it right.

CROSS-EXAMINATION by A. S. Bacon:

XQ22. How many A. A. Waterman pens did you buy in all? A. I think two dozen or two and a half dozen.

XQ23. How many did you return that were injured? A. About one-third.

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XQ24. How many did you send back to New York? A. About ten or twelve in all.

XQ25. And you kept two? A. Yes. I kept three.

XQ26. Why did you not send the three back? A. No particular reason. I just neglected sending them.

XQ27. What was the retail price of these pens? A. The two dollar pens.

XQ28. How long did you sell these pens? A. About a year or a year and a half.

XQ29. How long ago was that? A. It must have been three or four years.

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XQ30. May it not have been much longer than that? A. I think not.

XQ31. Was it in Crestline? A. Yes, sir.

XQ32. How long have you been in Crestline? A. Eight years.

XQ33. Was it not when you first came to Crestline? A. I don't think so.

XQ34. Are you sure? A. Yes, for I was selling the Parker pen when I first came here.

XQ35. May it not have been about the first year you were here? A. No, sir.

XQ36. Are you sure? A. Yes.

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XQ37. What makes you so certain of the date? A. Because I was selling the Parker pen for some time after I came here.

XQ38. How long were you pushing the Parker pen? A. I should judge for about something like three or four years.

XQ39. Did you not sell other pens while you were selling the Parker? A. Not at first.

XQ40. How soon did you? A. I don't remember. Three or four years after I got the Mooney Self Filler, and then I got the Waterman Modern.

XQ41. Who was the man who sold you these goods? A. I don't remember his name.

XQ42. Do you know whether he represented the Modern Pen Co. or some jobber? A. He represented the Modern Pen

1524

Co. and so told me.

XQ43. Did he give you his card when he first came in? A. I think he did.

XQ44. And that card had on it, the Modern Pen Co., sole selling agents for the A. A. Waterman & Co.? A. I think it did.

XQ45. You had sold the L. E. Waterman goods before that? A. I did at Fostoria, Ohio.

XQ46. Then the moment he came in and showed you his card, you knew that he represented A. A. Waterman & Co. and not L. E. Waterman & Co.? A. Yes, sir.

XQ47. Then you did not have to ask him the difference between the companies? A. I think I did know the difference.

1525

XQ48. And you did not have to ask him the difference? A. No, sir.

XQ49. Do you know whether this man travelled from Chicago or New York? A. I think from New York.

XQ50. Did you correspond with New York? A. Yes, sir.

XQ51. And you always found the New York people very nice to deal with, did you not? A. Yes, sir.

XQ52. What pen did you take on in the place of the Waterman? A. I took on no new pen. I pushed the sale of the Mooney, which I had sold for four or five years.

XQ53. Do you know whether or not the A. A. Waterman pens which were returned as unsatisfactory had met with accidents? A. No, I think the fault was in not knowing how to use them right.

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XQ54. If they had known how to use them all right, would they have been all right?

Objected to as being purely speculative.

A. I could not say.

RE-DIRECT EXAMINATION by Mr. Raymond:

RDQ55. Do you remember whether or not the salesman, who sold you the A. A. Waterman & Co. pen described them to you as Waterman pens? A. No, he said that they were "Modern Pens" made by the A. A. Waterman & Co.

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RDQ56. Did the initials "A. A." convey any distinction to you between the Waterman pens you had dealt with in Fostoria, and the pens the salesman was selling you? A. It did.

RDQ57. When you were dealing in the L. E. Waterman pens at Fostoria did you have so large a percentage of them returned as unsatisfactory, as with the A. A. Waterman & Co. pens? A. No, sir.

RDQ58. You found the L. E. Waterman pens generally satisfactory to the customers? A. I did.

RDQ59. Were these A. A. Waterman & Co. pens which were returned to you in a condition indicating that they had been

stepped upon or that some accident had happened to them? A. No, sir.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ60. You did not know what had happened to them? A. No, sir.

RXQ61. Tell generally about the trouble you have had with self-filling pens? A. I had about one in five of the Mooney pens returned as unsatisfactory, customers not knowing just how to use them. With the A. A. Waterman pens they twist them too hard, and twist them off.

1529

CHAS. E. TRORY.

A. H. KINSEY, being first duly sworn, deposes as follows:

Direct-examination by Mr. Raymond:

Q1. What is your name, occupation and place of residence? A. A. H. Kinsey, Crestline, Ohio; druggist.

Q2. How long have you carried fountain pens, and what kinds have you carried? A. I have had Beltzer & Wilson, the Eagle, Laughlin, Rexall, and the A. A. Waterman.

1530 Q3. Will you state what conversation you had with the salesman, who sold you the A. A. Waterman pens, giving as near as possible the date of the conversation? A. I can't remember the date. I think it was a year ago last fall. I cannot remember all the conversation, but I do remember that the salesman said that A. A. Waterman, and L. E. Waterman were brothers.

Q4. What else did he say? A. He said that they had been partners, and that they had dissolved, and that they were manufacturing practically the same pen.

Q5. How long had you known the pens made by the L. E. Waterman & Co., and how had you known the pen? A. I could not say as to that. In fact the time that I bought these pens, I did not know which was the original.

Q6. Did the salesman tell you or lead you to believe that the A. A. Waterman was the originator of the Waterman pen?

Objected to as leading.

A. I don't think that he did.

Q7. What did he say? A. I have told you all that I can recall as to the conversation.

Q8. Did he give you any instructions as to the name which the pens should be sold to the public? A. No.

Q9. Did he call these pens "Waterman Pens" in selling them to you? A. I think he did.

CROSS-EXAMINATION by A. S. Bacon: 1532

XQ10. Did you know the name of the salesman? A. No, sir.

XQ11. How many did you buy? A. I think a dozen.

XQ12. Did he travel from New York or Chicago? A. I don't know that. The pens came from New York. I don't know where he travelled from.

XQ13. Did he give you his card when he first came in? A. As far as I recall he did.

XQ14. He told you that he represented A. A. Waterman & Co., and called your attention to the distinction between the A. A. Waterman, and the L. E. Waterman concern? A. Somewhere in the conversation he did.

XQ15. He told you that A. A. Waterman was not connected 1533
with L. E. Waterman, and that the two concerns were entirely separate? A. Yes, sir.

XQ16. Did he say that he represented the Modern Pen Co. sole selling agents for the A. A. Waterman & Co.? A. I think he did, that is where the pens came from, but I don't recollect the conversation.

XQ17. Did he give you a printed memorandum of sale? A. I think so.

XQ18. And on the bottom of it, was printed in large letters, "Modern Pen Co., sole selling agents for A. A. Waterman & Co.?" A. I don't recall anything about that.

1534 *A. H. Kinsey*

XQ19. But you do recollect that he gave you to understand that his goods were manufactured by the A. A. Waterman & Co., and not by the L. E. Waterman & Co.? A. Yes.

RE-DIRECT EXAMINATION by Mr. Raymond:

RDQ20. Did he explain the distinction between the concerns voluntarily, or did you ask him? A. I could not say.

RDQ21. You knew that there was an L. E. Waterman & Co.? A. I knew that there was an L. E. Waterman & Co., and also that there was an A. A. Waterman & Co., but did not know which one was advertised.

1535

Signature of witness is waived.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK,

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

1536 vs.

MODERN PEN COMPANY,
Defendant.

Testimony of witnesses taken before B. C. Miller, a Clerk of the United States Circuit Court and Standing Examiner at his office in the Post Office Building in the City of Cleveland, County of Cuyahoga, State of Ohio, under the provisions of the Equity Rules and Revised Statutes on the 7th day of April, 1911, at 10 o'clock in the forenoon, pursuant to notice hereto annexed.

Appearances:

Walter B. Raymond, of Counsel for Plaintiff.
Alexander S. Bacon, Solicitor for Defendant.

GEORGE P. KNEELAND, a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct-examination by Mr. Raymond:

Q1. What is your name, residence and occupation? A. George P. Kneeland, Cleveland, Ohio, 1251 Parkwood Drive; department manager, Burrows Brothers Company.

Q2. How long have you handled fountain pens? A. For about 11 years. 1538

Q3. What makes of fountain pens have you handled during the 11 years and for how long have you handled them? A. During that time I have handled Waterman Ideal pens, the Paul E. Wirt pen, for eleven years, and during that time I have handled the Moore Non-leakable pen, Conklin, the Auto-filler, Laughlin and numerous other makes.

Q4. Now, under what name do the public call for Waterman's Ideal fountain pen? A. Invariably they ask for a Waterman pen.

Q5. How long has that been the case in your experience? A. Ever since I have handled the pen.

Q6. Does the Waterman's Ideal pen prove generally satisfactory to customers? A. They do invariably so, to the extent that they come back repeatedly when the first ones are lost, as is often the case. 1539

Q7. Now, I show you a photograph marked as "Complainant's Exhibit No. 1, April 7, 1911." Were you present at the time that photograph was taken? A. I was.

Q8. Will you state whether that photograph is a fair representation of the window which is purported to be photographed? A. It is.

Q9. What window is it? A. The west window of the Standard Drug Company in Euclid Avenue, Cleveland.

1540 *George P. Kneeland*

Mr. Raymond: I offer that photograph in evidence.

Said photograph is hereto attached and made part hereof.

Mr. Bacon: That is objected to as immaterial and in no way connected with the defendant.

CROSS-EXAMINATION by Mr. Bacon:

XQ10. Have you ever dealt in A. A. Waterman pens? A. Not in a selling capacity. We have handled them as repairs.

XQ11. You do not know how people designate them when they want to buy them? A. Invariably they ask for a Water-
1541 man pen, as we handle the Waterman pens and feel that is the pen they want. When they say "Waterman," we refer to the Waterman Ideal.

XQ12. When people want to get an A. A. Waterman pen, you do not know what they inquire for, because you never have sold them? A. Never have sold them; no, sir.

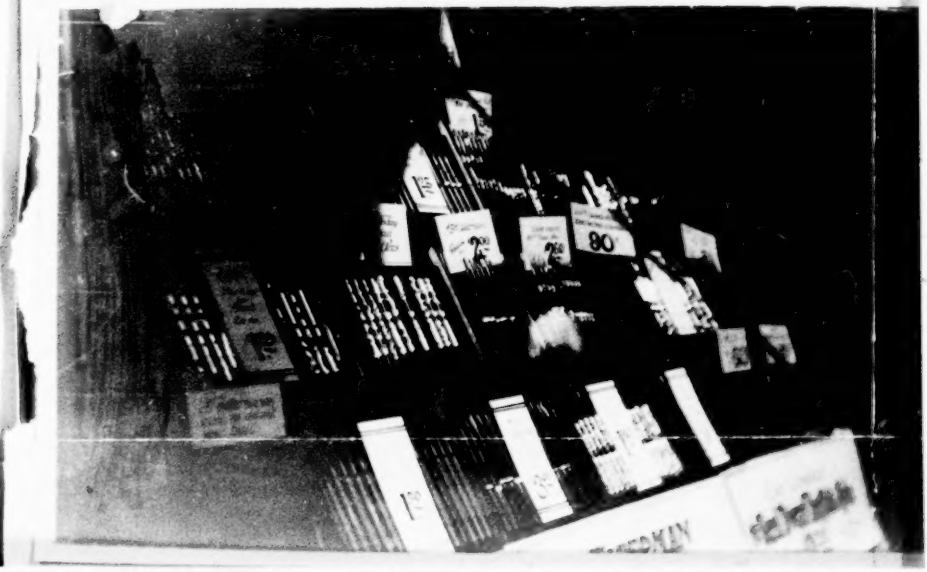
XQ13. Then you don't know how people describe the A. A. Waterman pen when they want to buy one? A. I would not know; no, sir.

RE-DIRECT EXAMINATION by Mr. Raymond:

RDQ14. Did you ever in your experience have a person ask
1542 for a Waterman pen where from their subsequent actions you learned that they intended to ask for and expected to receive an A. A. Waterman & Company pen? A. I do not recall any such instance.

Signature of the witness waived by consent of counsel present for both parties.

Plaintiff's Exhibit 1 of April 7, 1911.



1546 *Alfred Burkhardt*

ALFRED BURKHARDT, a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct-examination by Mr. Raymond:

Q1. What is your name? A. Alfred Burkhardt.

Q2. Where do you reside? A. Euclid, Ohio.

Q3. Did you accompany a gentleman named Cormier, of the office of Watson & Raymond, in New York, at the time he was in Cleveland purchasing pens? A. I did; yes, sir.

Q4. Now, will you state in your own words what occurred? A. We left Burrows Brothers, I imagine, about 10 o'clock. We walked up to the Standard Drug Company, Arcade, Euclid
1547 Avenue, and looked over their window. We had known they had a large number of Waterman pens in there and we thought we would go in there and purchase one. We looked over the pens and asked—

Mr. Bacon: I object to this on the ground that the Standard Drug Company is a stranger to the defendant.

A. (Continued.) We asked the young lady if that was the Waterman Ideal pen and she said, "Yes, it was." So we asked the price. It was $3.50. So finally she turned us over to the gentlemen, seeing we were some time in buying a pen, and he remarked that was a $3.50 Ideal fountain pen, that they were selling it because they were intending to close them out and
1548 that the regular price of that pen was $8.00. So we finally bought the $3.50 pen.

Q5. Do you remember what was inscribed on the pen which was so purchased? A. As I remember, "A. A. Waterman" pen, fountain pen.

Q6. Do you know whether or not it was a Waterman Ideal fountain pen? A. I know it was not.

CROSS-EXAMINATION by Mr. Bacon:

XQ7. Have you ever dealt in pens? A. No, sir.

XQ8. Had you ever seen an A. A. Waterman pen before? A. Yes, sir.

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XQ9. Where? A. Standard Drug Company.

XQ10. Do you know the name of the young lady that you spoke to? A. No, sir.

XQ11. Do you know the name of the man you spoke to? A. No, sir.

XQ12. The Standard Drug Company is a very large concern? A. Yes, sir.

XQ13. And has a great many salesmen and saleswomen? A. Well, the Standard Drug Company has; yes, sir.

RE-DIRECT EXAMINATION by Mr. Raymond:

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RDQ14. This is one particular store you went to? A. One particular Arcade store.

RDQ15. And there were one or two people in charge of the counter? A. Two people, lady and gentleman.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ16. And how many clerks in the store all told? A. I couldn't tell you.

RXQ17. A great many? A. Quite a number.

RXQ18. You don't know how many but it was a large number? A. I don't know how many, no.

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Signature of the witness waived by consent of counsel for both parties.

1552 *George F. T. Brooks*

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK,

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

v.

MODERN PEN COMPANY,
Defendant.

1553

Testimony taken *de bene esse* for final hearing on behalf of the plaintiff, before Frank H. Mason, a Notary Public, at his office in the main Post Office Building, Boston, Massachusetts, on the 31st day of March, 1911, beginning at 10 o'clock in the forenoon, pursuant to notice hereto annexed.

Appearances:

Samuel S. Watson, Esq., Counsel for Plaintiff.
Alexander S. Bacon, Esq., Counsel for Defendant.

GEORGE F. T. BROOKS, a witness of full age, produced on
1554 behalf of the plaintiff, being duly sworn, deposes as follows:

By Mr. Watson:

Q1. Please state your name, place of residence and your occupation? A. George F. T. Brooks, Belmont, Massachusetts; stationery buyer.

Q2. With what concern are you associated? A. The Harvard Co-operative Society, Cambridge, Massachusetts.

Q3. Where is their place of business? A. Harvard Square, Cambridge, Massachusetts.

Q4. And how long have you been connected with them? A. Since 1896; 15 years.

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Q5. Does the Harvard Co-operative Association handle and sell fountain pens? A. They do.

Q6. How long have they done this? A. I couldn't tell you how much before I was there, but ever since I have been there.

Q7. And since you have been connected with that concern what kind of fountain pens have they handled and sold? A. They have sold the L. E. Waterman, the A. A. Waterman, the Moore, and what was the Colonial at one time; those are the principal ones; we have handled several smaller that I couldn't recall just now.

Q8. Ever handled the Wirt pen? A. Yes.

Q9. Ever handled the Swan pen? A. Yes, we have handled the Swan. We have handled the Parker also.

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Q10. Ever handled the Sterling? A. No.

Q11. By what name do your customers ask for a Waterman Ideal fountain pen? A. Usually a Waterman pen.

Q12. And how long has that been a fact as far is it has come to your knowledge? A. No specified time. It has always been that way as far as I know, been the custom; it has been the custom to ask for a Waterman pen.

Q13. And what is the name by which that pen is generally spoken of by the trade? A. Ideal, as far as I know; that is what I understand by a Waterman pen, is an Ideal.

Q14. And do the trade refer to this pen and speak of it as a Waterman pen or a Waterman Ideal pen? A. I have usually heard it spoken of as Waterman Ideal.

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Q15. How long has that been a fact as far as you are personally concerned? A. I can't recall any specified time, date.

Q16. Has it ever been anything different? A. Very often spoken of as Waterman pen, but personally when I think of Waterman I think of Ideal; that's the first thing that comes into my head.

Q17. Do the Waterman pens and the pens that the plaintiff manufactures prove generally satisfactory to your customers as far as has come to your personal knowledge? A. At one time we handled nothing but the A. A. Waterman pen; that's what was the main pen. We used to have a great deal

1558 *George F. T. Brooks*

of trouble with it, more so than since we handled the L. E. Waterman Ideal. We had at one time both of them in the store.

Q18. Did you have any confusion between these pens on account of the similarity in name? A. Used to have; used to have quite a little trouble with them.

Q19. Did you ever know of any customer coming into your place and asking for a Waterman pen and expecting to get an A. A. Waterman pen? A. No, not that I can answer definitely; I couldn't say that I have.

Q20. When they asked for a Waterman pen, as far as it came to your personal knowledge they always wanted a Waterman's
1559 Ideal fountain pen? A. They did.

Q21. From your experience in handling fountain pens and the different makes you have mentioned, what in your opinion is the best fountain pen on the market? A. I should stand back of the Waterman Ideal; I know that from experience and the amount of sales also.

Q22. When were you handling pens stamped A. A. Waterman & Co., what period of time? A. 1899 up to 1903.

Q23. What did you find to be the principal complaint regarding these pens? A. The A. A. Waterman?

Q24. Yes? A. The pen points were inferior.

Q25. That is what people told you the matter was? A. Yes, we had more pens come back to us for repair than any other that
1560 I have had.

Q26. Do you have any evidences come to your attention of confusion now between the Waterman's Ideal Fountain Pen and those stamped A. A. Waterman & Co.? A. No.

Q27. Nobody brings them in now? A. Nobody asks for A. A. Waterman's pen; they ask for Waterman; we hand it out to them.

Q28. But has anybody brought you an A. A. Waterman pen and asked you to exchange it? A. No, I can't say that they have, not to my personal knowledge.

Q29. Do you come in personal contact with your customers? A. I do considerable selling.

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Q30. And you have general charge of the Harvard Co-operative Association's stationery department? A. Stationery department.

31. And you have had that charge for about 15 years? A. Yes; I went there to take that position.

CROSS-EXAMINATION by Mr. Bacon:

XQ32. Was not Mr. F. H. Thomas formerly in charge of that department? A. No, sir.

XQ33. What was his position? A. He had charge of the Medical Department in Boston.

XQ34. Were not you under him? A. No, sir. 1562

XQ35. Didn't he buy the pens? A. Wait a minute. Did you say—

XQ36. Were you under him? A. He was superintendent at one time, from 1899 to 1903.

XQ37. He was superintendent? A. Superintendent of the whole Co-operative Society.

XQ38. He was the whole thing? A. He was the whole thing.

XQ39. And that is the time they sold A. A. Waterman pens? A. That was the time.

XQ40. And then after he left in 1903, you took charge of the stationery department? A. No; I had charge of it while he was there also; he was superintendent of the whole store.

XQ41. The A. A. Waterman pens were used at his direction, 1563 were they not, from 1899 to 1903? A. They were.

XQ42. You didn't have any control over it? A. No, not at that time; no, I didn't.

XQ43. When he left as superintendent and you had the say in the stationery department, you changed to the L. E. pen? A. I did.

XQ44. And you have not sold any of the A. A. pens since 1903? A. We sold what stock we had left after 1903.

XQ45. How long did it take you to sell that out? A. I can't tell.

XQ46. A short time? A. No; two or three years.

XQ47. You never have bought any pens of the Modern Pen Company at all? A. No.

XQ48. And you never have sold any pens that have been made since the Modern Pen Company was organized? A. No.

XQ49. And you don't know anything about the new pen manufactured since their organization? A. Only what I learned from their salesman; their salesman calls on me every little time.

XQ50. But you have no personal knowledge of the A. A. Waterman & Co. pens as manufactured since 1905, when the Modern Pen Company was organized? A. Not since the new company has gone into existence.

1565 XQ51. And your whole experience relates to the period from 1899 to 1903? A. As far as the two pens are concerned.

XQ52. As far as these two pens are concerned? A. That is, handling the two together, you might say.

XQ53. And you haven't handled the recent manufacture of Modern pens? A. No.

XQ54. I am not mistaken, then, in saying that you do not handle any A. A. Waterman pens at all nowadays, and haven't for some years? A. At present we don't handle any pens except L. E. Waterman pens.

XQ55. And haven't since July 1, 1905? A. It is safe to say that I haven't bought any, anyway.

XQ56. If a man was carrying an A. A. Waterman pen, he
1566 would be apt to call it a Waterman, wouldn't he? A. That is a question; I wouldn't, myself.

XQ57. And if he went into a store where they sold A. A. Waterman pens, wouldn't he call for a Waterman? A. Not if he knew the difference, I don't think he would. Anybody speaks of Waterman naturally speaks of Ideal.

XQ58. They speak of Ideal pen, don't they? A. Not always; they call for a Waterman.

XQ59. And if they want a Modern pen, they speak of that that way? A. No.

XQ60. Weren't they called Modern pens when you dealt with them years ago? A. No, I am not so sure of that, when they

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did call that Modern. I shall have to recall that statement.

XQ61. If a man went into a store where they sold A. A. Waterman pens, what would he be apt to call for? A. I should naturally suppose he would ask for A. A. Waterman.

XQ62. If he saw the "A. A. Waterman" outside on the door, would he call for a Waterman?

> Plaintiff's Counsel objects to all this line of testimony as entirely immaterial and on its face improper in form, calling for speculation of the witness as to what some man would do or might do under some hypothetical conditions that do not exist here; also objected to as not relating to the issue in this case.
>
> 1568
>
> Defendant's attorney puts on the record a statement that as far as his experience goes in this case the only evidence that seems to have been desired is absolutely immaterial, irrelevant and incompetent on the part of the plaintiff.

Deposition closed.

Signature waived.

MISS FLORENCE W. WOOD, a witness of full age, produced on behalf of the plaintiff, being duly sworn, deposes as follows:

1569

By Mr. Watson:

Q1. Will you please state your name and your place of residence, and your occupation? A. Florence W. Wood; Bedford, Massachusetts; clerk at L. E. Waterman Company's.

Q2. And you are a clerk in the store of the L. E. Waterman Company at No. 8 School Street, Boston? A. Yes.

Q3. How long have you been a clerk in that store? A. A little over a year.

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Q4. And you wait on the customers who come in to buy goods? A. Yes.

Q5. And when these customers come into the store and ask to buy a fountain pen, what do they ask for? A. Why, either ask for a fountain pen or a Waterman pen.

Q6. And has that been the fact all the time since you have been in the store? A. Yes.

Q7. Did you ever have anybody come in there and ask for a Waterman pen and give you to understand in any way that they expected to get an A. A. Waterman & Co. pen? A. No.

Q8. Have you ever sold a pen stamped "A. A. Waterman & Co., New York"? A. No.

1571 Q9. Are these ever brought into the store? A. Yes.

Q10. Please tell in your own way just how these pens, stamped A. A. Waterman & Co., come to your attention? A. A customer comes in the store and wants his pen repaired and I look at it and find that it is an A. A. Waterman, and I tell them it is not our pen and sometimes they get very angry and say they know they bought the pen at our store. I tell them that it is not our pen and then they say they bought it for a Waterman pen.

Q11. And do you have many cases of the character such as you have described? A. Yes.

Q12. How often do those cases occur where people bring in a pen stamped "A. A. Waterman & Co., New York," and tell
1572 you in one way or another that they thought it was a pen of the plaintiff's manufacture? A. Why, they vary; sometimes we have three or four a week and then again we wouldn't have any; sometimes we would have more than four.

Q13. Do these people that complain to you in this way usually leave their name with you? A. Well, not always.

Q14. Do they sometimes? A. Yes, sometimes they do.

Q15. Do you repair pens of other makes at your store other than those of the L. E. Waterman Company? A. Not as a rule; sometimes we do to accommodate our customers.

Q16. As a general rule you don't take in any other pens for repair,—only those of the plaintiff's make? A. No.

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Q17. Do you take in and exchange pens of other makes besides those of the Waterman Ideal pen? A. Sometimes we do.

Q18. Do you take in and exchange a pen of any make that is offered? A. Yes.

Q19. Do you give the same terms of exchange as you do on a Waterman Ideal Fountain Pen? A. No, we allow them 25 per cent.

Q20. Is there any discrimination in their store between pens stamped "A. A. Waterman & Co., New York," and those of Wirt or Swan or any of the other makes? A. No, just the same.

1574

CROSS-EXAMINATION by Mr. Bacon:

XQ21. You work for the plaintiff, the L. E. Waterman Company, do you not? A. Yes.

XQ22. And are a saleswoman only? A. Yes.

XQ23. You don't do any repairs? A. No.

XQ24. And have had but one year's experience in selling pens? A. Yes.

XQ25. There is a store right across the street from you that sells A. A. Waterman pens, is there not? A. Yes.

XQ26. You said the people would sometimes come in and appear to be angry and say that they bought the pen at your store. Is that right? A. Yes.

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XQ27. And they were just as mistaken in the store as they were in the pen, were they not? A. Yes.

XQ28. Don't people often come in and ask for Ideal pens? A. Well, they do sometimes, but as a rule they ask for a Waterman pen or a fountain pen.

XQ29. You have never handled A. A. Waterman goods at all? A. No.

XQ30. And you don't know by what name people call these pens when they own them or ask for them? A. No, I don't know.

1576 *William J. Chaplin*

WILLIAM J. CHAPLIN, a witness of full age, produced on behalf of the plaintiff, being duly sworn, deposes as follows:

By Mr. Watson:

Q1. Please state your name, place of residence and your occupation? A. William J. Chaplin; South Hanover, Massachusetts; am a salesman and manager of the New England Branch of the L. E. Waterman Company.

Q2. The plaintiff has a store in Boston? A. They have, yes, sir.

Q3. Where is it located? A. 8 School Street.

1577 Q4. You have charge of that store? A. I have.

Q5. And what are your duties outside of having charge of that store? A. Why, visit the retail trade, Boston, Providence, Philadelphia, Baltimore and Washington.

Q6. How long have you had the same territory and duties that you have now? A. Well, I have had the territory of Philadelphia, Baltimore and Washington this is the 11th year; this is the 9th year I have been manager of the New England Branch.

Q7. You sell fountain pens and other products of plaintiff's manufacture at both wholesale and retail at the Boston store? A. I do.

Q8. Do you personally come in contact with the retail cus-
1578 tomers at the Boston store? A. More or less.

Q9. Substantially every day when you are in the City? A. Yes.

Q10. And what part of the time are you in the city? A. Two-thirds of the time.

Q11. By what name do customers call for fountain pens of plaintiff's manufacture? A. At the retail store?

Q12. Yes? A. Usually for Waterman pens or fountain pen or pen.

Q13. When they mention any name in connection with the fountain pen or pen, what is the name they usually employ? A. Waterman.

1579

Q14. And how long has that been the fact? A. Always.

Q15. As far as your experience goes? A. As far as my experience goes.

Q16. What do your wholesale customers, dealers, etc., ask for? A. As a rule, Waterman pens.

Q17. How long has that been a fact? A. Ever since I have been employed with them.

Q18. As far as the matter has come to your personal attention, what is the name the trade usually employ when they refer to pens of plaintiff's make? A. Waterman.

Q19. How long has that been a fact? A. Always.

Q20. When you say "always," you mean during your entire experience? A. Exactly. 1580

Q21. Did you have any acquaintance with the trade in fountain pens prior to your employment by the plaintiff? A. I did.

Q22. What was the name then the trade used in speaking of or referring to pens of plaintiff's manufacture? A. Usually Waterman.

Q23. As far as the matter has come to your personal knowledge, have the pens of plaintiff's manufacture proved satisfactory to the trade? A. Entirely so, yes.

Q24. To your retail customers? A. Yes.

Q25. Have any evidences come to your attention of confusion between the pens of plaintiff's manufacture and those stamped "A. A. Waterman & Co., New York"? A. Yes, a great many. 1581

Q26. In what way, and relate some of the circumstances, if you can recall them? A. Usually through reports of my help, and occasionally the matter is brought to me.

Q27. And what is the nature of the complaints as you find them out? A. Well, they are usually brought in the first place because for some reason the pen is unsatisfactory. When we get talking with them they usually think that it is the one of the plaintiff's make, a Waterman pen, even going so far as to say the name is on the barrel. When we point out it is not ours,

1582 they are usually surprised and sometimes, not infrequently, they get very angry about it.

Q28. What frequently occurs as to the guarantee? A. Well, when they think it is ours, they refer to the pen as being guaranteed and think we ought to make it good.

Q29. Do they ever give you to understand that they feel you are trying to avoid making good your guarantee? A. They certainly do.

Q30. Miss Wood referred in her testimony, that you heard, to some people coming into your store and stating that they had purchased a pen stamped "A. A. Waterman & Co., New York," in your store. Can you give any explanation of how such an

1583 occurrence as that could happen? A. Yes.

Q31. Will you please do so? A. Well, I have a case in mind, a case brought to me within a few months, of a lady that had an A. A. Waterman pen; she got rather angry because she thought we were trying to avoid using her properly, and when she found it was not our make she then said that she had bought it in a store on Bromfield Street, located in about the same place on Bromfield Street that ours is on School. She said to me that she wanted a pen, a regular Waterman pen, and said so because her husband wanted a regular, genuine Waterman pen, because a friend of his got one; that is what she asked for and she got an A. A., and she went back, I believe to Ailman's over the matter.

1584 Q32. As the Court may not be familiar with Boston, will you please state in a little more detail the relative location of these two stores? A. Bromfield Street and School Street are parallel. We are 8 School, and Ailman, I think, is 10 Bromfield.

Q33. The Ailman store and the Waterman store are on the same side of their respective streets? A. They are.

Q34. And Bromfield Street runs from Washington Street to Tremont Street? A. Yes.

Q35. And School Street also runs from Washington Street to Tremont Street? A. Yes, they do.

1585

Q36. Both of these streets are one block long? A. One block long; one block apart.

Q37. And parallel? A. Parallel.

Q38. And one block apart? A. One block apart.

Q39. Does this store that you refer to on Bromfield Street, Ailman & Co., I think is the name, have signs and other advertisements of pens stamped A. A. Waterman & Co.? A. They do.

Q40. They have a large sign out bearing that name? A. Well, they have signs in their window; fair, good sized signs in their window, and usually they have one indicating that they are the agents.

1586

Q41. You don't recall whether or not they have a large sign over their door hanging out over the sidewalk, which has their name as agents for the A. A. Waterman & Co. fountain pens? A. I cannot.

Q42. Do you find any confusion among the retail dealers in fountain pens between the fountain pens that the plaintiff manufactures and those stamped "A. A. Waterman & Co., New York"? A. Yes, we find some.

Q43. Will you mention some instances, if you have any in mind? A. Why—give the name of the dealer?

Q44. Yes? A. Why, I have in mind a man named Tucker. Is it necessary to have his initials?

Q45. Where is his place of business? A. Whitman, Mass.

1587

Q46. And any other? A. I had a report of one recently; Guertin in Pawtucket, Rhode Island. There are others from time to time but I remember these two because one was reported recently and the other I handled personally, Tucker.

Q47. Do you recall any complaints in the trade respecting sale of fountain pens by the Egyptian Diamond Jewelry Company of Washington? A. I do.

Q48. Please relate the circumstances as to how this matter came to your attention? A. I visit Washington regularly and some of my dealers down there complained that Waterman pens were sold at cut prices.

1588 *William J. Chaplin*

Q49. Did they mention the place? A. They mentioned the place the Egyptian Diamond Company.

Q50. What did they say to you about that in general? A. They were complaining about it. I couldn't recall the very exact words, but they complained that this man had our pens and were selling them at cut prices.

Q51. Did you investigate it? A. Immediately investigated.

Q52. And found they weren't the plaintiff's goods? A. I did.

Q53. How did you find those goods were marked that were displayed by the Egyptian Diamond Jewelry Company? A. Just the goods? Well, most of them, in fact I think all that
1589 I saw, had "Lincoln" and then "A. A. Waterman & Co., Maker, New York." I know A. A. Waterman; that is as far as I looked.

Q54. Did you see any pens there marked "Royal Ideal"? A. I did.

Q55. Did you see a lot of these pens displayed in the window of this concern, the Egyptian Diamond Jewelry Company? A. Yes.

Q56. What were the signs displayed in connection with those goods? A. The window itself had in big letters, "Fountain Pens," and then in small ones had "A. A. Waterman," possibly "& Co.," but "A. A. Waterman," however, and on the other side they had "Royal Ideal;" so much that it confused even
1590 some of my trade. Then the windows—in the windows he had them piled up in the usual way with A. A. Waterman trays and then in these little signs he had marked exactly the same as the window was: "A. A. Waterman" and "Royal Ideal" and "Pens."

Q57. Do you know whether on these signs in the window it was A. A. Waterman or A. A. Waterman & Co.? A. I wouldn't say.

Q58. Do you remember whether sign on the window was "Royal Ideal" or "Royal Ideal Pens"? A. I should say "Royal Ideal Pens."

1591

Q59. When was this? A. I should say about a year and a half ago.

Q60. And where was this store located in Washington? A. On 9th Street Northwest, about two or three doors above F Street.

Q61. And that would make it 900 and something 9th Street, Northwest? A. That is what it would.

Q62. Did you see any advertisements of the Egyptian Diamond Jewelry Company and of the pens that you described in the newspapers? A. Yes.

Q63. About the same time that you investigated the case? A. Yes.

1592

Q64. And were these pens in the advertisements you saw advertised in connection with the name of Royal Ideal Pen and A. A. Waterman & Co.? A. They were; they carried out the general scheme of the store.

Mr. Bacon: Question and answer objected to. The advertisement is the best evidence.

Q65. Does the L. E. Waterman Company sell pens marked with the name on the barrel of "Waterman" alone? A. A great many of them, yes, sir.

Q66. A great many different styles of pens that are marked "Waterman" alone? A. Yes, sir.

Q67. How long has that been the fact? A. Ever since I have been in the business.

1593

Q68. Does the L. E. Waterman Company sell fountain pens which are marked on the barrel "Waterman's" alone, without any distinguishing initials or other words? A. They do.

Q69. How long have they been doing that? A. Ever since I have been with them.

Q70. Did you ever see any pen anywhere at any time, any fountain pens except those handled by the plaintiff, which were marked "Waterman" alone without any distinguishing initials or other distinguishing marks? A. No, I haven't.

Q71. Did you ever see any fountain pen any time, anywhere, which was imprinted "Waterman's" alone, without other dis-

1594 tinguishing marks or initials except those handled by the plaintiff company? A. No, sir.

CROSS-EXAMINATION by Mr. Bacon:

XQ72. How long have you been in the pen business? A. 13 years.

XQ73. Did you know A. A. Waterman personally? A. I did, yes, sir.

XQ74. Knew him when he was in business in Boston? A. Yes.

XQ75. What year was that? A. About 1899.

1595 XQ76. Were you in business with him then? A. Not when I met him, no, sir.

XQ77. What was he doing when you first met him? A. Well, I should say he was trying to form a pen company.

XQ78. He was manufacturing pens, wasn't he, or selling them himself? A. I don't think he was manufacturing, no, sir.

XQ79. He was selling them under his own name? A. I believe so.

XQ80. Here in Boston? A. Yes.

XQ81. When you first met him? A. Supposed to be, yes, sir.

XQ82. And did you know him when he was in the firm of
1596 A. A. Waterman & Company when Mr. Gibson was his partner? A. I did not.

Mr. Watson: Counsel for plaintiff objects to this line of questions as not proper cross-examination and not referred to by the direct-examination and gives notice that the defendant makes the witness his own as to all new matter of which he inquires about on cross-examination.

XQ83. Did you know him continuously after about 1899?

Same objection and notice that the defendant is bound by the witness' answers.

1597

A. I knew him continuously for a year and a half or so.

XQ84. Was he then selling pens marked "A. A. Waterman & Co."?

Same objection.

A. When I first knew him it was A. A. Waterman.

XQ85. He was selling pens marked "A. A. Waterman," wasn't he?

Same objection.

A. Yes.

XQ86. Then afterwards was he selling pens marked "A. A. Waterman & Co."?

1598

Same objection.

A. I think he put "A. A. Waterman & Co." afterwards. I don't know just when.

XQ87. Did you ever work for him or with him?

Same objection.

A. I worked with him; not for him.

XQ88. In what concern?

Same objection.

A. I was connected with the Colonial Pen Company.

XQ89. What were his relations with the Colonial Pen Company?

1599

Same objection.

A. I think that primarily he was an employee the same as I was.

XQ90. Did not the Colonial Pen Company manufacture pens for him marked "A. A. Waterman & Co."?

Same objection.

A. Not to my knowledge, no, sir.

XQ91. Did they manufacture pens for anybody marked "A. A. Waterman & Co."?

1600 *William J. Chaplin*

Same objection.

A. I think not.

XQ92. When Mr. Waterman was connected with the Colonial Pen Company did he not sell pens marked "A. A. Waterman & Co."?

Same objection.

A. Part of that time, I think he did, yes, sir.

XQ93. Who made those pens, do you know?

Same objection.

1601 A. I think part of the time he bought the parts and put them together.

XQ94. And you have known of the A. A. Waterman pen from that day to this, haven't you, as continuously on the market?

Same objection.

A. Yes, I think so.

XQ95. And it has been advertised at times profusely, has it not?

Same objection.

A. I wouldn't say so, no, sir.

XQ96. It has been advertised all this time?

1602 Same objection.

A. No, I wouldn't say so.

XQ97. It has been advertised a great deal of this time?

Same objection.

A. Some of the time.

XQ98. It was sold openly and above board in the market as the A. A. Waterman & Co. pen, was it not?

Same objection.

A. I will not say; I don't know; I don't know that.

XQ99. You knew of its being sold?

1603

Same objection.

Q. Yes, some dealers who sold it.

XQ100. For how many years have you known the A. A. Waterman pen being sold on the Boston market?

Same objection.

A. I have known of the A. A. Waterman pen being on the market for 11 years, I think; all the time I have been connected; I guess that will come within the limit all right.

XQ101. And it has been continuously on the market during those 11 years, hasn't it?

Same objection.

1604

A. So far as I know.

XQ102. You sell nothing but L. E. Waterman goods?

Same objection.

A. That is all.

XQ103. In your Boston store at 8 School Street you have nothing but L. E. Waterman fountain pens?

Same objection.

A. No, sir, that is not true.

XQ104. Do you sell other makes?

Same objection.

1605

A. No, sir.

XQ105. Then you have certain pens manufactured by L. E. Waterman & Co. that do not bear their name of Waterman?

Same objection.

A. No, sir.

XQ106. What do you mean?

Same objection.

A. I mean if you made that word "products" I would have said so, but you said only fountain pens.

1606

XQ107. I was referring to pens.

Same objection.

A. We don't sell any other pens, only one. We sell their products.

XQ108. What are their products?

Same objection.

A. Ink and accessories of different kinds.

XQ109. How many fountain pens do you carry in stock in the Boston store?

1607

Same objection and also entirely immaterial to any issue in this case.

A. I don't want to answer that question.

XQ110. I insist upon its being answered?

Same objection.

A. Then I will tell you that I can't tell you off hand.

XQ111. About a thousand?

Same objection.

A. We carry that many filled with ink.

XQ112. About how many thousands—I don't expect an accurate answer?

1608

Same objection.

A. We have a thousand pens filled with ink for our retail trade—

XQ113. In the Boston store?

Same objection.

A. —to deliver at once on small orders.

XQ114. That is in 8 School Street?

Same objection.

A. Then we have the wholesale stock besides.

1609

XQ115. In 8 School Street, how many pens have you marked "Waterman" or "Waterman's" alone, without any other distinguishing mark?

Same objection.

A. I couldn't tell you.

XQ116. About how many?

Same objection.

A. I don't know. They come constantly.

XQ117. Have you got a hundred?

Same objection.

1610

A. I should say more.

XQ118. You are not willing to swear that you have more than 100?

Same objection.

A. I should just as soon as swear to anything if I knew it. Our stock is constantly moving; would be impossible to do so.

XQ119. Did Mr. Saadi, in Washington, the Egyptian Diamond Company, in Washington, sell L. E. Waterman pens, too?

Same objection.

A. Never to my knowledge. Certainly he never bought them. 1611

XQ120. You mean he never bought them of you?

Same objection.

A. Exactly.

XQ121. He could buy them of jobbers?

Same objection.

A. He can't, no, sir; it is an impossibility.

XQ122. Why so?

Same objection.

A. Because they are not sold to jobbers.

XQ123. Don't you sell any goods through jobbers?

Same objection.

A. Never. We sell direct to the retail dealer.

XQ124. Nevertheless, Mr. Saadi could have bought L. E. pens from other people, couldn't he?

Same objection.

A. Not without paying the retail price.

XQ125. What is the name of the firm that sells your goods in Portland?

1613

Same objection.

A. There are several. I have sold two firms within a few days.

XQ126. What were the names?

Same objection.

A. One a drygoods firm and one a big jewelry house down there.

XQ127. What was the name of that?

Same objection.

A. McKenny.

1614 XQ128. We examined yesterday a salesman from a stationery store in Portland. I can't think of the name of his firm. Don't you know that Mr. Stevens, the salesman for that firm, sells L. E. Waterman pens on the road?

Same objection.

A. No, sir; I do not.

XQ129. Doesn't he sell pens at wholesale? A. I don't think he does. I have never known of a case in my career with the Waterman people.

XQ130. Do you know the Tower Manufacturing & Novelty Company of New York?

1615

Same objection.

A. Know of them, yes.

XQ131. Don't you know that they job L. E. pens?

Same objection.

A. No, sir.

XQ132. You never knew that?

Same objection.

A. No, sir.

XQ133. How often were you at the Egyptian Diamond Jewelry store in Washington?

1616

Same objection.

A. I think twice.

XQ134. How long an interval between?

Same objection.

A. Two months.

XQ135. Isn't it a fact that Mr. Saadi, the owner of that store, only sold the Royal Ideal pen for a very short time?

Same objection.

A. I don't know that. I know that for two or three months —I go there every two months; the first time it is brought to my attention; then I report it; and the next time some action is taken. 1617

XQ136. You should say he was selling it for two or three months?

Same objection.

A. I believe six or eight months altogether.

XQ137. You don't know when he began?

Same objection.

A. No; I took no notes on that.

XQ138. You don't know how many he sold?

Same objection.

1618

A. No, sir.

XQ139. You say that a man named Tucker from Whitman, Massachusetts, a dealer, had a personal conversation with you about being confused as to the different makes of pen. Kindly give that conversation?

Same objection.

A. I was going through Whitman one day waiting for a car and dropped in to see Mr. Tucker and saw he had some A. A. pens in the case. I brought up the matter of why he didn't handle some Waterman pens; he said, "I've got them;" "No, you haven't;" "Sure I have," he said, "in the case."
1619 Knowing they were A. A., I said, "No, those aren't Waterman pens. I represent the Waterman Company." He went and looked at them and found they were marked A. A. Waterman. I said, "That is a different pen altogether." He was very much surprised.

XQ140. Did he say of whom he purchased his goods?

Same objection.

A. Percival.

XQ141. Who is Percival?

Same objection.

A. A jobber.

1620 XQ142. Where?

Same objection.

A. Boston; it is in the Jeweler's Building here. I don't know the number; he is one of the large jobbers here; Jeweler's Building, Washington and Bromfield Streets.

XQ143. Did any individual ever come to you in the Boston store and say when they had an A. A. Waterman pen they thought it was an L. E. Waterman?

Same objection.

A. A great many.

1621

XQ144. Can you give the names of any?

Same objection.

A. I think I can. One of them was a lady, in the case I referred to here.

XQ145. What is her name?

Same objection.

A. Her name is Ronimus.

XQ146. You don't know her first name?

Same objection.

A. It seems to me it was R. S. 1622

XQ147. And you don't know her address?

Same objection.

A. Allston, which is a suburb of Boston.

XQ148. And you don't know her street address?

Same objection.

A. 16 Princeton Avenue, Allston.

XQ149. Give us some other name?

Same objection.

A. The other one that I have in mind is a Mrs. Kelly; she lives in 189 West Springfield Street, Boston Massachusetts. 1623

XQ150. Are those the only two names you can give us?

Same objection.

A. The only two I can remember off hand, yes, sir.

XQ151. You never have dealt in A. A. Waterman pens at all?

Same objection.

A. Oh, yes, some.

XQ152. When?

Same objection.

A. When I was with the Colonial Pen Company.

XQ153. That was many years ago?

Same objection.

A. Yes, sir.

XQ154. You never have dealt in A. A. Waterman pens since the organization of the Modern Pen Company?

Same objection.

A. No, I think not. The Modern was the name of the line that they made at that time.

XQ155. The Modern Pen Company was organized about July
1625 1, 1905?

Same objection.

A. Yes, sir.

XQ156. You don't personally repair pens yourself?

Same objection.

A. At the present time?

XQ157. At any time, now, at any time?

Same objection.

A. Not unless something comes in I can do right off for a customer.

1626 XQ158. And you have had no experience in the manufacture of pens? A. Some.

XQ159. When? A. When I was with the Colonial Pen Company.

XQ160. When did you leave there? A. Ten years ago last October.

XQ161. How long were you with them? A. I have got mixed when I started; in 1899, I think it was.

XQ162. About how long were you with them? A. About two years, I should say.

XQ163. What did you do when you were with them? A. I was manager of the Colonial Pen Company.

XQ164. And did they manufacture pens? A. No.

XQ165. What did they do? A. They bought their pens from A. A. Waterman.

XQ166. And he manufactured them? A. Supposed to, yes, sir.

XQ167. Then when you were manager for the Colonial Pen Company you didn't have anything to do with the manufacture of the pens? A. Not with the organization, no, sir; but as manager of the Colonial Pen Company I had more or less to do with both ends of it.

XQ168. Then A. A. Waterman & Company were manufacturing pens and selling them to the Colonial Pen Company, is that it? A. That was the idea, yes, sir. 1628

XQ169. You do not take in all sorts of pens to repair, do you? A. Not as a rule, no, sir.

XQ170. You do not take in A. A. Waterman pens to repair? A. Not as a rule. There are exceptions in both cases.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ171. Do you know Edward M. Stevens of Portland, personally? A. No.

RDQ172. Do you visit Portland? A. No.

RDQ173. Is it part of your territory? A. No.

RDQ174. Do you know the concern with which he is connected? A. Know of them. 1629

RDQ175. The conversation you had with Mr. Tucker of Whitman, Massachusetts— A. Yes.

RDQ176. —Did Mr. Tucker say anything to you as to what make of pen he thought he had? A. He certainly did.

RDQ177. What did he say he thought he had? A. Waterman pen.

RDQ178. What did he mean by that? A. He meant the Waterman Ideal.

RDQ179. Did he give you distinctly to understand that? A. He did.

RDQ180. What did he say to make you think so? A. He said he was going to get rid of that stock as soon as he could and buy ours.

RDQ181. Did he express any familiarity with Waterman's Ideal fountain pen? A. Yes.

RDQ182. And what did he say that convinced you that he had been deceived in purchasing these pens he had? A. First he told me who he bought them of, Percival of Boston; was quite surprised to find they weren't the genuine Waterman pen; was further surprised they would let him go on and buy those pens under that impression.

1631 RDQ183. Did he say anything about buying them as pens of the plaintiff's make?

Objected to as irrelevant, immaterial and incompetent, as hearsay.

A. He said when he bought them he thought he was getting a genuine Waterman pen and that he would buy them later.

RDQ184. When you said he would buy them later what do you refer to? A. Waterman Ideal.

RDQ185. When you speak of Waterman's genuine pen what do you mean? A. Waterman's Ideal.

RDQ186. How do you happen to remember these two or three cases you call to mind, Mrs. Ronimus and Mrs. Kelley? A. As a rule a case of that kind in the store I don't handle
1632 personally; they are reported to me, however, and when a customer gets a little beyond their help they refer them to me and tell them I will be in; and Mrs. Ronimus came to me so strenuous about it I remember it very well from that fact.

RDQ187. Did you handle the other cases that you have referred to? A. Tucker of Whitman I handled; that is why I remember it. Guertin is of recent date. It came to me in the form of a report from one of our men.

RDQ188. You personally received the complaints regarding the Egyptian Diamond Jewelry Company? A. I did from customers in Washington.

1633

RDQ189. I understand on your cross-examination you said that when you first met A. A. Waterman he was making pens under his own name—that is, A. A. Waterman. Is that correct? A. Yes, sir.

RDQ190. Do you recall how those pens were marked? A. When I first met him? "A. A. Waterman," I think.

RDQ191. Anything else on them? "A. A. Waterman, Maker, Boston," on them? A. Yes, some of them. I think he gradually changed as he went along. I think at first I knew him only as A. A. Waterman and his business as A. A. Waterman. He had only an office at that time.

RDQ192. Did he have a factory at that time? A. No.

1634

RDQ193. Was he manufacturing pens? A. No. I know he bought them in New York, some of them; some of his gold pens he bought from P. D. Collins.

RDQ194. Where are they? A. Gold pen manufacturers of New York. I think he bought product from Frazer & Geyer of New York.

RDQ195. And how long did you know him before the Colonial Pen Company was organized? A. I couldn't tell you that exactly, but shortly after that, formed the company; they finally named it the Colonial Pen Company.

RDQ196. Two or three months? A. Might have been two or three weeks and might have been two or three months. From the time I first met him and until we got the Colonial Pen Company it was certainly three months.

1635

RDQ197. And during that time do you know of any pens that he manufactured under the name of A. A. Waterman & Co.? A. Yes.

RDQ198. During the time you met him before the Colonial Pen Company was organized he was manufacturing pens marked A. A. Waterman & Co.? A. No, not in that time. I thought you asked—

RDQ199. And when you organized and began business as the Colonial Pen Company did you have any factory? A. No.

RDQ200. And how were the pens marked when you started business as the Colonial Pen Company? A. They were marked

"A. A. Waterman"—this is my recollection—"Maker, Boston, Mass." Then we marked some of them "Dewey's Perfect Pen made by A. A. Waterman."

RDQ201. Did you make that to start with, when you started the Colonial Pen Company? A. As soon as we could get it out.

RDQ202. How long was that? A. I can't tell you.

RDQ203. Did you make a pen which you called, or did you sell a pen which you called the Uncle Sam? A. Yes.

RDQ204. And did you advertise after you got started as the Colonial Pen Company that you were selling A. A. Waterman pens? A. We did; yes, sir.

1637 RDQ205. And not A. A. Waterman & Co. pens? A. Yes, we did.

RDQ206. Did you find this marking caused any confusion in the trade? A. Yes, there was confusion.

RDQ207. And what was there about it that caused confusion? A. The marking.

RDQ208. What part of the marking? A. The name "Waterman."

RDQ209. Was the name "Waterman" at that time well identified with the plaintiff's fountain pens? A. Yes.

RDQ210. Did the trade at that time know the plaintiff's make of pens as Waterman pens? A. Yes.

RDQ211. And were they called for at that time by the trade by the name of Waterman pens? A. Yes.

1638 RDQ212. Did you come in contact with the trade at that time? A. Some.

RDQ213. And had you known anything about Waterman pens of plaintiff's make before you formed the Colonial Pen Company? A. Yes.

RDQ214. How long? A. Oh, six or seven years. I will correct that. Five years, I will say, before.

RDQ215. Did you know Edward L. Gibson, who was formerly at one time a partner of Arthur A. Waterman?

Objected to as that was answered on cross-examination.

A. No, I never met the gentleman.

RDQ216. Do you know whether he is alive or not now? A. Yes. I know he is dead.

RDQ217. Do you know when he died? A. Why, yes. He died in August, 1899.

RDQ218. When did Arthur A. Waterman sever his connection with the Colonial Pen Company? A. In January, 1901, I should say.

RDQ219. I show you a copy of a circular signed "A. A. Waterman" and dated Boston, March 1, 1899, and ask you if you recall seeing the original of that circular? A. I do.

RDQ220. Have you got a copy of it? A. I can't say for sure now. 1640

RDQ221. You haven't any copy here? A. No.

RDQ222. Do you remember anything about whether this circular was sent out to the trade on or about its date or not? A. Just as soon as we could get it out, yes.

RDQ223. Was it sent out while you knew A. A. Waterman? A. It was; yes, sir.

RDQ224. And where was his office at that time? A. In Bromfield Street, 56.

RDQ225. Boston? A. Yes, Boston.

RDQ226. Were you in that same office at the time the circular was sent out? A. Yes, sir.

The circular identified by the witness is offered in evidence and marked Plaintiff's Exhibit 100. 1641

Objected to as irrelevant, immaterial and incompetent, as the circular is the best evidence.

RDQ227. I show you copy of the circular dated Boston, April 20, 1899, and signed "A. A. Waterman." Do you remember of seeing the original of those circulars? A. I do; yes, sir.

RDQ228. And do you know whether or not those circulars were sent out to the trade on or about the date they bear? A. Yes.

RDQ229. And was A. A. Waterman in the same office with you at the time those were sent out? A. He was.

The circular identified by the witness is offered in evidence and the same is marked Plaintiff's Exhibit 101.
Same objection.

RDQ230. Do you know anything about the circular, a copy of which I now show you, and which is dated Boston, February 1, 1899, and signed "Rhodes Lockwood"? A. Yes, I have seen the matter.

RDQ231. Was that circular distributed among the trade, do you know? A. Yes.

1643 RDQ232. At about the time of its date? A. Yes.

Circular identified by the witness is offered in evidence and marked Plaintiff's Exhibit 102.
Same objection.

RDQ233. Looking at the circulars you have identified, can you now tell us when, or about what time, you first met A. A. Waterman? A. Along—well, I should say along in May of 1899.

RDQ234. How long after you met A. A. Waterman did you form the Colonial Pen Company? A. Well, a couple of months, say.

RDQ235. Soon after? A. Soon after.

1644 RDQ236. And at the time you met A. A. Waterman was he making any kind of pens as far as you know except those which were marked "A. A. Waterman, Maker, Boston"? A. No.

RDQ237. Did he at that time, do you know, make a pen he called the Uncle Sam? A. Yes, a little later; about that time, I might answer that question, somewhere.

RDQ238. Was A. A. Waterman at the time you met him, so far as you know, making any fountain pens marked "A. A. Waterman & Co."? A. No, sir.

RDQ239. How long was it after the time you first met him before you knew he was making or selling fountain pens marked "A. A. Waterman & Co." A. I can't answer that.

RDQ240. Did he make any up to the time that you formed the Colonial Pen Company as far as you know? A. I should say not.

RDQ241. Can you give us any approximate time when he first made pens marked "A. A. Waterman & Co." after you knew him? A. No, I wouldn't want to say when he did that.

RDQ242. After you formed the Colonial Pen Company you became the selling agents for all the goods that he was making? A. Yes, sir.

RDQ243. And you advertised them as A. A. Waterman pens and not as A. A. Waterman & Co. pens; is that so? A. I think at first we did as A. A. Waterman pens.

RDQ244. And afterwards as A. A. Waterman & Co. pens? 1646
A. That is my recollection; yes, sir.

RDQ245. When you first began to sell them, they were marked "A. A. Waterman, Maker, Boston"? A. That is my recollection; yes, sir.

RDQ246. Do you know when the Colonial Pen Company began to sell fountain pens stamped "A. A. Waterman & Co."? A. No, sir.

RDQ247. When A. A. Waterman left the Colonial Pen Company, what were his relations to that company? A. Well, he was practically an employee.

RDQ248. What were his duties? A. To look after the factory and sell goods on the road.

RDQ249. Was he an officer of the Colonial Pen Company? 1647
A. I think he may have been; not positive.

RDQ250. When did he leave the Colonial Pen Company? A. About the first of the year 1901.

RDQ251. And when he left the Colonial Pen Company, what became of the factory that he was running? A. The Colonial Pen Company moved it to Boston and run it.

RDQ252. Did the Colonial Pen Company own that factory? A. Yes, sir.

RDQ253. Did they furnish the money to equip that factory? A. Yes, sir.

RDQ254. And when A. A. Waterman left the Colonial Pen Company, did he take any of the goods or assets of the Colonial Pen Company with him? A. Not to my knowledge; no, sir.

RDQ255. What became of the business after he left? A. It was run by the Colonial Pen Company.

RDQ256. Just the same as before? A. Just the same as before.

RDQ257. How long did it continue? A. Well, I should say as a matter of fact it run a good while.

RDQ258. You mean by a good while, several months or several years, or what? A. Well, it run until late in the fall of the same year.

1649 RDQ259. 1901? A. Yes, sir; and then they had a failure.

RDQ260. And what became of its property then? A. It was afterwards run by one or two of the old members of the company and finally sold out to one Lancaster of Baltimore.

RDQ261. The old concern as a going concern and all its assets sold to Lancaster? A. So far as I know.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ262. When did the Colonial Pen Company fail? A. I think along in the latter months of 1901.

RXQ263. Who were the officers of the company? A. I think Mr. Dewey was president.

1650 RXQ264. What other officers? A. Well, I think that I was only manager, and I don't know who the other officers were. We were the three active ones.

RXQ265. Who was the third? A. Mr. Waterman, A. A. Waterman.

RXQ266. Do you know whether he held some office? A. I wouldn't say.

RXQ267. The Colonial Pen Company was the selling agent of A. A. Waterman & Company? A. Yes, sir.

RXQ268. And they did the manufacturing? A. Whom do you mean by "they"?

RXQ269. A. A. Waterman & Company. A. Yes.

1651

RXQ270. And their factory was at Somerville, Mass.? A. Yes.

Mr. Watson: Same objections to these questions.

RXQ271. In 1899 did L. E. Waterman Company have a factory anywhere? A. 1899?

RXQ272. Yes, or 1900. A. I don't know only by reputation.

RXQ273. Wasn't their reputation at that time that they didn't have any factory at all? A. My experience was this in that matter, that they did not have a factory.

RXQ274. And for many years after that? A. I wouldn't say that; no, sir.

1652

RXQ275. When did the L. E. Waterman Company first have any factory of its own? A. Well, I have always understood that they had a factory at Seymour, Connecticut.

RXQ276. That is where the penholders were made? A. Yes, sir.

RXQ277. Is that the only factory? A. No, they have a factory in Canada.

RXQ278. That is only within the last year or two? A. Within the last year or so.

RXQ279. What other factory have they? A. In New York.

RXQ280. How long have they had one there? A. I think for five or six years.

RXQ281. Before that they didn't have any factory at all? A. Except the one at Seymour.

1653

RXQ282. And up to five or six years ago the L. E. Waterman Company were mere assemblers of the parts, were they not? A. I don't know; I wouldn't want to say that.

RXQ283. You knew they bought their pen points of one party and got their penholders from another?

Same objection.

A. I think that might be said at any time. You asked me when they had a factory. I don't know when they first had their factory in New York.

RXQ284. It is true now that they get their holders at Seymour, Connecticut, and buy pen points and manufacture them—A. So far as I know their Seymour, Connecticut, factory is their factory; I don't know; at one time I tried to get some holders and couldn't.

RXQ285. When you first went with them, did they have a factory at Seymour—when you first went there? A. I don't know that; I think they did.

RXQ286. When you were selling L. E. Waterman pens through the Colonial Pen Company didn't people call them Waterman pens at that time? A. Yes, sir.

1655 RXQ287. Did Mrs. Ronimus or Mrs. Kelley tell you who sold them their pens? A. Mrs. Ronimus did.

RXQ288. Mrs. Kelley did not? A. I am not sure she did; no, sir.

RXQ289. Whom did Mrs. Ronimus say? A. She claimed she bought her pen at Ailman's.

RXQ290. Did she say what they told her when she bought the pen? A. She didn't say what they told her; she said what she asked for.

RXQ291. She didn't say what they told her? A. I don't think she did.

RXQ292. You induced Mr. Tucker to change his line of goods, didn't you? A. He did change them; not at that time.

1656 RXQ293. Owing to your persuasive eloquence? A. No, I don't think so.

RXQ294. You will not admit it A. No. Mr. Tucker was very indignant.

RXQ295. Did you see his stock? A. I did; yes, sir.

RXQ296. It was in a large case? A. No, sir; it was in a tray.

RXQ297. And on the tray was "A. A. Waterman & Co."? A. I think it was.

RXQ298. And Mr. Tucker can read and write? A. Yes, sir.

RXQ299. How long has he been in the business? A. I don't know; he is a jeweler.

RXQ300. Did he say that he didn't know the difference between L. E. Waterman and A. A. Waterman pens? A. He

didn't know there was but one company; he thought he had the genuine.

RXQ301. He knew he had A. A. Waterman & Company's? A. Before I left him he did; yes, sir.

RXQ302. Didn't he from the fact that that sign was on the case? A. No, sir; apparently from what he said to me he didn't.

RXQ303. Apparently he read the sign on the tray and didn't know he had A. A. Waterman & Company's goods? A. He thought they were Waterman.

RXQ304. Are you prepared to say they were not Waterman? A. From my understanding I am prepared to say so.

RXQ305. That wasn't your understanding 10 years ago— 1658
11 years ago? A. Yes, sir.

RE-RE-DIRECT EXAMINATION by Mr. Watson:

RDQ306. You haven't anything to do with the manufacturing department of the L. E. Waterman Company have you? A. Not a bit.

RDQ307. And you don't know whether they had a factory in New York five years ago or ten years ago, do you? A. I certainly don't.

RDQ308. You don't know whether they had a factory in 1899 or not? A. I do not; no, sir.

RDQ309. Did A. A. Waterman & Company ever have any 1659
factory in Somerville that you know of; did they ever have any factory in Somerville at any time? A. It was run under that name; yes, sir.

RDQ310. When? A. Along between—oh, 1900.

RDQ311. That factory was, as a matter of fact, owned by the Colonial Pen Company, wasn't it? A. Yes.

RDQ312. And you used that name to get the benefit of the Waterman name; wasn't that the fact? A. I think that is the truth.

RDQ313. And A. A. Waterman didn't own a dollar in that factory? A. No, sir.

RDQ314. And had absolutely no interest in that factory at all? A. No financial interest.

RDQ315. The only interest he had in it was his salary as an employee of the Colonial Pen Company? A. And we got the benefit of his experience over at the factory.

RDQ316. And the only interest he had in it was his salary as an employee of the Colonial Pen Company? A. That is all.

RDQ317. And he ran it for their interest and benefit? A. He did; yes, sir.

RDQ318. And the plaintiff's pens were called Waterman pens at that time, were they not? A. They were; yes, sir.

RDQ319. And when people call a pen stamped A. A. Waterman & Co. the Waterman pen, how do they happen to do it? A. They get confused on the names; don't know L. E. from A. A. In the case of Mr. Tucker, he thought he had a genuine Waterman pen and was surprised when he found he hadn't.

1661

RDQ320. He meant by genuine Waterman the one— A. The one that was advertised extensively was the words he used; the one he thought he had.

RDQ321. When you explained the difference to him, did he say anything about the pen he thought he had? A. Yes.

RDQ322. Which one did he say he thought he had? A. He thought he had Waterman's Ideal fountain pen.

RDQ323. When people called pens stamped A. A. Waterman & Co., which were sold by the Colonial Pen Company, Waterman pens, did they call them so because they were mistaken, too? A. Yes, sir.

1662

RE-RE-CROSS EXAMINATION by Mr. Bacon:

RXQ324. You never heard of an L. E. Waterman factory up to about five or six years ago, did you? A. Yes, sir.

RXQ325. Where? A. From A. A. Waterman.

RXQ326. Did you hear of an L. E. Waterman Company factory up to about five or six years ago? A. Yes.

RXQ327. Where? A. From A. A. Waterman.

RXQ328. I do not understand. Did you ever hear of the L. E. Waterman Company having a factory up to five or six years ago? A. Yes, sir.

RXQ329. From whom? A. A. A. Waterman.

RXQ330. He told you that they had a factory? A. Yes, sir.

RXQ331. Did anybody connected with the L. E. Waterman Company ever tell you they had a factory up to five or six years ago? A. I think they did.

RXQ332. Where was that? A. I think it was in New York.

RXQ333. Who told you? A. I wouldn't want to say that; I don't know; in other words, I would say if I knew.

RXQ334. You were in New York very frequently? A. Not much. 1664

RXQ335. Were you ever in their factory? A. Yes, have been in their factory.

RXQ336. When? A. Couldn't tell you just when, but for a number of years.

RXQ337. Within five or six years? A. Yes.

RXQ338. You never were in one before? A. Not to my knowledge.

RXQ339. When you were with the Colonial Pen Company you always called the A. A. Waterman pen the Waterman pen? A. No, sir.

RXQ340. Didn't the people who came in call it the Waterman pen? A. Yes, sir; asked for a Waterman.

RXQ341. And the dealers you dealt with eleven or twelve years ago called it the Waterman? A. The dealers not so much so. 1665

RXQ342. They did some? A. Possibly some; but the retailers are what we call the dealers; but the people at large referred to it as the Waterman pen.

RXQ343. When they meant the A. A. Waterman? A. No; usually they wanted the Waterman Ideal, and it takes an explanation to sell them an A. A.

RXQ344. And if a man was carrying an A. A. pen way back twelve years ago, he would call it a Waterman pen? A. I don't know that he would call it that, Waterman; no, sir. I would have no way to answer a question of that kind.

1666 *Howard L. Wheeler*

HOWARD L. WHEELER, a witness of full age, produced on behalf of the plaintiff, being duly sworn, deposes as follows:

By Mr. Watson:

Q1. Please state your name, place of residence and your occupation. A. Howard L. Wheeler; 32 Sackett Street, Providence, Rhode Island; stationer.

Q2. And where is your place of business? A. 98 Westminster Street, Providence, Rhode Island.

Q3. And how long have you been in the stationery business? A. Twenty-seven years.

Q4. How long have you sold fountain pens A. More than
1667 twenty years.

Q5. What kind of fountain pens have you sold during that period? A. I have sold Waterman Ideal, Moore's Non-Leakable, Boston Safety, Swan, the Conklin, and the Wirt and the A. A. Waterman.

Q6. When did you sell A. A. Waterman pens? A. I should say 17 or 18 years ago; that is just an estimate.

Q7. How long since you stopped selling pens stamped "A. A. Waterman & Co."? A. Probably ten years.

Q8. How long did you sell them? A. I couldn't say just how long; six or seven years, I should estimate.

Q9. Of all the pens that you have handled, what pens have you found the best? A. I have sold more of the Waterman
1668 Ideal pen; consider it the best.

Q10. By what name do your customers ask for the Waterman Ideal fountain pens? A. They ask for Waterman pen, Waterman Ideal pen.

Q11. What is the name they usually use when they come into the store and ask for one of these pens? A. Waterman pen.

Q12. How long has that been so? A. As long as we have sold them.

Q13. What is the name by which the trade usually refer to pens of the plaintiff's make? A. Waterman pen.

Q14. And by what name do they usually refer to the plaintiff—when they refer to the plaintiff, what name do they use? A. Waterman.

Q15. Have you had any evidence brought to your attention of confusion in the trade or in the minds of the public between the pens of plaintiff's make and those stamped "A. A. Waterman & Co., New York"? A. Yes.

Q16. In what way does that confusion come to your attention? A. Well, people have brought in pens for exchange, thinking that they had the Waterman pen; that is, the one generally called the Waterman pen and advertised extensively, and felt bad when they found we wouldn't exchange it because we didn't carry at the time the A. A. Waterman pen.

Q17. Did you ever have any customer come into your store and ask for a Waterman pen and give you to understand in any way that they expected to obtain an A. A. Waterman & Co. 1670
pen? A. No, I think not.

CROSS-EXAMINATION by Mr. Bacon:

XQ18. You haven't sold any A. A. Waterman pens in the last ten years? A. I wouldn't say for a certainty.

XQ19. Certainly not since July 1, 1905, when the Modern Pen Company was organized? A. I should say not.

XQ20. And the present firm of A. A. Waterman & Company? A. I should say not.

XQ21. Then you know nothing of the pens that are manufactured by the present firm of A. A. Waterman & Company? A. Practically nothing. 1671

XQ22. You don't take them in exchange? A. No.

XQ23. You don't take them to repair? A. Take them to repair.

XQ24. Do you get very many to repair? A. No.

XQ25. Very few? A. Very few.

XQ26. When you were selling both lines ten years ago, did you call both the L. E. and A. A. Waterman pens, Waterman pens? A. We called the A. A. usually the A. A. Waterman.

XQ27. You sometimes called it the Waterman? A. I think not.

XQ28. How did the people who carried the A. A. Waterman pens speak of it? A. Spoke of it as the A. A.

XQ29. Wouldn't they call it the Waterman? A. They might.

XQ30. If a man had an A. A. Waterman pen or an L. E. Waterman pen, he would call it a Waterman, wouldn't he? A. I think he would.

XQ31. Can you give the name of any person who has come to your store with an A. A. pen thinking they had an L. E. pen? A. No, sir.

XQ32. How long since any such incident has occurred? A. Shortly before Christmas, this last Christmas, I was called by
1673 one of the sales people that there was a man had an A. A. Waterman pen, brought it in for repair, and brought it in for exchange; they told him they carried only Waterman Ideal and they couldn't exchange it and he gave them to understand that he thought he was getting and bought a Waterman pen, the one that was advertised.

XQ33. Did he say where he bought it? A. In a drug store.

XQ34. Where? A. In Providence.

XQ35. Didn't tell you what one? A. No.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ36. When people call a pen marked "A. A. Waterman
1674 & Co." a Waterman pen in your experience, isn't it because they think they have a Waterman Ideal pen? A. Yes.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ37. How do you know that? A. I don't know it.

Deposition closed.

(Signature waived.)

1675

HARPER W. POULSON, of full age, a witness produced on behalf of the plaintiff, being duly sworn, deposes as follows:

By Mr. Watson:

Q1. State your full name, place of residence and your occupation. A. Harper W. Poulson; residence, 44 Steadman Street, Brookline; stationer.

Q2. How long have you been in the stationery business? A. I should think about twenty-five or twenty-six years.

Q3. How long have you handled fountain pens? A. I should think almost 25 years.

Q4. What kind of fountain pens have you sold? A. Well, the Wirt, I believe, was the original that I remember, and then 1676
the Waterman and then Parker and then back to the Waterman.

Q5. How long have you handled the Waterman Ideal fountain pen since you put it in the last time? A. I should think five or six years.

Q6. How long have you handled the Waterman Ideal fountain pen altogether? A. Well, I should say about 15 years ago, perhaps, we handled the Waterman pen originally.

Q7. How long did you handle it then? A. Oh, I should say two or three years.

Q8. Have you ever handled or sold the pen stamped "A. A. Waterman & Co."? A. Yes, sir.

Q9. When did you handle those? A. When A. A. Waterman
first left the L. E. Waterman Company and started his pen, we 1677
put his pen in.

Q10. How long did you sell that pen? A. For a few years; I don't remember just how long.

Q11. How long since you have handled any pens stamped "A. A. Waterman & Co."? A. Haven't handled any for a long time, I should say ten years or more, except perhaps a few that were left over, but we haven't carried any in stock regularly for about twelve years, I should think.

Q12. Have you had these A. A. Waterman & Co. pens shown to you by traveling salesmen? A. Not now.

Q13. How long since you have had any shown you by traveling salesmen? A. I should think eight or ten years ago.

Q14. They don't call on you now? A. No, sir.

Q15. Of all pens that you have handled, what pen do you in your opinion consider the best? A. The Waterman.

Q16. When you refer to the Waterman, what pen do you mean? A. The L. E. pen.

Q17. The Waterman Ideal fountain pen? A. Yes.

Q18. Has this pen proved satisfactory to your customers as far as the matter has come to your personal attention? A. Very.

Q19. By what name do your customers ask for pens of plaintiff's manufacture? A. Waterman pen.

1679 Q20. How long has that been the fact? A. Well, as far back as I can remember.

Q21. What is the name by which the trade generally speak of or refer to pens of plaintiff's manufacture? A. The trade?

Q22. Yes. A. Well, the Waterman pen or the Waterman Ideal fountain pen and the L. E. Waterman pen.

Q23. Is the pen of plaintiff's manufacture well known among the trade as far as you know? A. More so than any other, I should say.

Q24. As far as you have observed, they are more generally sold than any other pen on the market? A. Yes, sir.

Q25. Have at any time any evidences of confusion come to you between pens of plaintiff's manufacture and those stamped
1680 "A. A. Waterman & Co., New York"? A. Not so much now; originally a great deal; I mean when the A. A. Waterman started originally.

Q26. What was the reason that you discontinued the sale of the A. A. Waterman pens?

Mr. Bacon: Objected to as immaterial and not relating to any period covered by the defendant's life.

Mr. Watson: In view of defendant's counsel's objection the question is withdrawn.

Q27. Do you have any instances of confusion between plaintiff's fountain pens and those marked "A. A. Waterman & Co." in the last year or two? A. Yes, some.

Q28. How do those instances come to your attention? A. Well, I should say the most recent one was where a party came in with an L. E. barrel with an A. A. Waterman pen in it; said that the pen had been put in by somebody when they needed a pen somewhere and they came back and objected to the pen, so we took it out and sent it over and had an L. E. Waterman pen put in it.

Q29. Have any cases of confusion come to your attention where people have brought in an L. E. Waterman pen stamped "A. A. Waterman & Co."? A. Not recently. Rarely ever hear of A. A. Waterman now.

CROSS-EXAMINATION: 1682

XQ30. Where is your place of business? A. 26 Tremont Street.

XQ31. Boston? A. Boston.

XQ32. Then you haven't dealt with A. A. Waterman goods since July 1, 1905, about which date the present firm of A. A. Waterman & Co. was organized? A. No, I should say not.

XQ33. Very rarely see one, you say? A. Very rarely see one.

XQ34. Don't you know there are a great many A. A. Waterman pens sold in Boston? A. I do not.

XQ35. You know that there are a great many stores that carry them? A. I don't. 1683

XQ36. You never have heard of that? A. I say I don't know of a great many stores that carry it. I don't know of any stores.

XQ37. Allman & Company? A. I don't know it—I believe I do know that because I believe we had occasion to send down there with this pen I speak of; I had to get the information where to send it because I didn't know before that.

XQ38. Don't you know Smith & McCance carry it? A. No, sir.

XQ39. Don't you know they are sold here in a dozen different places? A. No, sir.

XQ40. You don't know much about your neighbors? A. Don't know much about that pen. I know it isn't sold by the prominent stationers.

XQ41. When you sold the A. A. Waterman pen 10 or 12 years ago didn't you call it the Waterman? A. No, sir.

XQ42. Didn't people who came in and bought it call it the Waterman? A. They didn't come in for that pen. They came in for *the* Waterman pen.

XQ43. Were you selling the L. E. Waterman pens— A. They put in the other pen when Mr. A. A. Waterman come in more as a matter of personal friendship.

1685 XQ44. Were you selling the L. E. Waterman pen at the same time A. Yes; we changed.

XQ45. Which did you sell the most of? A. Most of the L. E. Waterman.

XQ46. About how many years did you sell the A. A. Waterman pen? A. Carried them along for a few years; I should say probably four or five years.

XQ47. Are you a member of the firm? A. No.

XQ48. Were you then? A. No.

XQ49. You are a mere salesman? A. Well, I am there on a guaranteed salary and a commission account for my department.

XQ50. You do not do the buying? A. All of it in my department.

1686 XQ51. What does your department consist of? A. Stationery. The business is booksellers and stationers and engravers, and I have the stationery department.

XQ52. Why did you drop the L. E. Waterman line some years ago? A. I dropped everything with the name of Waterman because the thing had got so mixed up I got sick of it and put in another pen.

XQ53. When was that? A. That I couldn't tell you just when. When we discontinued the A. A. Waterman we discontinued both of them and went back to the Wirt pen; cleaned out the Waterman pen entirely, and I only put the Waterman pen back because the customers demanded it.

XQ54. And you carry other lines, too, don't you, now? A. No; our business is somewhat peculiar in this way, that we only handle one thing and that we recommend. We handle only Crane's paper and don't handle anything else.

XQ55. Did you make the change on account of threats of litigation? A. No.

XQ56. You say it was so mixed up. How did that trouble you? A. Well, because in the first place A. A. Waterman himself would come in in my absence and try and instruct my girls to show the A. A. pen when Waterman's pen was called for.

XQ57. How do you know; you weren't there? A. I was told so. And then he was rather an aggressive fellow, and then there was a good deal of confusion as to what pen the customer really did want and I thought to settle it we would throw them both out. 1688

XQ58. Then the customers didn't really know whether it was an A. A. Waterman or an L. E. Waterman pen they wanted? A. They knew a Waterman pen.

XQ59. They called an L. E. just as they called an A. A., and that was a Waterman pen? A. They didn't want an A. A. Waterman because at that time it wasn't a good pen; it wasn't satisfactory; since then they have improved; that was years ago, but when we first had it it was not satisfactory.

XQ60. You don't know who made the L. E. Waterman pens, do you, at that time? A. No.

XQ61. Never heard they had a factory anywhere? A. No. 1689

RE-DIRECT EXAMINATION:

RDQ62. What is the name of the concern with which you are? A. W. B. Clarke Company.

RDQ63. And that company has a big place of business, large store? A. Yes.

RDQ64. One of the largest here in Boston in its line? A. I should say one of the very largest; yes, sir.

RDQ65. Located on one of the principal streets of Boston? A. Tremont, 26 and 28 Tremont and opens onto Court square also.

RDQ66. That is one of the principal streets in Boston? A. I should say it was.

RDQ67. And in the main business section of Boston? A. Yes.

Deposition closed.

(Signature waived.)

Recess.

KEVIN W. BARRY, of full age, a witness produced on be-
1691 half of the plaintiff, being sworn, deposes as follows:

By Mr. Watson:

Q1. Please state your name, place of residence, and your occupation? A. My name is Kevin Walter Barry; at the Hermitage, 7 Willow Street, Boston, Mass.

Q2. And your business? A. My business is second-hand book seller.

Q3. And with what concern are you connected? A. The DeWolfe & Fiske Company.

Q4. Where is their place of business? A. 20 Franklin Street, Boston, Mass.

Q5. Have you at any time handled and sold fountain pens?
1692 A. Yes.

Q6. When? A. For the last three years at Rochester, New York.

Q7. With what concern were you connected when you sold fountain pens? A. Duffy-McInerney Company.

Q8. And where was their place of business? A. On Main Street, Rochester.

Q9. New York? A. Yes.

Q10. What kind of fountain pens did you handle? A. The L. E. Waterman, exclusively.

Q11. By what name are these pens usually called for by your customers? A. Well, they simply say they wish to select a pen.

They don't call them by any particular name, but there was possibly one reason for that. I had the name so well advertised that there was no occasion for them to ask for the name, because they saw it before they bought the goods; in fact before the goods were taken out of the case.

Q12. By what name are these pens known in the trade, so far as it has come to your attention? A. As the "Ideal;" they are always sold as the "Ideal," because other pens are sold on the market and they don't specify that they are Ideal pens.

Q13. Have you ever sold any other pens besides Waterman Ideal fountain pens? A. No. I have been canvassed to do so.

1694

Q14. Did the Waterman Ideal fountain pens that you sold prove satisfactory to your customers as far as the matter came to your attention? A. In every way.

Q15. While you were handling fountain pens in Rochester, did any evidences of confusion come to your attention between Waterman's Ideal fountain pens and those stamped A. A. Waterman & Co., New York? A. Yes; there was quite a little friction on account of the price, people saying they could buy Waterman fountain pens cheaper elsewhere.

Q16. And what were the pens referred to by the customers? A. The pens referred to were sold by another house, Scranton, Wetmore & Company, they being under the impression that they were Waterman fountain pens. They were manufactured by A. A. Waterman.

1695

Q17. Did you have any of those pens stamped A. A. Waterman & Co. brought into your store by people who told you they had bought them for Waterman's Ideal fountain pens? A. I had those pens brought into my store with the request that they be returned, and I explained that they were not L. E. Waterman fountain pens, and the people were very much astonished, as they thought there was but one Waterman, and they had bought the pens.

Q18. Did they give you to understand that they thought they had purchased the pen of the L. E. Waterman Company man-

ufacture? A. Yes; in this way; that they thought they had purchased *the* Waterman pen.

Q19. And *the* Waterman pen meant what? A. The big advertiser, L. E. Waterman.

Q20. And that was well known by the trade? A. So well known that a man would not think of asking whether it was L. E. or anybody else.

Q21. And all the time that you have been familiar with fountain pens, has that been a fact? A. Positive fact.

Q22. Had you any acquaintance with fountain pens prior to your connection with the concern you have mentioned in Rochester? A. No active experience. I have know about fountain pens
1697 all my life, but as far as selling them and attending to the repairing of them and such matters, why, no.

Q23. Did any of these customers that brought in pens stamped A. A. Waterman & Co., when you told them they were not the genuine Waterman Ideal fountain pen, become indignant? A. Well, not indignant, but very much disgusted, because they were under the impression that what they bought was bought with the provision that it could be repaired at any place in the country, which is so of the L. E. Waterman fountain pen.

Q24. These people gave you to understand that they only knew one Waterman, and that was the L. E. Waterman Company? A. No, they only knew one Waterman. They presumed that the fountain pen sold by L. E. Waterman was the only
1698 fountain pen in existence, and they so bought it.

Q25. You mean the only Waterman pen in existence? A. Yes. They presumed that the L. E. Waterman was the only pen.

Q26. The only Waterman pen in existence you mean, of course? A. Yes; well, we don't count any other pens in the market; when we talk about fountain pens we presume it is a Waterman.

Mr. Watson: That is all.

The Witness: Now, pardon me—

1699

CROSS-EXAMINATION by Mr. Bacon:

XQ27. Why do you say there is no other pen on the market? Don't you know that there are dozens of pens on the market? A. Not of the same grade as the L. E. Waterman fountain pen.

XQ28. How do you know that? A. You are not an expert in the manufacture or repairing of pens? A. No; I am not an expert in the manufacture of them.

XQ29. Or the repairing of them? A. No.

XQ30. Never did any repairing? A. No.

XQ31. And you never dealt in any other pen? A. No; except to examine them.

1700

XQ32. And you can't say that the L. E. Waterman pen is better than any other, can you? A. Yes, sir.

XQ33. You wouldn't put your judgment against that of a man who had experience in the manufacture of pens? A. No, I wouldn't put it against an expert, but I would use my own common sense and be convinced of the fact that the pens were not equal, when one was sold for 75 cents at trade, and the other was sold at $1.50.

XQ34. That is your only reason? A. That is my main reason.

XQ35. If an A. A. Waterman pen sells at six dollars and an L. E. Waterman pen sells at six dollars, you would presume they were about equal in value? A. No, on account of the patents that exist on the L. E. Waterman pen, which don't exist on the A. A. Waterman pen.

1701

XQ36. Are you aware that the principal patents on the L. E. Waterman pen ran out years ago? A. The fundamental patent ran out, but there are a great many patents still in existence that the others cannot get control of.

XQ37. And what are those patents? A. Well, I can't enter into details about them.

XQ38. You don't know anything about them, do you? A. Not much.

XQ39. Don't you know that they have got no patent existing, except on the feed? A. No; I understood there were others.

XQ40. And don't you know that their feed is extremely conceded to be about the poorest on the market? A. No, it is not.

XQ41. That the reed feed, so-called, is the very best, and not used by the L. E. Waterman Company? A. No.

XQ42. Did you know that the L. E. Waterman Company didn't manufacture their pens at all? A. The L. E. Waterman Company didn't manufacture pens?

XQ43. Yes; did you ever hear that? A. I have heard that statement made, but I never credited it.

1703 XQ44. Just assembled the parts? A. No. I heard that contradicted flatly.

XQ45. By whom? A. Inside the Waterman house.

XQ46. When? A. Oh, I guess—well, within those three years.

XQ47. The three years is the last three years? A. Yes.

XQ48. You gave up that business about two months ago? A. No; I gave it up about a year ago, exactly.

XQ49. And will you give me the name of anybody who came into your store? A. No; I was buyer, I wasn't a salesman.

XQ50. This is only what you have heard somebody else tell you? A. A case in which I have been brought down to appease a customer and smooth matters, and explain difficulties.

1704 XQ51. How many such cases are there that came within your personal observation? A. Within my personal observation about one a week. I figured we lost the sale of about 50 pens a year, and we refused to repair at least as many more.

XQ52. Can you give the name of any such person? A. I can't.

XQ53. You refused to repair any makes except your own? A. Yes, sir; we certainly did.

XQ54. And you refused to exchange any pens except your own? A. Yes, sir.

XQ55. Wasn't the cause of the anger from the fact that you wouldn't repair the pen that was brought to you? A. No; it

was because we couldn't properly explain to the customer that there was a difference between L. E. Waterman and A. A. Waterman, without entering into a slanderous story one way or the other.

XQ56. You knew of A. A. Waterman, didn't you, as a rival concern? A. I knew A. A. Waterman was once employed by L. E. Waterman.

XQ57. He started in for himself? A. Yes; and failed.

XQ58. Whoever told you that he failed? A. I have heard that from various persons. I can't tell offhand who told me.

XQ59. When did he fail and where did he fail? A. He failed in New York and went to Chicago.

XQ60. When? A. I couldn't tell you the year or anything of 1706
that kind.

XQ61. Whoever told you that? A. That I can't tell you. I am simply now telling you frankly what I heard.

XQ62. What some L. E. Waterman salesman told you? A. No. The only salesman that came to me from L. E. Waterman was L. E. himself.

XQ63. Did he tell you that? A. No, he didn't. No, I didn't hear it from L. E. Waterman at all, I know that.

XQ64. You never made any repairs yourself? A. No.

XQ65. You wouldn't know how to? A. No, sir.

XQ66. And you don't know anything about the relative merits of pens from your own experience? A. No.

XQ67. If a man had an A. A. Waterman pen in his pocket and 1707
came into your place, wouldn't he call it a Waterman pen? A. He might call it a Waterman pen, but we would know by the make of the pen, just the general formation and everything else, that it was not an L. E. Waterman pen.

Mr. Bacon: That is all.

The Witness: Now, what I was going to say was practically covered in what this gentleman asked me.

Deposition closed.

Signature waived.

FLORENCE W. WOOD, recalled.

By Mr. Watson:

Q31. Since you gave your deposition this morning did Col. Bacon call on you at the store of the Waterman Company? A. Yes.

Q32. And ask for a fountain pen with the name "Waterman" on it? A. Yes.

Q33. And have you looked in the stock of the store at 8 School Street since the Colonel's visit and found any pens of the plaintiff's manufacture, such as he inquired about this morning, in your store? A. Yes; I have them right here. (Witness produces box of pens.)

1709

Q34. Did the pens you produce come out of the stock? A. Yes.

Q35. And are these pens and similar ones pens that have been in the stock of the L. E. Waterman Company since you have been in the store? A. Yes.

Q36. Marked the same way as these are? A. Yes.

Q37. And did these come out of the regular stock? A. Yes.

Q38. And all the time you have been there have pens similar to the ones you have produced here been in the stock of the L. E. Waterman Company at 8 School Street? A. Yes.

The nine pens produced by the witness are offered in evidence and marked "Plaintiff's Exhibit 103."

1710

Q39. I notice some of these pens have little tags attached to them bearing prices and numbers. Are the prices mentioned on these tags the retail selling price of the pens? A. Yes

Q40. Why didn't you show these to Col. Bacon when he asked for them at lunch time? A. When he came in I don't know just what I was doing, but I looked up, and I was rather confused, and that is the reason I didn't.

Mr. Watson: That is all.

CROSS-EXAMINATION by Mr. Bacon:

XQ41. When Mr. Geyer and I called on you about an hour ago, after you had testified this morning, we asked you if you had any pens in stock that were marked "Waterman" or "Waterman's," without any other initials on them, did we not? A. Yes.

XQ42. And you said you didn't have any? A. Yes.

XQ43. You said that every pen you had in stock was marked "Ideal," didn't you? A. Yes.

XQ44. You said you didn't have any pens at all that were not marked "Ideal"? A. Well, that was because I was confused.

1712

XQ45. Was there any reason why you should be confused? A. Well, I don't remember what I was doing at the time, but I looked up and saw you both in there, and I was just confused, that was all.

XQ46. We asked you that question perhaps half a dozen times, didn't we, if you were sure that you didn't have any in stock anywhere? A. I don't think you asked me that many times.

XQ47. When did you ever see these particular exhibits before? A. Why, since I have been there in the store.

XQ48. These exhibits are all metal holders, aren't they?

Mr. Watson: Objected to, as the exhibits speak for themselves.

1713

A. They are.

XQ49. And there is no name of any kind marked on the holder itself, isn't that right?

Mr. Watson: Same objection, and as not stating the fact, and the exhibits speak for themselves.

XQ50. Can you find the name "Waterman" on the holder on any of these pens in this Exhibit 103? A. You can, down there at the end (indicating on pen).

XQ51. Whereabouts? A. Right there.

XQ52. That is on the little bit of a shank at the end, isn't it? A. Yes.

XQ53. What does that read there? A. "Waterman."

XQ54. What else? A. "Pat'd. Feb. 12 & Nov. 4, 1884," and "Sterling."

XQ55. I show you this one in gold with a little bit of a projection at the end in rubber. Can you read with your naked eye what is on that? A. That is "Waterman."

XQ56. You can see it without glasses? A. Yes.

XQ57. Without a magnifying glass? A. I can.

XQ58. How many more have you got in your store like this? A. Why, I don't know just how many.

1715 XQ59. Have you ever seen any others besides these nine? A. Why, yes; but these were just what I happened to pick out.

XQ60. Who asked you to pick them out? A. Why, when Mr. Chaplin came back, I told him the statement I had made, and then I went and got him a pen. I told him I was confused.

XQ61. Didn't he tell you where to find them? A. No; I knew.

XQ62. What part of the store did you find them in? A. In the cases.

XQ63. Whereabouts in the store, in the front part? A. Yes; and there were some in the cabinet.

XQ64. Did you ever have anybody before inquire for a Water-
1716 man pen marked "Waterman" only? A. They ask for Waterman pens, that is all.

XQ65. And you always give them the Ideal? A. Yes.

Mr. Bacon: That is all.

Deposition closed.

Signature waived.

WILLIAM J. CHAPLIN, recalled.

By Mr. Watson:

Q344. Where did Plaintiff's Exhibit No. 103 come from, if you know? A. Pardon me. I didn't get the whole of that.

Q345. Where did these pens come from marked Plaintiff's Exhibit 103? A. Came out of our retail stock.

Q346. And how long had those pens been in stock ? A. Couldn't tell that, but some of them must have been there a long time.

Q347. Have you any other pens in stock similar to these like Plaintiff's Exhibit 103? A. Yes.

1718

Q348. And how long have you had pens marked the same as those pens in stock? A. All the time.

Q349. A great many of the higher priced expensive pens, mounted in gold and silver, are marked the same as the pens are marked which compose Plaintiff's Exhibit 103; is that so? A. Yes, sir.

Q350. Those pens which compose Plaintiff's Exhibit 103 are regular stock? A. Regular stock.

Q351. Of the L. E. Waterman Company? A. Regular stock.

Q352. How long have you been selling pens of that same kind and with the same mounting? A. Ever since I have been with them.

Q353. And no new designs there at all? A. No.

1719

Q354. Regular stock? A. Regular stock, yes, sir. There is the same thing (indicating two different pens); that is what we call "Barleycorn," and this is plain.

CROSS-EXAMINATION by Mr. Bacon:

XQ355. None of these are marked on the body of the pen, are they? A. Yes; this is the body of the pen really; the body is the rubber.

XQ356. That little shank on the extreme end is what you call the body? A. No. This is the holder, we refer to this part as

the holder. Now, this one happens to be covered with gold, but this isn't a shank on the end, this is a part of the whole thing.

XQ357. It is in very small letters on the end, isn't it? A. Well, it is in regular sized letters that we put on all of them.

XQ358. Have you any pens in your stock with plain holders of rubber, marked either "Waterman" or "Waterman's" alone? A. I think we have had some, but I don't know whether we have got them now or not.

XQ359. Did you look and try to find any? A. Picked these right out of the case.

XQ360. Well, did you try to find any with plain holders? A. No, sir.

1721 XQ361. How long since you have seen a pen with a rubber holder, not covered with gold or silver, that was marked "Waterman" or "Waterman's" alone? A. I have seen them recently.

XQ362. How recently? A. Well, I should say within a month or two.

XQ363. Are you willing to swear that there is one such pen in your store today? A. Well, I wouldn't now, no, sir; not until I looked, surely.

XQ364. You didn't look for any of those this noon, did you? A. No, sir.

XQ365. Didn't you know that it would be very much more desirable to produce a pen here with a plain holder marked "Waterman's," than one with a holder that is all covered up with

1722 gold or silver? A. I don't know why it would; no, sir, I did not.

XQ366. Didn't Mr. Watson tell you to scour through your store and find something marked in that way? A. He certainly did not, sir.

XQ367. What did he tell you? A. He didn't tell me anything. I came back and Miss Wood told me the story about those.

XQ368. And then what did you do? A. I asked her why she told that; didn't she know we had some? And she said yes, she was confused, she looked up from her work and you and Mr. Geyer were there, and she said, "I guess I showed my confusion in my face."

1723

XQ369. No, she didn't show any confusion? A. This is what she said to me; and she said, "I told them no." And I said, "You get some pens together right off and take them down to Mr. Watson right away."

XQ370. She walked from the front of the store to the back of the store in order to find a pen, and finally she did find one and it was marked "Ideal." A. Those pens were taken right out of our showcase, on exhibition. Others were in our retail stock, what we call our retail safe.

XQ371. Then you had them in the safe? A. Some of these were taken right out of the case. What I refer to as the safe is where we take these out of the case at night and lock them up.

1724

XQ372. But you didn't find any pens so marked that had a plain holder? A. No, sir, I haven't. Didn't look for one.

XQ373. And you don't think you have any? A. I wouldn't say.

XQ374. Well, it is unusual to see such a pen, isn't it? A. A plain one marked—

XQ375. A plain rubber holder marked simply "Waterman" or "Waterman's"? A. Well, I have seen some of them lately.

XQ376. But it is very unusual, isn't it? A. It isn't as usual as it is some of the others, probably.

Mr. Bacon: That is all.

1725

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ377. The black holders are for the most part marked "Waterman's Ideal fountain pen"? A. Yes, sir.

RDQ378. And the silver and gold mounted pens are marked the same as these composing Plaintiff's Exhibit No. 103? A. Yes, sir.

RDQ379. And that has always been the fact since you have been connected with the business? A. Yes, sir; these things come that way. I don't know the reason, just why they do.

Mr. Watson: Taking these pens, I find that one I pass to defendant's counsel is marked "Waterman" alone.

Mr. Bacon: "Waterman" where?

Mr. Watson: On the back end of the holder.

Mr. Bacon: And defendant's counsel states that the marking is so small that with his glasses he cannot read it.

Mr. Watson: I pass another pen of another style, in gold mounting, that is also marked in the same place with the word "Waterman."

Mr. Bacon: Defendant's counsel makes the same remark about the size of the letters and his glasses.

1727 Mr. Watson: I hand another of the pens composing Plaintiff's Exhibit 103, which is marked in the same place with the name "Waterman" alone.

Mr. Bacon: Defendant's counsel makes the same remark, and states that in each of these instances the word "Waterman" or "Waterman's," if that is what it is, is on the extreme end of a little shank and not on the body of the pen.

Mr. Watson: Plaintiff's counsel passes three more pens composing Plaintiff's Exhibit 103 to defendant's counsel and calls attention to the fact that these are marked in the same place and in the same way with the word "Waterman" alone.

1728 Mr. Bacon: The same observation, on the extreme end of a little shank and very small letters, and not on the body of the pen.

Mr. Watson: Plaintiff's counsel examines each one of the nine pens composing Plaintiff's Exhibit 103 and finds that each one of them bears the name "Waterman" alone upon the barrel.

By Mr. Bacon:

RDQ380. Defendant's counsel asks the witness if he found any more pens so marked? A. Yes, sir.

1729

RDQ381. How many did you find? A. Well, I went as high as a dozen, but I didn't happen to have a box, and I brought the nine just to fit the box.

RDQ382. And that is all you found? A. That is all I found this time, yes, sir.

By Mr. Watson:

RDQ383. I show you a fountain pen and ask you if you recognize that as one of the regular stock of the plaintiff company? A. Yes, sir.

RDQ384. Is that a style of pen that has been regularly sold by the plaintiff company? A. Yes, sir.

1730

RDQ385. For how long? A. As long as I have been with them.

The pen identified by the witness is offered in evidence and marked "Plaintiff's Exhibit 104."

Mr. Watson: I desire to have it noted on the record that this pen is marked "Waterman's fountain pen."

Mr. Bacon: Defendant's counsel makes the same remark, that is marked on the extreme end or shank in such small letters that he cannot read it.

Deposition closed.

Signature waived.

1731

It is stipulated by and between counsel that the exhibits offered in evidence by the plaintiff shall be retained by the plaintiff until final hearing.

1732 **Plaintiff's Exhibit 100.**

TO THE TRADE

On Feb. 1 the partnership previously existing between ARTHUR A. WATERMAN and EDWARD L. GIBSON, doing business under the name, A. A. WATERMAN & Co., was dissolved by mutual consent. On the same date my relations with Mr. RHODES LOCKWOOD were terminated, causing a ma-
1733 terial reduction of working capital.

In consequence of these changes, I deem it advisable hereafter to conduct the business in my own name; and, for a short time, on a strictly cash basis, giving to customers, able and willing to purchase for cash, exceptional terms.

The regular line of my pens will be stamped "*A. A. Waterman, Maker, Boston,*" and their well-known high standard *will be maintained.*

1734 A. A. WATERMAN

36 Bromfield St.

BOSTON, March 1, 1899

Plaintiff's Exhibit 101. 1735

NOTICE TO THE TRADE

REGARDING

A. A. WATERMAN'S FOUNTAIN PENS

On Feb. 1, 1899, the partnership previously existing between E. L. GIBSON and myself, doing business as A. A. WATERMAN & Co., was dissolved by mutual consent

1736

Mr. GIBSON took a position with the Sterling Fountain Pen Co., then starting in business, having acquired certain rights from the business of A. A. Waterman & Co.; while I continued as sole maker of fountain pens bearing my name and guarantee

The regular line of my pens will be stamped "A. A. Waterman, Maker, Boston," and their well-known high standard *will be maintained*

To secure at once the best facilities for the wide distribution of my pens, called for by the Trade, I have 1737 sold my entire product to the COLONIAL PEN COMPANY, of Boston, feeling assured that they will serve the Trade most acceptably

Hereatter all orders sent me for my pens will be referred to the COLONIAL PEN COMPANY as Sole Selling Agents

A. A. WATERMAN

36 Bromfield St.
BOSTON, April 20, 1899

1738 **Plaintiff's Exhibit 102.**

CIRCULAR

FOUNTAIN PENS.

To the Trade:

Boston, Feb. 1, 1899.

The business connection existing between A. A. Waterman and the undersigned has been this day discontinued.

I am the sole owner of the Trade Mark Standard, Reliable & Sterling for fountain pens, and as such have made over to the Sterling Fountain Pen Co. the exclusive right to manufacture
1739 the same.

The Davidson Rubber Co. will continue as heretofore to make the Hard Rubber parts, and thus enable them to maintain the same degree of excellence that these Pens have always had in the past.

All settlements of accounts with A. A. Waterman & Co. existing previous to Feb. 1, 1899, and orders for above goods should be mailed to the Sterling Fountain Pen Co., 19 Milk St., Boston, Mass., who are authorized to attend to the same.

Respectfully yours,

RHODES LOCKWOOD.

1740

J. Edward Nunn 1741

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant. 1742

Met pursuant to agreement at the office of Watson & Raymond, 10 Wall Street, New York, April 6, 1911, at 12 o'clock noon.

Appearances:

Samuel S. Watson, for Complainant.
Morton Stein, for Defendant.

J. EDWARD NUNN, a witness produced on behalf of the plaintiff, being duly sworn, deposes as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, residence and occupation? A. J. Edward Nunn; my business address is Baltimore, Maryland; I live at Severn Anne Arundle, County of Maryland, about 15 miles out from Baltimore; occupation, stationer. 1743

Q2. How long have you been in the stationery business? A. 31 years.

Q3. With what concern are you now connected? A. Meyer & Thalheimer, 301 West Baltimore Street, Baltimore, Maryland.

Q4. And their business is stationers, printers, blank book makers, school desks and books, office furniture? A. Yes, sir.

Q5. With what department are you connected? A. Well, in a general way over the whole thing, especially with the school and furniture end of it.

Q6. General manager of the whole business? A. Yes, sir, general manager of the whole business.

Q7. And how long have you been with Meyer & Thalheimer? A. For the past year.

Q8. And your duties all the time have been the same as they are now? A. Yes, sir.

Q9. Prior to that time with what concern were you connected? A. Nunn & Company.

1745 Q10. And you were a partner in that business? A. Yes, sir.

Q11. And how long were you in business as Nunn & Co.? A. Seven years.

Q12. Was that business conducted in Baltimore? A Yes, sir.

Q13. Prior to that time with what concern were you connected? A. Cushing & Bailey, stationers, at Baltimore.

Q14. How long were you with them? A. I was with them from 1880 until 1903, 23 years.

Q15. What was their business? A. Book sellers and stationers.

Q16. In Baltimore? A. Yes, sir.

Q17. How long have you handled and dealt in fountain pens in connection with these concerns with which you have been
1746 associated? A. Well, they have sold them the whole time I have been there; they always handled them.

Mr. Stein: Since 1880?

The Witness: Yes, sir. My recollection is that during the early period most of them were stylographic pens.

Q18. Have you handled and sold during any of this period pens manufactured by the L. E. Waterman Company or Lewis E. Waterman? A. Yes, sir.

Q19. By what name have these pens been usually known in the market? A. The Waterman pen.

Q20. And how long have you handled Waterman pens? A. It would be pretty hard for me to answer that as to the exact

year; I know we had them at Cushing & Bailey's for a number of years before I left there, but I could not give you the exact date, but it is certainly over 15 years.

Q21. And you have handled them and sold them ever since that time? A. Yes, sir.

Q22. And during all that time what has been the name by which these pens have been commonly referred to and called for by your customers? A. Well, as a rule the customers come in and ask for a Waterman pen or a fountain pen.

Q23. And has that also been the name by which the trade generally had known this pen?

Mr. Stein: Objected to as incompetent, immaterial, irrelevant and no proper foundation laid. 1748

A. Yes, sir.

Q24. Have you heard these pens spoken of and discussed by other dealers in fountain pens since you have been handling them? A. Yes, sir, the members of the trade in Baltimore, the various stationers there, I have often talked with them.

Q25. By what name do they refer to the pen manufactured by the L. E. Waterman Company? A. They are generally spoken of as Waterman pens. I may say as a rule from my experience if the other pen is in mind it is always called special attention to as a A. A. Waterman Company pen.

Q26. Have you ever handled the pen marked A. A. Waterman & Co., New York? A. No, sir, I have not. 1749

Q27. Have you ever seen these pens? A. The A. A. Waterman?

Q28. Yes? A. Oh, yes, sir, I have seen them.

Q29. How have you seen them? A. Well, their agents have shown them to me, their traveling men have called on me and I have seen them in other stores.

Q30. Did you ever have any customer come into your store and ask for a Waterman pen or Waterman fountain pen and give you to understand in any way that they expected to purchase or receive a fountain pen stamped A. A. Waterman &

1750 *J. Edward Nunn*

Co.? A. No, sir, not to my recollection, I do not recall any instance.

Q31. Is the Waterman's Ideal Fountain Pen or the Waterman Pen as you have called them, manufactured by the L. E. Waterman Company, well known in the market or otherwise? A. Very well known I should say.

Q32. And what is their reputation among the trade for quality?

Mr. Stein: Objected to as incompetent, irrelevant and immaterial and not at issue.

A. As being one of the best.

1751 Q33. Do you know whether the fountain pens which you have referred to as Waterman pens manufactured by the L. E. Waterman Company of New York, are recognized as the standard pen on the market or not? A. Well, I know from my experience with the trade in Baltimore it is always considered one of the best pens that there is made; we consider it the standard, yes, sir.

Q34. And how long has that been a fact so far as it has come to your knowledge? A. Well, for quite a number of years, for quite a good while; I could safely say ever since I have been in business for the last ten years.

Q35. What kind of fountain pens have you handled and sold since you have been selling fountain pens? A. The Wirt pen,
1752 the Parker pen, and the Sterling pen, and also Waterman's Ideal Fountain Pen.

Q36. Have you been generally familiar with the fountain pens which are offered to buyers by traveling salesmen during the last 10 or 15 years? A. Yes, sir.

Q37. Do you buy the pens for the concern you are now with, are you the buyer? A. Not in that special department, no, sir.

Q38. But you have general superintendence of that department? A. They were bought largely at my suggestion.

Q39. And what makes of fountain pen does the concern you are now with sell? A. The Sterling, which is made up for them with their imprint on, and the Waterman Ideal.

1755

Q40. The pen with their imprint on is not sold under the name Sterling? A. No, sir.

Q41. When you were in business for yourself, what fountain pen did you carry yourself? A. The Sterling and the Waterman at first; I afterwards dropped the Sterling and carried the Waterman exclusively.

CROSS-EXAMINATION by Mr. Stein:

XQ42. You testified before that substantially since 1880 you sold pens manufactured by L. E. Waterman & Company or Lewis E. Waterman, is that correct? A. Well, no, not that I sold them since 1880; I said I did not know just exactly what 1754
date we commenced to sell the Waterman pen; I said we sold fountain pens in a general way of different makes.

XQ43. For 10 or 15 years you sold pens stated by you to have been manufactured by L. E. Waterman & Company or Lewis E. Waterman? A. Yes, sir.

XQ44. Do you know of your own knowledge whether those pens have been manufactured by L. E. Waterman & Company or Lewis E. Waterman or merely assembled? A. Why, I could not say anything about that.

XQ45. You have no personal knowledge on that subject? A. I have no personal knowledge of that, no, sir.

XQ46. Did I correctly understand you to say that when people wanted a A. A. Waterman & Company pen or one manufactured 1755
by that concern they called for a A. A. Waterman & Company pen? A. No, not exactly that; I was speaking of in the trade. As a matter of fact most people who come in our store simply ask for a Waterman pen. I have had very few inquiries either to say L. E. or A. A.; simply a Waterman pen is what they usually ask for, or a fountain pen.

XQ47. When people so ask do you tell them there are two pens, one manufactured by L. E. Waterman & Company and the other by A. A. Waterman & Company? A. No, sir.

XQ48. You simply sell them the pen you have on hand? A. Yes, sir.

1756 *J. Edward Nunn*

XQ49. Without knowing whether in the mind of the customer is the thought of purchasing an A. A. Waterman or L. E. Waterman Company pen? A. The L. E. Waterman has always been best known by us in Baltimore, and I do not think the other has been thought of there.

XQ50. In other words, you act upon this presumption without specifically knowing what is in the mind of each customer? A. Of course I do not know their mind, but I have never had any complaint.

XQ51. But the trade recognizes the difference between the two pens and speaks of the one as being made by A. A. Waterman & Company? A. Yes, sir.

1757

XQ52. Have you had any experience with the A. A. Waterman & Company pen? A. No, sir, I have never sold it.

XQ53. You have never bought any? A. No, sir.

XQ54. Sold any? A. No, sir.

XQ55. Used any? A. No, sir.

XQ56. Are you familiar with the quality of the pens made by the A. A. Waterman & Company since July 1, 1905? A. No, sir.

XQ57. And in determining that the Ideal is one of the best made you have reached that conclusion without considering the qualities of the A. A. Waterman pen? A. No, sir, I have done it on the general reputation and what I have heard; in my own determination, simply what I have heard, and in general dis-

1758

cussions of the trade. I never took one of their pens and wrote with it or used it myself.

XQ58. So without any personal knowledge on the subject or without any personal comparison you have reached the conclusion stated? A. No, sir, I could not say that, I have examined the pens when they have been shown to me by representatives of the company when they have come at different times.

XQ59. Are you familiar with its self-filling qualities? A. I have had them shown to me.

XQ60. Have you examined that feature of them? A. Yes, sir.

1759

XQ61. And with all those in mind you still believe that the L. E. Waterman pen is the standard? A. I think so; the self-filling device of any pen that I have had never appealed to my customers; I was never able to sell them to any extent.

XQ62. Have you ever had any self-filling pen? A. Yes, sir.

XQ63. Manufactured by whom? A. The Waterman people have a pen.

XQ64. L. E. Waterman? A. Yes, sir. I also had a self-filling pen made by the Scharf people; I also had that Remex made also by the L. E. Waterman people that you press on the side.

1760

XQ65. All of those manufactured as the self-filling feature are very similar to the A. A. Waterman pen, aren't they? A. Yes, sir.

XQ66. And you have never shown A. A. Waterman pens having unique features as to self-filling properties? A. No, sir.

XQ67. To any customer? A. No, sir.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ68. The fountain pens which you have described as Waterman pens, which you have stated were known by the trade and public as Waterman pens, were sold to you by the L. E. Waterman Company? A. Yes, sir, and billed by them.

1761

RDQ69. And when people asked for Waterman pens, was there anything ever came to your knowledge that led you to believe that they wanted anything except, or referred to anything except, the Waterman pen put out by the L. E. Waterman Company?

Mr. Stein: Objected to as incompetent, immaterial, irrelevant, calling for the conclusion of the witness and an expression by him of the minds of customers or others, and as not being proper re-direct.

Mr. Watson: Counsel for complainant respectfully calls the Court's attention to the fact that this ques-

1762 *J. Edward Nunn*

tion is in direct reply to one asked by defendant's counsel. It does not call for a conclusion, it calls for the opinion of this witness as a man who has been in the stationery business handling fountain pens for thirty years.

A. No; I have never had a single complaint. The reason I say I never had a complaint, I assume if they had not been what they wanted they would have made some complaint. I took that as a reason for answering no.

RDQ70. As far as the matter has come to your knowledge, does the trade regard the pen stamped A. A. Waterman & Company as a Waterman pen? A. No, we have always considered
1763 the L. E. Waterman as the Waterman pen, that is what it generally brings to my mind.

RDQ71. And as far as the matter has come to your attention, is that the opinion of the trade?

Mr. Stein: Objected to as incompetent, immaterial, irrelevant and not the proper way of proving the fact.

A. Yes, sir, as far as I have heard any expression of opinion from them, it is.

Deposition closed.

Signature waived by consent of counsel.

1764 Adjourned to Friday, April 7, 1911, at 10:30 o'clock, A. M.

Matthew Mullineux 1765

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant. 1766

Met pursuant to agreement at the office of Watson & Raymond, 10 Wall Street, New York, April 7, 1911, at 10:30 o'clock, A. M.

Appearances:

Samuel S. Watson, for Complainant.
Morton Stein, for Defendant.

MATTHEW MULLINEUX, a witness of full age, produced on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Watson: 1767

Q1. Please state your name, place of residence and business? A. Matthew Mullineux; my present residence is 161 East 39th Street; my occupation, motor boat supplies.

Q2. Did you purchase a short time since a fountain pen in this city? A. Yes.

Q3. From whom did you buy it? A. From a man named Harry Frank, 421 Broadway, New York.

Q4. When did you buy that pen from Mr. Frank? A. On Monday, the 27th of March, 1911.

Q5. Will you please relate the conversation you had at the time you purchased this pen?

1768 *Matthew Mullineux*

Mr. Stein: Objected to as incompetent, irrelevant and immaterial, no proper foundation laid and no connection shown.

A. I went into this store, in the afternoon, and wanted to see some fountain pens, as I intended purchasing one, and the assistant there showed me some Vulcan pens. I tried these and did not like them and I said, "Now have you a Waterman pen? Do you keep the Waterman pens?" He said, "Yes." I said, "Show me some." So he handed me out a pen, which I tried. It was not satisfactory. I tried two or three others and finally I got a pen that suited my hand.

1769 Q6. Is this the pen you have here, that you produce (showing witness a pen)? A. This is the pen that I purchased from him. Holding the pen up I said, "Has this a spoon feed?"—knowing that one of the latest features of the Waterman pen to a Britisher was a spoon feed. He said, "Yes." So I said, "What is the price of this?" and he said, "$1.60." I said, "What is the usual price." I asked him this because he was selling off. He said "$2.50." I said, "How can you sell these Waterman pens so cheaply?" He said, "We have a large stock on hand and we are clearing off." I said, "All right, and give me a bottle of ink now." He gave me a bottle of ink for ten cents and I paid him $1.70 and went out.

Q7. And the pen you produce is the pen he sold you? A.
1770 Yes, that is the pen he sold me as a Waterman pen.

The pen produced by the witness is offered in evidence and marked Plaintiff's Exhibit No. 107.

Objected to as incompetent, irrelevant and immaterial.

Q8. Is the box which you produce the box in which he gave you the pen? A. This is the box in which he gave me the pen and this is the filler.

The box and contents produced by the witness are offerred in evidence and marked Plaintiff's Exhibit No. 108.

Same objections.

Q9. What else happened about this pen? A. Two days later I was looking through the 'phone book and I saw a large advertisement of Waterman & Co. and I looked at the address and found the initials were L. E. Waterman, corner of Cortland Street and this made me look up the little circular that I had placed in the box in which the pen was sold to me. I found there that the name was A. A. Waterman and I immediately began to think I had been deceived. The following day I went up to the corner of Cortlandt Street and looked at the store but not having the pen with me, I did not go in. On Friday, however, March 31, I made a special trip to the store with the pen in my pocket.

Q10. When you asked for a Waterman pen at the store of Mr. Frank what pen did you expect to receive? A. I only knew of one Waterman. In England we only know one Waterman pen. I thought I was getting a real genuine article when I asked for one; otherwise I would not have bought it. 1772

Q11. Do you know whether the pen that you call a Waterman, a genuine Waterman, is sometimes known as the Waterman Ideal Fountain Pen? A. I did not know that. I never paid particular attention to that. It is simply known as the Waterman pen in England.

Q12. How long have you known about the pen? A. Ten years. I have used them about ten years.

Q13. And the pens that you used and have been familiar with are not the A. A. Waterman pens? A. I never used an A. A. Waterman pen before. 1773

Q14. And since you have purchased the pen, Plaintiff's Exhibit 107, have you found out whether or not it is the kind of a Waterman pen that you expected to buy?

Mr. Stein: Objected to as incompetent, irrelevant and immaterial and not binding on the defendant.

A. I found out that it is not the class of Waterman pen I expected to get.

Q15. When you went into the store at the corner of Broadway and Cortlandt Street did you there see the kind of pen that you expected to buy?

Mr. Stein: Objected to as incompetent, irrelevant and immaterial.

A. Yes.

Q16. And you were familiar with the kinds and styles of pens that were shown you in that store at Broadway and Cortlandt Street? A. Yes.

Q17. And that is the kind you expected to buy when you went into Mr. Frank's store and asked for a Waterman pen? A. Yes.

CROSS-EXAMINATION by Mr. Stein:

1775

XQ18. How familiar were you with the pens at Broadway and Cortlandt Street, or that you saw at Broadway and Cortlandt Street? A. I had used a Waterman for ten years, I suppose, but I lost it some two years ago and I have not had one since.

XQ19. You used one Waterman pen then for eight years? A. Yes.

XQ20. You were familiar with its appearance? A. Yes.

XQ21. Was it an Ideal pen? A. That is a thing I never noticed; I could not say.

XQ22. You never noticed that? A. No.

XQ23. Did you notice whether the pens in Cortlandt Street were marked Ideal? A. No, I looked for Waterman. I thought there was only one Waterman.

1776

XQ24. The thing you complain about is that there are two Watermans doing business in fountain pens? A. I will not say I complain of that.

XQ25. That is the thing that you thought misled you? A. Yes. What I complain of is that one coming a stranger to a country with the idea that there is only one Waterman, is deceived by the present method of business.

XQ26. You were deceived by the fact that you had used one Waterman pen for eight years and you do not know whether it was an Ideal or not? A. I only know that it was a genuine Waterman pen.

XQ27. How do you know it was if you don't know whose name was on it? A. I did know. It had a name.

XQ28. What name? A. On the Waterman pen that I used there used to be a name about that space (indicating).

XQ29. What was the name? A. Waterman.

XQ30. Just Waterman? A. I did not know any initials. I never looked for the initials. As far as I can remember it was "Waterman's Fountain Pen."

XQ31. You are not sure whether or not there were any initials attached? A. No, I am not sure.

XQ32. When you bought this pen at Frank's and tried it out you were satisfied with it? A. Yes, I was satisfied then.

XQ33. Are you satisfied now? A. No. 1778

XQ34. Why—because it is not an L. E. Waterman pen? A. That is one reason (pointing to the pen). See the ink coming out of that. That shows it is not a spoon feed.

XQ35. How much experience have you had with fountain pens outside of the use of this one pen for eight years? A. I have had Mabie Todd pens—Mabie, Todd & Bard, I believe. They used to make the Swan pen.

XQ36. Have you any technical knowledge of fountain pens or have you made any technical studies? A. No, I cannot say I have.

XQ37. Do you know the different parts of a pen and the peculiar mechanism of each pen? A. No, I cannot say I do. I know the parts of a pen but I do not know the peculiar mechanisms. 1779

XQ38. Are you here under subpoena? A. No.

XQ39. How much have you been paid for coming here? A. Nothing at all.

XQ40. How much have you been promised for coming here? A. Nothing at all.

XQ41. Where do you live? A. My permanent address?

XQ42. Yes? A. 627 Broughton Street, Vancouver.

XY43. Are you in business for yourself? A. Yes.

XQ44. What is the name of your business? A. Vancouver Motor Launch Supply Company.

1780 *Matthew Mullineux*

XQ45. In Vancouver? A. In Vancouver, Coal Harbour. It is on the water, the B. C. Motor Launch Supply Company.

XQ46. How long have you been in New York? A. Three weeks tomorrow.

XQ47. When do you leave? A. I may be going any day. I am just waiting for some samples.

XQ48. How is it you came here to testify this morning? A. I was asked to come.

XQ49. By whom? A. By Mr. Watson.

XQ50. How did you come to see Mr. Watson; who sent you to Mr. Watson? A. In Waterman's store Mr. Raymond came in and asked me would I testify. I said yes, because I don't like
1781 to be taken in in this way, whether wilfully or otherwise. I said I would be very glad to testify if my evidence would put a stop to such practices.

XQ51. Don't you think it is rather unfair for you to testify here that you have been "taken in," merely from the fact that you are accustomed to use a Waterman fountain pen manufactured by a firm of whom you do not know, bearing a mark that you do not recollect, and because there happened to be another A. A. Waterman & Co. concern doing business in New York? A. No.

Q52. And a concern that did business in New York before you ever bought a Waterman fountain pen? A. I don't know how long A. A. Waterman has been in business, but as a Britisher
1782 I only know one Waterman pen.

XQ53. And as a Britisher you think you have a right to come here and testify under oath that you were deceived because you were handed a pen bearing distinctly upon it the name A. A. Waterman & Co., New York, when in your British home you happened to buy an L. E. Waterman Company pen? A. There is only one Waterman pen known in Great Britain.

XQ54. Do you think Great Britain constitutes the world? A. No.

XQ55. Do you believe a man has a right to do business in America who does not care to do business in England or Great Britain? A. Certainly.

XQ56. And it is because in Great Britain so far as you know only one pen is known that you feel you have been deceived, because you happen to buy a pen made by a concern that was manufacturing and selling similar pens before you had ever bought a fountain pen?

> Mr. Watson: Counsel for complainant takes exception to the speeches of counsel for defendant and desires to call the Court's attention to the alleged statements of fact contained in these speeches, of which there is no evidence in this record and which counsel for complainant is convinced are not true statements of fact and that the evidence so far in this record shows that they 1784
> are not statements of facts.

A. I feel I have been deceived in the same way I should feel deceived if I had bought a Steinway piano in some country outside of America and then found that it was a different make of Steinway.

XQ57. Suppose the piano you had bought outside of America was manufactured by a concern that had been manufacturing pianos under the name of Steinway before you were born and selling them under that name before you were born, would you still feel that that concern was deceiving you by selling you a piano under that name? A. I do not say the concern was deceiving me but what I understand by a Steinway piano is something that I have in my mind, that I know. Another piano may 1785
be got up exactly like it and if it is not the real Steinway I should feel I had been deceived.

XQ58. Do you believe that anybody purposely endeavored to fool you or deceive you into buying a pen not made by the people that you thought were making the pen? A. That is rather a difficult question to answer.

XQ59. I ask for an answer?

> Mr. Watson: I object to it as it calls for the operation of the mind of some other person, and not of this witness and is entirely improper.

Mr. Stein: I will change the form of that question.

XQ60. In testifying this morning that you were deceived, do you want us to understand that you believe that somebody endeavored to fool you, or that you were simply mistaken in that you had no prior knowledge of A. A. Waterman & Co., and its pens?

Same objections.

A. I can say this, that if I had known that there was any other make of Waterman pens than the one I had been accustomed to use I would have been much more careful in my selec-
1787 tion.

XQ61. Did you ask for any specific Waterman pen? A. No, I asked for a Waterman pen because I thought there was only one Waterman in the world. That is what I thought at the time.

XQ62. And you did not know much about fountain pens and you just went on the name of Waterman? A. I knew as much as the average writer. I am not an expert in fountain pens.

XQ63. But so far as the fountain pens went, you knew the name Waterman and you purchased on that name? A. Yes.

XQ64. What do you know about spoon feed? A. A spoon feed is a feed I saw advertised by Waterman in one of the magazines and I said the next time I get a pen it shall be a spoon
1788 feed.

XQ65. What is a spoon feed? A. A feed that comes through corrugations underneath the pen. Instead of being perfectly flat under the pen it is wavy.

XQ66. And that wave is visible to the eye? A. No, not unless you take it off.

XQ67. How did you happen to know about this particular feed? A. Because I read about it.

XQ68. And you read about the interior? A. Yes, and I saw a diagram of it and I gathered from that that it prevented an overflow.

XQ69. Have you examined this pen, Exhibit 107? A. No.

XQ70. To see whether or not there was a spoon feed? A. No, I was advised not to take the pen to pieces.

XQ71. Who advised you? A. You will find most instructions of pen dealers are not to take them apart. I found out definitely about it of course in a Waterman store.

XQ72. Your time is rather valuable to you is it not? A. It is fairly valuable, yes.

XQ73. And the affairs of L. E. Waterman and A. A. Waterman & Co. are of no concern to you, are they? A. No, no concern to me.

XQ74. Have you had any discussion with anybody as to being recompensed for the time you are spending on this matter? A. The only thing I was told—I did not ask for anything—was that Mr. Raymond said any time I lost I would be paid for, if I liked to claim it. 1790

XQ75. At what rate? A. He did not say any rate at all.

XQ76. What rate have you determined in your own mind? A. I have determined on each day I have been here, $5 a day.

XQ77. $5 will amply pay you for the loss of time? A. Yes.

XQ78. What are you accustomed to pay for waterman pens in England, in dollars and cents? A. I suppose about $2.50. It is ten and six pence. Not quite $2.50.

XQ79. For a pen similar to that which you did purchase at $1.60? A. Yes. 1791

XQ80. What is the price for the Waterman pen that you know of in Vancouver? A. I really do not know. I have not priced them in Vancouver, but I can tell you that some years ago in Victoria, the size next to the smallest size was $4.

XQ81. What is the price in New York? A. $2.50.

XQ82. You knew that this Waterman that you speak of was a standard pen in England? A. The Waterman that I had in mind, you mean?

XQ83. Yes, it was standard? A. Yes, it is known as the Waterman pen.

1792 *Matthew Mullineux*

XQ84. You realized that it had a fixed price throughout the world, didn't you? A. I was not aware of that, no.

XQ85. Did you believe so? A. It never entered my head. This man Frank was selling off and that is why I went into his store.

XQ86. In other words, you went in to buy a bargain? A. Yes.

XQ87. Now let us come right back to the one proposition developed in your testimony. You have testified that you were deceived and the only ground for such testimony is the fact that in England, so far as you knew, there was only one kind of Waterman pen known; and the kind of pen you bought here
1793 was not the kind of Waterman pen that you knew of and purchased in England; is that correct? A. It is correct, yes.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ88. Have you known anything about the Waterman pen in Canada; have you seen it there? A. Yes, I have seen the Waterman pen there.

RDQ89. And was that Waterman that you have known in England the same kind of pen? A. Yes, when anyone has been asked the make of the pen and says "Waterman," there is only one Waterman, so far as my experience goes, in England and in Vancouver.

1794 RDQ90. And that is the pen you expected to buy? A. That is the pen I expected to buy.

RDQ91. And that is the pen you did not get? A. I certainly did not.

RDQ92. I have taken apart Exhibit 107. Will you kindly look at it now and see if that is the spoon feed of which you have seen cuts?

Mr. Stein: I object to the procedure by which counsel dissects the different parts of exhibits in the case. My understanding is that exhibits are rather sacred and cannot be taken apart without the consent of other counsel

or the Court, and that exhibits must not be tampered with in any way. I further object on the ground that the witness has not been proved competent to answer this question.

Mr. Watson: Counsel for plaintiff desires it to appear on the record that he has taken the gold pen from Exhibit 107 in the presence of defendant's counsel and was working at it for several minutes directly in front of defendant's counsel and there was no objection made until this question was asked the witness.

A. No, this is not a spoon feed.

1796

RE-CROSS EXAMINATION by Mr. Stein:

RXQ93. What concern advertised the spoon feed? A. L. E. Waterman & Company.

RXQ94. When did you first know that L. E. Waterman & Company advertised the spoon feed? A. I suppose in the last month. It was in a magazine I saw it, on the railroad.

RXQ95. Before or after the purchasing of this pen? A. Before.

RXQ96. And did you then see that it was an L. E. Waterman advertisement? A. I did not notice the initials. I did not notice the initials until I happened to be looking through the 'phone book.

1797

RXQ97. Did you re-examine that cut? A. Yes, I re-examined that cut and I re-examined this circular.

RXQ98. Where was that cut? A. It was in a magazine I had. I cannot tell you the name; they advertise in so many magazines.

RXQ99. When did you re-examine that cut? A. After March 27th. I saw the cut again in Waterman's publication that they have.

RXQ100. At their own store? A. Yes.

RXQ101. When did you re-examine the cut? A. That I first saw?

RXQ102. Yes? A. I have not re-examined that at all.

RXQ103. So you do not know now whether the cut you saw was issued by L. E. Waterman & Company or by another Waterman, do you? A. I can only rely on my memory.

RXQ104. But your memory is a blank as to the initials of the Waterman that advertised that cut? A. Yes, but I have the cut in my memory.

RXQ105. And that cut in your mind shows the name L. E. Waterman & Co.? A. By cut I mean the diagram of the thing. That did not show anything. I think I could make a rough sketch of it now.

1799 RXQ106. The experience that you mention is experience based on the purchase of a Waterman pen in England and on the purchase of a Swan pen; is that correct—your experience in fountain pens? A. Unless you call it experience to see advertisements and cuts from time to time in the papers; otherwise the two that you say.

RXQ107. After using the pen purchased in England eight years you cannot tell us whether the word Ideal appeared on it? A. I cannot swear to that.

RXQ108. You cannot swear to the initials that appeared upon that pen? A. I cannot.

RXQ109. You cannot state positively that the pen you used in England was not a pen manufactured by A. A. Waterman & Company? A. Yes, I could swear to that.

1800 RXQ110. How could you swear that it was a pen made by L. E. Waterman? A. Because there is only one Waterman in England and that is L. E. Waterman.

RXQ111. That is as far as your experience goes? A. Yes.

RXQ112. Are you willing to swear that A. A. Waterman & Co. have not been doing business in England for more than ten years? A. I could not swear to it.

RXQ113. You have no personal recollection as to any name on that pen except the name Waterman? A. Except the name Waterman.

RXQ114. You will not swear positively whether that name was preceded by the intitials A. A. or L. E.? A. No. I can swear that it was what was called a genuine Waterman pen.

RXQ115. So you thought it was the genuine Waterman pen? A. Yes, because I got it from the Army & Navy Store in England, a firm that when it says genuine Waterman means genuine Waterman and no other.

RXQ116. What initials were on that pen? A. I cannot tell you that.

RXQ117. Are you endeavoring to stamp on this record by your testimony what the majority of people of the British Isles mean by Waterman pen when your sole experience in fountain pens has been the purchase of one Waterman pen made by a concern that you cannot mention and the purchase of one Swan pen?

1802

Mr. Watson: Counsel for plaintiff calls the attention of the Court to the unfair form of this question and the mis-statements of the witness' testimony.

A. Will you put that question in another form? It is rather a long question.

RXQ118. I cannot change its form? A. I am not endeavoring to stamp that on this record but it is my firm belief that by "Waterman pen" the British people have in their mind the genuine Waterman pen of L. E. Waterman & Co.

RXQ119. With how many British people have you discussed fountain pens throughout your entire life? A. Probably with every man I have come across who has had a fountain pen.

RXQ120. Is that answer made seriously? A. Sure it is. 1803

RXQ121. And with how many of them have you discussed what constituted the genuine Waterman fountain pen? A. I have not discussed it with any one. That is in England; you are referring to England, are you not?

RXQ122. Yes.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ123. How long have you used a Waterman pen did you say? A. About ten years.

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RDQ124. Is the Waterman pen that you have been familiar with generally known in England? A. I say there is only one name known and that is "Waterman pen," and it is the pen one sees advertised there largely.

RDQ125. You have seen it advertised largerly? A. Yes, in magazines you pick up, and periodicals, they have their advertisements in, generally.

MATTHEW MULLINEUX.

Adjourned to Saturday April 8th, 1911, at 10:30 A. M.

1805

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

vs.

MODERN PEN COMPANY,
Defendant.

1806

Met pursuant to adjournment at the office of Watson & Raymond, 10 Wall Street, New York, April 8, 1911, at 10:30 in the forenoon.

Appearances:

Samuel S. Watson, for Complainant.
Morton Stein, for Defendant.

HARRY M. PARCELS, a witness of full age, produced on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, place of residence and business? A. Harry M. Parcels; 248 Audubon Avenue, New York City; occupation; real estate business.

Q2. Did you have occasion recently to purchase a fountain pen? A. Yes, sir.

Q3. Where did you buy it? A. The north side of 42nd Street somewhere between Third and Fourth Avenue. What the name of the place is I don't know.

1808

Q4. Near the Grand Union Hotel? A. Just opposite.

Q5. When did you buy this pen there? A. Monday.

Q6. April 3rd? A. April 3rd.

Q7. 1911? A. Yes.

Q8. Please state the circumstances under which you purchased this pen?

Mr. Stein: Objected to as incompetent, irrelevant and immaterial, no proper foundation laid and no connection shown.

A. To begin with, I lost a Waterman fountain pen. I was going through 42nd Street and saw a sign in a winodw "Pens for 95c." or "98c.,"I forget which; "Selling out on account of moving." I went to look over the 98c. ones and I saw what I 1809 supposed to be a Waterman pen in their case—in a plush case, in their case, and I told them that that was a pen that looked pretty good to me; it was the size I wanted and I tried it and I asked how much he wanted for it and he said $2.50 on account of moving. I asked if he was going out of business. He said no; he said it was on the window where they were going to move to . The cap of the pen was chipped. He tried to get a new cap and could not get one to fit; so I told him I would take it just as it was for $2. He said, "All right," and he gave me a glass filler and he wanted to give me a guarantee for a year, or something like that but I told him I did not think it was

1810 necessary, that I would come back if the pen was not right. Then I told him I would go down to Cortlandt Street and get a new cap with a clip on it, as I was down that way more often than I was up to 42nd Street; and he said it was not necessary for me to go down to Cortlandt Street, down to Waterman's, if I came up there he might fix me up with one. I told him that I would not be up there and I was going down to Cortlandt Street. I went down to Cortlandt Street, yesterday I think, and asked for a new cap with a clip and they told me it cost sixty or sixty-five cents; and the young lady asked me if I knew I did not have a Waterman pen. I told her I did not know any such thing. I told her I bought it for a Waterman
1811 pen and that was all I knew about it. She called another gentleman, the manager of the place, I guess he was, and I told him just the same as I am telling you.

Q9. You asked for a Waterman pen when you bought the pen? A. I asked him, "Is that a Waterman pen?" He said, "Yes." I said, "Bring it out here and I will try it."

Q10. When you called for a Waterman pen what make of pen did you expect to get?

Mr. Stein: I move to strike out the long answer just given by the witness and serve notice that we will move to strike out the answer on final hearing on the ground that it is irresponsive and contains conclusions of the wit-
1812 ness, and not binding on this defendant. I now object to the question just asked by Mr. Watson on the ground that it is incompetent, irrelevant and immaterial and calls for the expression of the operation of the witness' mind at the time.

A. The same kind that I got down at Cortlandt Street and Broadway.

Q11. How long have you been familiar with the pens obtained from Cortlandt Street and Broadway? A. I obtained them indirectly. If there was anything the matter with the pen that is where I went to have it fixed. I have changed pens there and

had them filled. That is the only place I would go to if I wanted to get it fixed up.

Q12. Have you ever owned or carried Waterman's Ideal fountain pens? A. Yes.

Q13. How long? A. I don't know; off and on—the last one I had I had for four years and lost it.

Q14. How long have you been familiar with Waterman's Ideal fountain pens? A. Ten or twelve years.

Q15. And you knew that as a Waterman pen? A. Yes.

Q16. Have you got the pen with you that you purchased on 42nd Street? A. Yes.

Q17. Will you please produce it? A. (The witness produces a pen.) 1814

The pen produced by the witness bears the name "A. A. Waterman & Co., New York, Patented Dec. 12, 1899," and plaintiff's counsel presents it to defendant's counsel for inspection.

CROSS-EXAMINATION by Mr. Stein:

XQ18. Are you under subpoena? A. Yes.

XQ19. How much was given to you when the subpoena was served? A. $2.85.

XQ20. Are you in business for yourself? A. I am in the real estate business, but I am not on any salary; I am on a commission. 1815

XQ21. In whose office? A. A. W. Beckley, 32 Union Square.

XQ22. Have you ever used any fountain pen other than the pens made by L. E. Waterman Company, except the one produced by you this morning? A. No, not since I was a kid. I think I have one up in the trash drawer now.

XQ23. You were very particular to get a pen made by L. E. Waterman Company? A. I buy at Waterman's down at Cortlandt Street. That is the only pen I ever will buy.

XQ24. The "Ideal" pen? A. I always knew it as a Waterman pen.

1816

XQ25. What were the marks on the pen that you always knew as a Waterman pen? A. Now that I come to think about it the only mark they ever had on a Waterman pen was a circle with "Ideal" in it.

XQ26. You recognize it as the trade-mark of the L. E. Waterman Company? A. Now I do, yes.

XQ27. But you did not when you purchased this pen? A. No, because I thought a Waterman was a Waterman and that is the end of it.

XQ28. Had you ever had any experience with pens made by the A. A. Waterman Company before? A. No.

XQ29. You did not know anything about those pens, did you?

1817 A. No.

XQ30. Their qualifications, or anything else? A. I knew the pen I had was a good one, and I knew it was as good the day I lost it as the day I bought it, and when I went to buy again I knew that was what I wanted.

XQ31. Did you know whether the A. A. Waterman pen was a better pen? A. No, I took it for granted that the Waterman pen was as good as you could get in the way of a pen; that is what I wanted, the best.

XQ32. The fact is, you were satisfied with an L. E. Waterman pen? A. Yes.

XQ33. And wanted to continue with that pen? A. Yes.

XQ34. Without regard to whether there were better pens on

1818 the market? A. Yes, that is the idea. I thought I was getting it cheap and that is the reason I bought it.

XQ35. Who asked you to come here to testify? A. To begin with, a gentleman over in Waterman's wanted to get my name. I gave it to him.

XQ36. Can you answer questions? A. Who asked me to testify?

XQ37. Yes. A. I was served with a notice last night to come down here.

XQ38. Who first asked you to testify in this case? A. A gentleman came uptown last night, I don't know his name, a lawyer.

1819

XQ39. Had anybody talked to you before? A. No, not about testifying at all.

XQ40. Wanted your name? A. Wanted my name.

XQ41. For what purpose? A. For the simple reason that they said they had had some similar cases where people had gone in to get a Waterman pen and did not get it, and I gave them the idea that I just wanted what I asked for.

XQ42. You saw these pens in the window marked at 95 or 98 cents? A. The man was moving and he had an ad. in the window, a big sign, I think it was, 95 or 98 cent pens, and I went, with that for a leader, and when I went inside I saw this pen in the case.

1820

XQ43. You knew that the Waterman pen was a pen sold all over the world, didn't you, at a fixed price? A. At a fixed price.

XQ44. Yes. A. I have always been under that impression.

XQ45. And were you under that impression the day you walked up to that store? A. Yes.

XQ46. And that the price for one of the pens made by L. E. Waterman & Co. would be the same in any store in any part of the United States A. Except they were selling out, or something, and wanted to make some inducement instead of moving that stock.

XQ47. Don't you know that the L. E. Waterman Company takes back pens from people to whom they sell them, at cost price at any time on demand? A. No.

1821

XQ48. You never heard about it? A. No.

XQ49. Give us the name of the person at Cortlandt Street who wanted your address? A. I did not ask for the name. A young lady waited on me. She called this gentleman. I don't know his name at all.

XQ50. Was he a lawyer? A. Not to my knowledge; he was an employee of Waterman.

XQ51. You were willing to give your name and address to different people without getting from her the name of the person who wanted the information? A. I did it, yes.

1822

XQ52. Have you been promised anything for coming here? A. No. I was promised that I would not be over half an hour here, and my half hour is up.

The pen produced by the witness is offered in evidence and marked Plaintiff's Exhibit 109.

By Mr. Stein:

XQ53. What is the name of the man at whose store on 42nd Street you bought Exhibit 109? A. That I don't know.

XQ54. What is the name of the clerk? A. I don't know that.

1823 XQ55. Have you made any effort to find out? A. No.

Deposition closed.

(Signature waived.)

WARREN N. LANCASTER, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, age, residence and occupation? A. My name is Warren N. Lancaster; my age is 61; my occupation is manufacturing fountain pens.

1824 Q2. Where do you live? A. Baltimore, Maryland, at the Marlborough.

Q3. Are you here under subpoena? A. Yes.

Q4. When were you subpoenaed? A. Just as I was going home last night. I was thunder struck; I was taken by surprise; I didn't expect to be here today.

Q5. How long have you been in the fountain pen business? A. I started in in a small way in 1879.

Q6. Have you been in the fountain pen business ever since? A. Yes.

Q7. During that time have you been making and selling fountain pens? A. Yes, sir.

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Q8. Have you had at any time during this period a factory of your own? A. Yes, sir.

Q9. During what period? A. In 1885 I manufactured the Automatic pen at Norwich, Connecticut.

Q10. How long did you have a factory then? A. About two years.

Q11. Did you make rubber holders at that time? A. No, sir; they were made for me.

Q12. Did you make the gold pens at that time? A. No, sir.

Q13. You obtained these parts and put them together and adjusted the pens? A. Yes.

Q14. Did you have a factory at any other period? A. Yes.

Q15. When? A. March 27, 1903; I had that factory until 1826
February 7, 1904, when it burned down.

Q16. It was burned out in the Baltimore fire? A. Yes.

Q17. Then what? A. I started up again in August, 1904, after that fire and continued until a year ago this month, the 19th of April.

Q18. While you had your factory during this period from 1903 to 1910, with the exception of the few months that you discontinued while replacing your factory, did you then manufacture the rubber holders in your factory at Baltimore? A. No, I had them made outside.

Q19. All of your rubber holders at Baltimore? A. Yes.

Q20. You did not do any turning of rubber in your factory at Baltimore? A. After the fire I did not for six or eight months, 1827
in August.

Q21. During the time that you had your factory at Baltimore did you turn your rubber holders? A. Yes.

Q22. Did you manufacture the gold pens yourself at that time? A. No, I never did that.

Q23. You bought them from gold pen manufacturers? A. Yes.

Q24. And you put the parts together in the factory and adjusted the pens there? A. Yes.

Q25. During the period of thirty odd years that you have been in the fountain pen business you have got your parts from

1828 different people and put your pens together yourself, except the periods you have mentioned?

Mr. Stein: I object to that as absolutely irrelevant and immaterial as to any issue here presented, and on the ground that Mr. Lancaster has not been shown to constitute the trade, and he is not a party to this action.

A. Yes.

Q26. During this thirty odd years that you have been in the fountain pen business have you sold fountain pens personally yourself? A. Yes.

Q27. To what class of persons have you sold these foun-
1829 tain pens?

Mr. Stein: Counsel for defendant interposes the same objection, and upon consent it is understood that the same objection is introduced to this entire line of questions.

A. To jewelers and stationers and corporations.

Q28. In what part of the country? A. As far east as Bangor, Maine, and as far west as Omaha, as far north as Minneapolis and as far south as Richmond. Of course I have done a great business all over the world.

Q29. Did you personally visit the stationers and jewelers in this large section of the United States that you have mentioned? A. Yes, a great many.

1830 Q30. Did you make these trips frequently, yearly or monthly, or how often? A. My western trips I made always in January; about once a year west of Chicago. I would continue with what I had made up until I had sold out.

Q31. Were you in contact with the trade in selling fountain pens in the eastern section of the United States north of Richmond? A. Yes.

Q32. How often did you visit the trade in that section of the country? A. Every week; I was always out traveling.

Q33. How long have you been traveling and selling fountain pens around the country in the territory you have just mentioned? A. How often?

Q34. How long have you been selling pens? A. Since 1879.

Q35. And during these trips have you visited the principal cities and towns in the territory you have mentioned? A. Yes, a large number of them.

Q36. And when you visited these cities and towns your business was to sell fountain pens? A. Yes, sir.

Q37. And you visited the trade? A. Yes.

Q38. To sell fountain pens? A. Yes.

Q39. Have you been familiar with the fountain pens put on the market by the L. E. Waterman Company and Lewis E. Waterman, its predecessor? A. Yes.

Q40. How long have you been familiar with the fountain pens put on the market by the L. E. Waterman Company and Lewis E. Waterman, its predecessor? A. 1882 or 1883.

Q41. Do you know by what name these pens are commonly referred to and called by the trade during this period? A. Called a Waterman pen.

Q42. Has that been the fact all the time? A. The first part it was Waterman pen; and then it became Waterman's Ideal fountain pen.

Q43. What is it called today? A. Waterman's Ideal Fountain Pen.

Q44. Is it referred to as Waterman's pen? A. Yes.

Q45. Is it commonly referred to as Waterman's pen? A. Yes.

Q46. And is that name, "Waterman's Pen" commonly spoken of in the trade? A. Yes.

Q47. How long has that been the fact? A. Since 1882 or 1883, somewhere along there, that I have known it to be sold to the trade; along about that time.

Q48. In later years it has been very well known to the trade, has it not? A. Tremendously.

Q49. Have you talked with dealers during this period about Waterman's pens? A. Yes, indeed.

Q50. As far as the matter has come to your personal attention and knowledge, how do the trade regard the Waterman's pens put out by the L. E. Waterman Company, as regards quality? A. Very high.

1834

Q51. Do you know whether they are regarded as the standard pens on the market or not? A. I should say it was the standard. I have used that name myself on my own pens, "Standard;" but the Waterman pen is superior to mine.

Q52. Do you know of any pen on the market that is superior to Waterman's Ideal fountain pen? A. No, sir.

Q53. Have you been familiar with the fountain pens stamped "A. A. Waterman & Co., New York," which have been on the market for the last four or five years? A. Yes.

Q54. How familiar are you with these pens? A. I have sold them.

Q55. How long have you sold them? A. The last year.

1835 Q56. Previous to that time were you familiar with the pens stamped "A. A. Waterman & Co." which were on the market? A. Yes, manufactured them.

Q57. Have you examined the pens which have been on the market, or any of the pens which have been on the market, stamped "A. A. Waterman & Co." during the last four or five years? A. Have I examined them?

Q58. Yes. A. Yes.

Q59. How frequently? A. A great deal since 1902.

Q60. Have you repaired these pens? A. Yes.

Q61. Have you made a business of repairing all kinds of fountain pens? A. Yes.

Q62. For how long? A. All my life since I have been in
1836 the pen business. I don't know any other business. Thirty years.

Q63. The repairing of pens has always been a part of your pen business? A. Yes.

Q64. And have you repaired the pens stamped "A. A. Waterman & Co."? A. Yes.

Q65. Have you been repairing pens stamped "A. A. Waterman & Co., New York," during the last five or six years? A. Yes.

Q66. Almost daily. A. No, not almost daily, weekly.

Q67. As regards the rubber parts of the Waterman Ideal Fountain Pen, can you speak as to the quality of the rubber in the Waterman's Ideal Fountain Pen? A. Yes.

Q68. Please state what the quality of rubber is in the Waterman's Ideal Fountain Pen?

Mr. Stein: Objected to as immaterial and irrelevant.

A. I found it a very high grade.

Q69. Do you know of any better rubber used in fountain pens, of anybody's make, than is found in the Waterman Ideal Fountain Pens that have come to your attention? A. No, sir.

Q70. How does the quality of the rubber in the Waterman's Ideal Fountain Pens that have come to your attention, compare with the rubber in the pens stamped "A. A. Waterman & Co., New York," that have also come to your attention? 1838

Mr. Stein: That is objected to as incompetent, irrelevant and immaterial, and no proper foundation laid.

A. The Waterman's Ideal rubber that they obtain is unequalled. Nobody can make the rubber to compare with the L. E. Waterman rubber. You cannot get it satisfactory. You could not buy it. There is something about the rubber that is superior to anything.

Q71. How does the rubber in the pen marked "A. A. Waterman & Co., New York," that has come to your attention, compare with the rubber in the Waterman Ideal Fountain Pen? A. It does not compare with it; it does not equal it. It looks well, but it does not compare with it.

Q72. When you say it does not compare with it, do I understand you to mean it is not as good? A. It is not as good. 1839

Q73. Referring now to the gold pen in Waterman's Ideal Fountain Pens, what can you say as to the quality of the gold pens in Waterman's Ideal Fountain Pens?

Objected to on the same grounds.

A. High class.

Q74. Do you know of any pens that are superior to those in Waterman's Ideal Fountain Pens? A. No, sir, I do not.

Q75. How do the gold pens in the fountain pens stamped "A. A. Waterman & Co., New York," which have come to your

attention, compare with the gold pens in the Waterman Ideal Fountain Pens? A. They do not equal it.

Q76. Do I understand from your answer that the gold pens in the A. A. Waterman & Co. fountain pens are inferior to those in Waterman's Ideal fountain pens? A. Yes.

Q77. In what way are they inferior? A. The points, the iridium points.

Q78. Referring to the workmanship of the rubber parts of Waterman's Ideal fountain pens, what can you say as to the quality of the workmanship in the Waterman Ideal fountain pens? A. Unequalled; the very best.

1841 Q79. What can you say of the workmanship of the fountain pens stamped "A. A. Waterman & Co., New York," which have come to your attention, as compared with the Waterman Ideal fountain pens? A. They are fair, but they cannot compare with the L. E. Waterman.

Q80. In the manufacture of fountain pens and in your experience with them and their manufacture, do you find that there is any special skill required to adjust the gold pen and feed and holder together? A. That is the manufacturing of a fountain pen. It takes years of experience to do it, to get the proper adjustment.

Q81. Does it require high skill to do that work? A. Yes.

Q82. As regards the Waterman Ideal fountain pens, do you find, and have you found, that the adjustment in these pens is
1842 good or bad? A. L. E. Waterman—very good.

Q83. Do you know of any fountain pen on the market where the adjustment of these parts is superior to that in the Waterman Ideal fountain pen? A. With my own pen I could equal it, if I have the goods.

Q84. Any other pen that you consider superior? A. No.

Q85. You consider the adjustment of your pen superior to that of the Waterman Ideal Fountain Pen? A. No. I can equal it.

Q86. Is the adjustment of the parts of the fountain pens stamped "A. A. Waterman & Co., New York," which you

1843

have seen, superior or inferior to the adjustment of the parts of the Waterman Ideal Fountain Pen? A. Inferior.

The same objections are made to all this line of examination.

Q87. What part or what element does the adjustment of the parts of a fountain pen play in the production of a satisfactory writing instrument? A. Why, the adjustment of it.

Q88. I don't understand your answer. Will you please explain what you mean? A. To get a perfect writing instrument the point section, the feed and the gold pen must be adjusted, and the point of the gold pen also must be adjusted.

Q89. Is this an important or unimportant element in making a good fountain pen? A. Most important. 1844

Q90. Have you compared the Waterman's Ideal fountain pens in the last five or six years, that have been on the market and have come to your attention, with the fountain pens stamped "A. A. Waterman & Co., New York," that have been on the market and have come to your attention during the last five or six years, as to which is the better writing instrument? A. Yes.

Q91. Which have you found to be the better writing instrument? A. Waterman's Ideal fountain pen.

Q92. What is there about the pens stamped "A. A. Waterman & Co., New York" that have come to your attention that you found defective? A. The feed and the gold pen. 1845

Q93. Did you find the adjustment of the parts perfect or defective? A. Defective. Of course I can take an A. A. Waterman pen and adjust it and it will make a first class writing instrument; but I cannot get them to be made as they should be, the way they used to be made.

Q94. As you have found them on the market, have you found them a satisfactory writing instrument? A. Well, they are fair.

Q95. How do they compare with the Waterman Ideal fountain pens which you have found on the market? A. They are not

equal. They are better than a good many pens on the market, but it is not as good as the L. E. Waterman pen.

Q96. When dealers speak of Waterman pens, what is it commonly understood that they mean?

The same objections apply to all this line of examination.

A. L. E. Waterman.

CROSS-EXAMINATION by Mr. Stein:

XQ97. When did you arrive in New York? A. I arrived here
1847 Wednesday afternoon.

XQ98. And on Wednesday did you see anybody connected with the L. E. Waterman Company? A. Wednesday evening I did.

XQ99. Who? A. This gentleman here.

XQ100. Where? A. At the Breslin Hotel.

XQ101. By appointment? A. Yes, by appointment.

XQ102. When and where was the appointment made? A. Baltimore.

XQ103. By "this gentleman" you refer to Mr. Samuel S. Watson who just examined you on behalf of the complainant? A. Yes.

XQ104. Whereabouts in Baltimore was this appointment
1848 made? A. At my home. He asked me when I was going to be in New York.

XQ105. Where is your home? A. The Marlborough Hotel, Baltimore.

XQ106. Where is your place of business? A. At the Marlborough. My office is there.

XQ107. Had he any appointment to meet you at the Marlborough? A. No, sir.

XQ108. Had you ever met him before? A. Yes.

XQ109. Where? A. In the court; a lawsuit in court.

XQ110. He was counsel in a case in court? A. Yes.

1849

XQ111. Tell us what took place at the Marlborough in Baltimore last week when Mr. Watson called on you? A. He called on me; he said he happened to be in the city and he called. He telephoned to me and asked where I was. I asked him to come up to the house and he came up.

XQ112. What day was that? A. One day last week; I cannot say which day now. It was in the evening. I think it must have been Thursday.

XQ113. Thurdsay of the past week, ten days ago? A. Last week Thursday.

XQ114. A week ago last Thursday? A. I am not positive now. Let me see where I was Thursday. No it was not then. I think it was Monday night this week.

1850

XQ115. What did he say to you? A. He asked me about my business and wanted to know something about the Colonial Pen Company and A. A. Waterman. I had not anything to tell him about them and he just spent the evening in a social way. He asked me when I was going to be in New York. I said I thought I would be in New York Wednesday. He asked me where I stopped and I said at the Breslin. He said, "I will see you there" and he did see me. I think I told this gentleman this week, I think it was Monday night, this week, that he called on me.

XQ116. You had an enjoyable evening? A. Yes.

XQ117. How long did that enjoyment last? A. Until 12 o'clock, with my wife and family.

1851

XQ118. And it started when? A. About eight o'clock, or after.

XQ119. Tell us what took place in that four hours time? A. Just a social time. We all sat there and talked socially and he asked me if I had books belonging to the A. A. Waterman Company. I had not anything of that kind, they were all burned up. He did not ask me to meet him in New York; he asked me when I was going to be there.

XQ120. Confine yourself to telling us what took place regarding fountain pens or a discussion regarding fountain pens and of this lawsuit and of your testimony? A. This what?

1852

XQ121. Lawsuit? A. Of mine?

XQ122. The present one of L. E. Waterman Company against Modern Pen Company? A. I don't just remember what it was. He asked me if I did not buy out the Colonial Pen Company. I told him I did. He asked me about A. A. Waterman, if he was not in the employ of the Colonial Pen Company. I told him he was; he was in the company; he sold out everything there in Boston to me and I moved it to Baltimore. He wanted me to find some books but I hadn't them, they were burned up. I told him I had the stock book of the Colonial Pen Company and part of the certificates.

XQ123. Did he talk to you about this litigation of the L.
1853 E. Waterman Company against the Modern Pen Company? A. I knew without his telling me.

XQ124. Did he talk to you about it? A. I don't remember what he said about it. I knew that he had a case and was going to examine some witnesses the next day there.

XQ125. How did you know he had occasion to do so? A. Had occasion to examine witnesses?

XQ126. Yes? A. I knew it through a man in Washington that they were going to examine. I knew it last—a good while ago; I knew it from Mr. Geyer, that they are having a suit; and I was surprised when he called me up on the telephone about it.

XQ127. Did you know through Mr. Geyer who was to be
1854 examined in Washington? A. I knew Mr. Saadi was to be examined there.

XQ128. As a matter of fact Mr. Saadi was not to be examined there? A. He told me himself that he was going to be examined.

XQ129. Where? A. That he was in the case; Mr. Saadi was defendant in the suit. He showed me his papers where he had been stopped from selling pens.

XQ130. When did he do that? A. It was before last Christmas, away long back.

XQ131. And it is because of this conversation with Saadi, held before last Christmas, that you knew Mr. Watson was to

1855

be in Baltimore last Tuesday? A. I did not know anything of the kind. I told you that he called me up by phone that night, Monday night or whenever it was he was in town and then he told me that he was going to examine some witnesses there and he was going to examine some witnesses in Washington.

XQ132. After Wednesday whom did you see in New York connected with the L. E. Waterman Fountain Pen Company? A. Nobody but him.

XQ133. Did you see Mr. Watson on Thursday? A. I think I saw him Thursday night.

XQ134. Where? A. He came to the hotel there, a little while, and talked with Mr. Hildreth the proprietor.

XQ135. Does Mr. Watson live at the Breslin? A. No, sir, I don't think he does. 1856

XQ136. Did you have any talk with Mr. Watson or anybody connected with the L. E. Waterman Company yesterday? A. Yes.

XQ137. Who? A. Mr. Watson.

XQ138. Where? A. Around on Broadway at the Savarin restaurant.

XQ139. You took lunch with him? A. Yes.

XQ140. Where did you meet him—at his office? A. No.

XQ141. At the Savarin? A. Yes.

XQ142. Where did you go after lunch? A. I went home.

XQ143. To the Breslin? A. Yes.

XQ144. With Mr. Watson? A. No, sir. 1857

XQ145. How long did the lunch occupy? A. About half an hour.

XQ146. Did you talk to Mr. Watson in Baltimore last Monday night about the nature of the testimony you were going to give today? A. I never heard of it. I didn't know of it.

XQ147. Did you discuss with him the relative merits and the comparisons of the L. E. Waterman Fountain Pen at that time? A. No.

XQ148. When did you first discuss those things with him? A. I think it was Wednesday night he asked me some things about it.

1858

XQ149. You refused to tell him anything I understand about the Colonial Pen Company on Monday night when he first saw you; is that right? A. He asked me about the A. A. Waterman people. I never refused to tell him anything. He asked me to get some book that I did not have.

XQ150. Did you tell him all that he asked you about, regarding A. A. Waterman in Baltimore Monday night? A. I never told him anything.

XQ151. Did he ask you anything about them? A. He never brought up anything except this book.

XQ152. Did he bring up anything at the Breslin on Wednesday night? A. Nothing more than anybody would talk about

1859 the pen business.

XQ153. Did he bring up anything about A. A. Waterman & Co. or the Modern Pen Co. on Wednesday night? A. He said he would like it if I could find the book of the minutes of the Colonial Pen Company; that is all. We talked about the make of the pens. He asked me if I had trouble in getting rubber, and all that.

XQ154. When did he first ask you about the comparative merits of the L. E. Waterman pens and the A. A. Waterman pens? A. I think it was Thursday night.

XQ155. How long did you discuss that subject? A. Not very long.

XQ156. How long? A. We were a good while talking there

1860 in the lobby of the hotel, talking to Mr. Hildreth and it was quite late, I guess it must have been after eleven o'clock.

XQ157. How long did you talk there that night? A. I guess we talked two hours fully, more than two hours.

XQ158. Did you then tell him everything that he wanted to know about these pens? A. He asked me questions.

XQ159. And you answered all those questions? A. Yes.

XQ160. Did he also discuss those same things with you at the lunch yesterday? A. No, he did not speak about them at all yesterday.

XQ161. How did you happen to go to lunch yesterday? A. He asked me to meet him there. I don't know why.

1861

XQ162. You did not have any suspicion or idea? A. None whatever.

XQ163. You are in New York on business, are you not? A. Yes.

XQ164. They are purely business trips? A. Yes.

XQ165. Your time is occupied by your own personal business from the moment you get up virtually until the day is over? A. Yes.

XQ166. Where are your business activities in New York? A. Do you want me to tell you—

XQ167. What centers; where have you been? A. Thursday I was out at City Island, the northeast part of New York, up, out, around; and yesterday, Friday, I was looking at stores in New York.

1862

XQ168. Whereabouts? A. Fifth Avenue.

XQ169. What Street? A. 450 Fifth Avenue.

XQ170. That is around 40th Street? A. No, 38th or 39th Street, somewhere along there. It was the Mirror Candy Company had a store to rent.

XQ171. What time of day were you looking at those stores? A. From 2 o'clock until 5.

XQ172. What were you doing in the morning? A. I was down around Broad Street trying to find a broker, up to after 12 o'clock; then I went around to Mr. Geyer and got my repairs and I met him. He asked me to come there. I didn't know for what reason; nothing in my mind.

1863

XQ173. By "him" you mean Mr. Watson at lunch? A. Yes, I met him at lunch.

XQ174. When you were over at the Modern Pen Company yesterday morning did you tell Mr. Geyer or anybody that you had an appointment with Mr. Watson? A. I had not had it when I was there.

XQ175. When did you make your appointment? A. It was after 1 o'clock.

XQ176. When did you make your lunch appointment with Mr. Watson? A. The night before.

1864

XQ177. When you were over at the office of the defendant yesterday morning about those repairs did you tell Mr. Geyer or anybody that you had a lunch appointment with Mr. Watson? A. No, I didn't.

XQ178. Then you did not see Mr. Watson after that lunch until last night? A. Five o'clock.

XQ179. Five o'clock last night? A. Yes.

XQ180. Mr. Watson met you at your hotel? A. A few minutes. He served a summons on me.

XQ181. He served a subpoena? A. Yes.

XQ182. Were you very much surprised when he served a subpoena? A. Yes.

1865

XQ183. Shocked? A. I didn't expect it. I was just going home on the six o'clock train.

XQ184. Did you tell Mr. Watson when you were going away? A. I did the night before.

XQ185. Did you think that it was rather peculiar that Mr. Watson, knowing that you were to go to your family on the six o'clock train, should have served a subpoena on you after five o'clock last night?

Mr. Watson: Counsel for the plaintiff objects to the form of the question.

A. I thought it was rather peculiar. I didn't expect it. I hadn't the least idea of it. I was very much surprised.

1866

XQ186. Did you feel aggrieved by it? A. I certainly did.

XQ187. You felt that he had breached your confidence? A. I thought it was queer. I told him how I felt. If I could have found a way to somebody that I knew I would have gone to him. I wanted to find Mr. Geyer last night and I could not.

XQ188. What time was it this subpoena was served on you last night? A. About five o'clock.

XQ189. The Modern Pen Company, where Mr. Geyer has his headquarters, has a telephone? A. Yes.

XQ190. And you have used that phone? A. I was there last week at half past five and found them open and they told me then that they would not have been open when I got there at

half past five if they had not been taking account of stock as they closed at five o'clock.

XQ191. You did not think it would be very difficult to try and reach them on the phone, did you? A. I did not bring it to my mind to do that. I could not have seen him personally. I know I had my dinner right afterwards. He didn't stay very long. He shoved that into my hands and left me. That is all about it.

XQ192. Did you feel, when Mr. Watson served the subpoena, returnable this morning, after knowing that you wanted to return to your family and your business, that he had broken faith with you or had breached your confidence? A. It kind of made me feel pretty sad, if you want to know the facts about it. I don't know why I should be brought into this. You would not think this man was a friend of mine. 1868

XQ193. Did you feel this morning that he was not a friend of yours? A. I don't know how to feel. I am here to tell the truth in the least words I can use.

XQ194. Tell us in the least words that you can use whether when you came here this morning you felt friendly or unfriendly to Mr. Watson? A. Well, it is like this. This man beat me in my patent suit, four years—three or four years in the suit. He has asked me these questions and I told him two or three times, why should I answer these questions to him, because I make my living out of the Modern Pen Company; they are the only ones who can make my pens, as near right as I can get them. They are not perfect by any means but I make my living by them and I was very much surprised when he called me here into this suit—very much surprised. I know this, that these two representatives of these two companies are practically making use of the pens that I myself originated. Now I have come here and got into this; I had to tell what I knew and tell the truth. Now how am I going to resist? I know I will never get any goods made by this side (pointing to plaintiff's counsel) and if this side (pointing to defendant's counsel) goes against me how am I going to make a living. 1869

XQ195. How are you going to make a living? A. I don't know.

XQ196. Are you going to retire? A. No, I can't retire. I have got to have pens.

XQ197. You have got to have money to retire? A. Yes, and I have not tha

XQ198. Do you want us to understand that you have nothing today? A. Very much so.

XQ199. That is the fact? A. That is the fact.

XQ200. That you need not only this business but you have to have money to meet your living expenses? A. Yes.

XQ201. Are you very desperately hard up financially? A.
1871 I am.

XQ202. Today? A. Today.

XQ203. And have been? A. Yes.

XQ204. Will you kindly tell us whether your attitude towards Mr. Watson was friendly this morning when you came here? A. Yes, just the same as it would be to anybody.

XQ205. Just as friendly, although he had served you with a subpoena last night after getting your confidence and breaking it? A. Yes.

XQ206. When did you first know of a firm of A. A. Waterman & Company or "& Co."?

Mr. Watson: Objection is made to the question as not
1872 proper on cross-examination; it deals with new matter and the defendant makes the witness its own and is bound by the answers.

A. A. A. Waterman & Company or & Co.? What do you mean by & Co.?

XQ207. When did you first hear of a firm known as A. A. Waterman & Company or a firm known as A. A. Waterman & Co.? A. 1899 or 1900, somewhere around there.

XQ208. You did business with that firm? A. No.

XQ209. You acquired certain rights possessed by that firm, didn't you? A. Yes.

XQ210. When? A. March 27, 1903.

1873

XQ211. Have you given any thought to the testimony that you were to give this morning in this matter? A. None whatever.

XQ212. Have not refreshed your memory as to anything? A. No.

XQ213. Will you kindly tell us why it is that you can give us the exact dates of things taking place ten or more years ago and that it required at least several minutes for you to tell whether or not it was on Monday last that you saw Mr. Watson in Baltimore? A. I will tell you why I know it was on Monday last.

XQ214. Answer the question? A. This was so deep in my mind, and I kept on my diary when I purchased the company. I can remember that distinctly. 1874

XQ215. You kept a diary so that you would not forget the date? A. I do keep a diary.

XQ216. Did you enter it in the diary for fear you would forget the date? A. No, I always put down every day what I do.

XQ217. Did you put down in the diary about your talk with Mr. Watson in Baltimore on Monday? A. I think it is there, yes.

XQ218. Suppose you show it? A. I have not got the diary here.

XQ219. Where is the diary? A. In Baltimore.

XQ220. Then you do not enter up every night what you do during the day? A. When I get back I write up what happened, according to my memory. 1875

XQ221. Will you send that diary to the commissioner upon your return to Baltimore? A. Yes. There is nothing written in it since Wednesday. Monday and Tuesday were there.

XQ222. Is your Monday night interview with Mr. Watson in there? A. I think it is. I don't write interviews; I simply write who called on me and how much money I take in in a day and my daily expenses. That is all I put in the diary.

XQ223. How much money did Mr. Watson give you yesterday? A. He gave me $1.85.

XQ224. Anything else? A. Yes, he loaned me $10.

XQ225. Did he suggest the loan to you? A. No, I told him that this was so unexpected, that I was disappointed in my business transactions today and I was on my way home and he loaned me $10.

XQ226. Did you give him an I. O. U.? A. No, I will send that to him as soon as I get back. I asked him just the same as I would ask anybody. I don't know why I have to do all this.

XQ227. Did that loan mollify your feelings as to Mr. Watson? A. What do you mean—ease my mind?

XQ228. As to Mr. Watson and his friendly interest in you?
1877 A. Mr. Watson—I don't know whether he is my friend or not; but I could have gone to Mr. Hildreth and got that $10 just as well but I didn't want to do it.

XQ229. Didn't you think it would be much more appropriate to borrow the money from the manager of the hotel at which you were stopping than it is to borrow money from an attorney representing a plaintiff in an action against your employers, or a person with whom you do business constantly, in a matter then pending in which you were to testify? A. I have done the same thing with him.

XQ230. Will you answer my question? A. I never borrowed any money at the hotel but I gave them a check and that is all they would ask me for. I have no bank account, I couldn't
1878 give a check now.

XQ231. When did you discontinue your bank account? A. It is a good while now.

XQ232. How long? A. I couldn't tell you the exact date but it was way back last year. I have my book that would show.

XQ233. Have you borrowed any money at the hotel since you discontinued your bank account? A. Yes, but I have had to make it good before I left town. I never drew a check; I cannot draw a check if I don't have an account. If I said, "Let me have $10" they would hand me a check as they always did and put the name of my bank on.

1879

XQ234. You knew if you were to testify today in response to your subpoena that you would be within a five minutes walk of the office of the Modern Pen Company, didn't you? A. That didn't strike me at all. I didn't think of that. I thought for a minute where I was, what it was, and if he was friendly towards me and I asked him for the $10 and he said, "Certainly" and loaned it without any hesitation.

XQ235. You are selling pens of the Modern Pen Company? A. Yes.

XQ236. You are not selling pens of the L. E. Waterman Company? A. I have no pens, only a few, of the A. A. Waterman; just a few.

1880

XQ237. But you do business with them? A. Yes.

XQ238. You do no business with L. E. Waterman Company? A. None whatever.

XQ239. You knew Mr. Watson represented the L. E. Waterman Company; you know there was a litigation between the L. E. Waterman Company and the A. A. Waterman Company? A. Yes.

XQ240. And you knew Mr. Watson represented the L. E. Waterman Company in that litigation? A. Yes.

XQ241. And that they were seeking to take away the right of A. A. Waterman Company to the use of the name Waterman as applied to fountain pens, didn't you? A. I did.

XQ242. You knew that that was a vigorous fight? A. I didn't make any thought on the subject at all.

1881

XQ243. You did not consider that at all? A. I did not think of that at all.

XQ244. Do you sell the pens manufactured by the A. A. Waterman Company under that name? A. Yes, A. A. Waterman.

XQ245. And that was a pen that you were selling and out of which you were making some money? A. Yes.

XQ246. You knew if this litigation succeeded so far as the plaintiff was concerned the A. A. Waterman Company could not manufacture pens under that name? A. I did not think of that.

XQ247. Did you know it? A. I do know it now.

XQ248. When did you first learn it? A. Learn what—that they were in litigation?

XQ249. The purposes of this litigation? A. A long time ago. I did not bring the case or anything into the question. I just returned from being turned down for a bill for a lot of money and I had no money at the moment. He handed me this subpoena and my thought was to go home, pay my bill at the hotel here and I didn't think at the instant of the outcome. I said, "Mr. Watson, would you be willing to lend me $10," he didn't hesitate but he handed it to me. Then he gave me $1.85, or something, and he said, "You owe me $10." I said, "Yes, thank
1883 you."

XQ250. Where did he hand you the $10? A. Right in front of the president's office, right on the sofa there, at five o. a little after five.

XQ251. Knowing about this litigation for some months, this pending litigation, knowing that Mr. Watson represented the complainant in this action, didn't you think it rather unusual that he called upon you in Baltimore and up at the hotel? A. I certainly did, very unexpected.

XQ252. Did you connect or associate those visits with this litigation? A. I never thought of it when he came there. He asked me about something as to the A. A. Waterman Company in 1899. He asked me if he could ask me some questions.

1884 XQ253. What did you think he was driving at or spending his time upon when he called upon you?

> Mr. Watson: Counsel for plaintiff makes a formal objection on the record to all this line of testimony at such great length and directs the Court's attention to the evident attempt to pad the record here with matters that have no connection with the issues in this case; and I shall move to Court to strike out this testimony at final hearing as entirely irrelevant and immaterial, and that the costs of taking the same be taxed against the defendant?

A. I supposed it was the case that has been on the last year and this year, of the Waterman Pen Company against A. A. Waterman.

XQ254. This case in which you are now testifying? A. Yes.

XQ255. You knew that he was engaged in behalf of the complainant in this case against the people for whom you were working or whose pens you were selling? A. Yes.

XQ256. You told us that you knew that you could not buy any pens from the L. E. Waterman Company and that the only people who could make pens at all situable to you were the A. A. Waterman Company? A. Yes.

XQ257. You knew if this litigation was prosecuted successfully the A. A. Waterman Company could not sell you pens 1886
under that name? A. I knew I would be out all around.

XQ258. You knew that you would be out all around and that your business would be gone? A. Yes.

XQ259. Did you know that you were under no legal obligation to give Mr. Watson answers to his questions? A. I was not under any obligation to give him any story.

XQ260. And you knew that? A. Yes, sir.

XQ261. And yet you went ahead and discussed with him all these things you have testified this morning? A. Yes.

XQ262. And you told him everything you testified to this morning? A. He asked questions just as he asked them today about the rubber and the pens and all that.

XQ263. How long have you been selling pens of the A. A. 1887
Waterman Company? A. I sold them along in 1902 and since last April.

XQ264. Right down to this time? A. No, 1902 until 1903. I was burnt out in 1904; and since last April.

XQ265. From April, 1910, to April 1911? A. Yes. I guess I had some before that; I am not positive.

XQ266. You have to buy those pens on a strictly C. O. D. basis, don't you? A. Yes.

XQ267. And you have applied for credit to the A. A. Waterman Company people, have you not? A. Yes, I have.

XQ268. To Mr. Geyer? A. Yes, and to Mr. Chapman. They let me have the samples.

XQ269. And each of them refused to sell you except on a C. O. D. basis? A. Before that this other man, Mr. Martling, gave me samples.

XQ270. But they declined to sell you on credit, although you applied for it and they insisted that your transactions must be on a C. O. D. basis? A. Yes.

XQ271. And you felt aggrieved, didn't you? A. I naturally felt aggrieved. I had no hard feeling. I wanted some samples last Christmas for Christmas business. This is strictly business.

1889 XQ272. Have you ever personally turned any rubber? A. No.

XQ273. You have never made any gold pens personally? A. No.

XQ274. Are you familiar with the process of manufacturing and turning rubber? A. Yes.

XQ275. Who manufactures the different parts that go into the L. E. Waterman pen? A. The L. E. Waterman Company.

XQ276. How long has it been doing that? A. That I don't know.

XQ277. How do you know that it is doing that? A. Because I read about their factory.

XQ278. When did they complete their factory? A. Within a year or more, I guess.

1890 XQ279. Before that who were manufacturing for them? A. H. P. & E. Day, of Seymour, Connecticut.

XQ280. What part did Day manufacture? A. All the parts except the gold pens.

XQ281. Who manufactured the gold pens for them? A. Fairchild, and Mabie Todd.

XQ282. Up to a year ago the work done by L. E. Waterman Company was to assemble the parts manufactured by other people; is that correct? A. Yes.

XQ283. And put them on the market? A. Yes.

XQ284. Is Day still in business? A. I don't know; I have not been there since 1904.

XQ285. Is Fairchild still in business? A. Yes.

XQ286. You can buy gold pens from Fairchild, can't you? A. I have.

XQ287. Of the same kind that they manufactured for and sold to the L. E. Waterman Company? A. Yes.

XQ288. And Fairchild turned out a pretty good pen, didn't he? A. Yes.

XQ289. And Day turned out an excellent, first-class rubber holder? A. Certainly.

XQ290. Could anybody turn out goods superior to Day? A I don't think they could.

XQ291. His were the best goods of that kind in the market? 1892
A. Yes.

XQ292. And Fairchild's pens were the best kind on the market? A. Yes.

XQ293. Were you at all familiar with the process employed by Day and Fairchild in getting out their goods? A. I know how to have the pens made, so that I could adjust them. That is the principal part, to adjust them after they are finished. They are not done then by any means. That is not the manufacture, that is, the turning. Any young man or boy could do the turning, but the other part is to assemble them and put them together and test them.

XQ294. Then I understand the turning of rubber is not an art or industry requiring great skill? A. No.

XQ295. Any boy could do that and turn them out? A. Yes, 1893
pretty fair.

XQ296. And the real secret of the success of fountain pens depends on the adjustment of the parts? A. Yes and testing and grinding the points of the gold pens, and finishing.

XQ297. Who adjusts the parts, men or women? A. Men.

XQ298. What is the salary ordinarily given to an adjuster of parts? A. They run from $25 a week up.

XQ299. Up to where? A. $35, somewhere around there. I have known of men getting that.

XQ300. Are there many men who are skilled and capable of earning such salary? A. Very few of them.

1894

XQ301. Don't you know as a fact that the adjusters at the L. E. Waterman Company get a salary of $12 a week each? A. I do not know.

XQ302. Have you ever made inquiry? A. No.

XQ303. Have you ever made inquiries into the salaries of adjusters at all? A. Only of my own and at Boston. They got good salaries.

XQ304. When you go into a store to sell an A. A. Waterman & Co. pen, what do you say? A. I always said, "A. A. Waterman fountain pens," "A. A. Waterman pens."

XQ305. And if the buyer went to a jobber and wanted a pen made by A. A. Waterman & Co. what would he ask for?

1895

Mr. Watson: Objected to as impossible for the witness to answer.

XQ306. Are there jobbers in the fountain pen line? A. I don't find any except people like Charles Broadway Rouss.

XQ307. Does Charles Broadway Rouss handle all kinds of fountain pens, or do they specialize? A. They have a good many kinds of pens.

XQ308. L. E. Waterman pens? A. I never have seen them there.

XQ309. Do you know a jobber by the name of Hodgkins in Philadelphia? A. Yes. I don't know that he is a jobber. I know a stationer. He was one of my first customers.

1896

XQ310. Does he handle L. E. Waterman pens? A. I believe they have them.

XQ311. Does he handle A. A. Waterman pens? A. I don't know. I never could sell them any pens.

XQ312. When you were at Mr. Geyer's office yesterday, did you tell Mr. Geyer that Mr. Watson had been to see you? A. No, I told him that Wednesday, when I came here first.

XQ313. On Wednesday? A. That was Wednesday afternoon, I think.

XQ314. Did you tell him on Friday that Mr. Watson had seen you that Wednesday night, and on Thursday night? A. I told

Mr. Geyer that Mr. Watson was at my house and I was very much surprised to have him call. 1897

XQ315. Did you tell Mr. Geyer yesterday, Friday, that Mr. Watson had seen you Wednesday night after you had seen Geyer? A. No, I did not tell him.

XQ316. And you did not tell him that he had seen you on Thursday night and that you had had these various conferences? A. No.

XQ317. So Mr. Geyer was in ignorance of the talk with Mr. Watson on Wednesday night and Thursday night? A. I don't remember. I don't believe I told him anything at all. I did not talk with him much.

XQ318. Mr. Geyer was in charge of the office of the A. A. Waterman Company and the Modern Pen Company, was he not? A. Yes. 1898

XQ319. Did you feel that you owed him any duty to acquaint him with these facts? A. Yes, a great deal.

XQ320. And yet you did not have any opportunity to talk about it? A. I did not say anything to him about it.

XQ321. How long were you there yesterday? A. About ten minutes.

XQ322. What did you talk about? A. Various subjects.

XQ323. What were they? A. One was about a book. He wanted to know if I knew the date of the book. I did not know anything about it.

XQ324. Did that take you ten minutes? A. No. 1899

XQ325. What did you discuss in the remainder of the ten minutes? A. I was not ready to talk to him. I had plans made to talk to him later on, but I had not anything to tell him definitely, anything that would interest him. I had nothing to tell him yesterday.

XQ326. Didn't you think that these nightly conferences at your hotel with an attorney for his adversary—A. I didn't think any more of it. He lived right near there. I thought he paid me a social call at my house, he being in the city.

XQ327. I am speaking now of the conferences at the Hotel Breslin in New York? A. Nothing came up. He asked me about some questions that did not interest me in the least.

XQ328. Where does Mr. Watson live? A. He told me that he lived near the Breslin. He told me that in Baltimore. I didn't ask him where.

XQ329. The situation that now confronts you, as I understand from your testimony, is that you cannot do business with L. E. Waterman? A. I never did.

XQ330. That as a result of this testimony you cannot do business with A. A. Waterman & Co? A. It don't look so.

XQ331. That you have nothing financially to bank upon? A. No.

XQ332. That your business is taken away? A. It can be taken away.

1901

XQ333. It can be taken away by the A. A. Waterman Company refusing to furnish you goods? A. Yes.

XQ334. And that you had to borrow $10 of Mr. Watson to get back to Baltimore? A. Yes.

XQ335. Have you made any arrangement with Mr. Watson for any further borrowings in order to stay here today? A. No.

XQ336. Have you had any talk with anybody except Mr. Watson connected with L. E. Waterman & Co., or with the firm of Watson & Raymond in the last two weeks? A. No, sir, never in my life.

XQ337. Never in your life? A. No. You mean about this? I don't know as I ever talked with anybody in the L. E. Waterman Company. I would not know them if I saw them, except the bookkeeper who used to be with me.

1902

XQ338. How many people are there in the United States manufacturing fountain pens? A. About fifty.

XQ339. And you know the product of those fifty? Where do you want us to understand that the product of the A. A. Waterman Co. stands? A. Where do they stand?

XQ340. Yes. A. They stand way up close.

XQ341. Close to L. E. Waterman Company? A. Yes.

XQ342. Very much difference between them? A. Yes, there is a good deal of difference between the rubber and the gold

1903

pens. They don't seem to get it. Perhaps you might once in a while find a cracker jack pen.

XQ343. What do you think of the self-filling or automatic pen of the A. A. Waterman Company? A. I think it is a very fair pen.

XQ344. I am now referring to the automatic self-filler? A. Of the A. A. Waterman?

XQ345. Yes? A. It is a good pen.

XQ346. Has the L. E. Waterman Company any self-filling pen equaling it? A. I believe they are advertising a pen lately.

XQ347. Have they any self-filling device that equals the self-filling device employed by A. A. Waterman & Co.? A. I have not used the pen; I don't know.

1904

XQ348. Have you ever seen the device of the L. E. Waterman Company? A. No, not that they have now. I have seen an old one.

XQ349. How old? A. One that was made similar to my pen.

XQ350. How old? A. I think it must have been four years ago.

XQ351. How does that compare with the automatic self-filler employed by A. A. Waterman & Co.? A. A. A. Waterman is the best.

XQ252. Is the best? A. Yes.

XQ353. When did you last see any kind of pen, for purposes of criticism and examination, manufactured or sold by L. E. Waterman & Co.? A. I don't catch that.

1905

XQ354. When did you critically examine pens manufactured by L. E. Waterman & Company? A. In July, 1907.

XQ355. Not since then? A. I have not examined any other pens since.

XQ356. You have not examined any pens of the L. E. Waterman Company since July, 1907? A. Self-filler; I have not seen any. They have got a new pen I understand. I have not examined it.

XQ357. You are referring now to L. E. Waterman & Co. self-filler? A. That they made at that time.

1906

XQ358. I ask you when did you last critically examine any kind of pen made by L. E. Waterman? A. That is the time, July, 1907.

XQ359. And that applies to all kinds of pens made by the L. E. Waterman Company? A. No, it only applies to self-filling pens.

XQ360. When did you see any of the other kind? A. I come in contact with them daily and weekly, the other kind.

XQ362. But you do not come in contact with self-filling pens frequently? A. No.

XQ363. They don't sell so very well, do they? A. I have not seen them.

1907

XQ364. You do not see them in the stores? A. Yes, I have seen them, but I have never taken them up and examined them. I was not interested in them.

XQ365. In 1882, from then on, the L. E. Waterman Company pen was popularly known as the Waterman pen; is that so? A. Yes.

XQ366. And after the product manufactured by the A. A. Waterman Company, or its predecessors, became generally used, how was the L. E. Waterman pen usually described by dealers? A. They called it a Waterman pen.

XQ367. And how was the A. A. Waterman Company described? A. Always called A. A. Waterman, so far as I know. That is the way they distinguish.

1908

XQ368. What does the dealer call the Ideal pen these days? A. He would call it a Waterman Ideal Fountain Pen.

XQ369. Is that the name generally applied to Waterman's Ideal Fountain Pen? A. Yes.

XQ370. And does that apply also to the consumer and the public? A. Yes, the public I think are not as familiar with the Ideal. They always say Waterman pen.

XQ371. How many pens manufactured by A. A. Waterman & Co. do you suppose have been sold in the United States and distributed? A. I have not the least idea. A great many.

XQ372. What would be your best guess?

Mr. Watson: Objected to.

A. I don't know. I don't know their business.

XQ373. How many of them have you sold? A. I guess I have sold several thousand.

XQ374. In the last year? A. Yes.

XQ375. And how many in earlier years? A. Not so very many because we put "Colonial" or my name on the pens after he sold out in Boston.

XQ376. But among the fifty manufacturers of fountain pens in the United States, excluding L. E. Waterman & Co., you found that you could get the best results, judged from your expert and analytical standpoint, from the A. A. Waterman Company; is that correct? A. They could make better work than any others. The next to them was Weidlich & Co. of Cincinnati.

XQ377. Do you do much repairing work? A. Yes.

XQ378. And have for ten years past? A. Yes.

XQ379. Do you repair more L. E. Waterman fountain pens than A. A. Waterman & Co. fountain pens? A. No, it runs all along, different ones. I can't tell; I couldn't tell you exactly; a good many of every kind.

XQ380. Do the L. E. Waterman fountain pens and A. A. Waterman fountain pens run very close as to repairs, or the number of repairs that you do? A. I would say the L. E. Waterman pens are not so many repaired as others.

XQ381. And that applies during the period when you have handled A. A. Waterman & Co. pens and have not handled for sale L. E. Waterman pens? A. Yes.

XQ382. From whom does the L. E. Waterman Company buy its rubber? A. H. P. & E. Day, Seymour, Connecticut.

XQ383. Are they general rubber dealers? A. No, they are exclusive. They do not make for anybody outside I understand. I never could buy any.

XQ384. Was that because your credit was not as good with them as L. E. Waterman? A. It was not that; it was because the Waterman Company took all of it. Nobody could buy.

XQ385. Do you recall talking about Day and L. E. Waterman Company to Mr. Geyer the other day? A. I don't remember.

1912

XQ386. Was there any conversation between you two as to Day and the L. E. Waterman Company and their relations? A. I don't recall it.

XQ387. Do you recall having any talk with Mr. Geyer the other day regarding the relation of H. P. & E. Day and the L. E. Waterman Company? A. No.

XQ388. Do you recall stating to him that Waterman had gotten in so deep today, to H. P. & E. Day, that L. E. Waterman Company was virtually controlled now by H. P. & E. Day? A. I believe I did have a talk something like that. You know H. P. & E. Day made goods for me for a good many years and Waterman got in there with them and he took all

1913

that they could make and I have seen the day when they have had their rooms piled high with goods waiting for Waterman to take them and Day would remark "If Waterman don't make good pretty soon we will send for Lancaster."

XQ389. Did you ever hear of the American Hard Rubber Company? A. Yes.

XQ390. They are manufacturers of vulcanized rubber? A. Yes.

XQ391. What sort of goods do they turn out? A. I have had some pretty hard stuff from them, pretty hard stuff.

XQ392. What is the best quality they make? A. Number four grade, if you can get it.

XQ393. The Akron brand? A. Yes, made in Akron.

1914

XQ394. Have you ever used their Akron brand of vulcanized rubber? A. I don't remember.

XQ395. Do you know anything about the Akron brand of vulcanized rubber? A. I never heard it mentioned.

XQ396. In what way—state specifically, just how rubber employed by A. A. Waterman & Company is inferior to that employed by L. E. Waterman & Company? A. I can't tell you any more than it is brittle. It don't adhere like a piece of Day rubber.

XQ397. Adhere in what way? A. You can screw up a section of the Day rubber and cannot see it, it takes such a fine

hair line and it will adhere to itself and then it is easy to unscrew again. It is more elastic, Day's rubber, than any other make of rubber. That is what I have found.

XQ398. Will you tell us in just what way the L. E. Waterman pen is superior to the pen used by A. A. Waterman & Co., the gold pen? A. The gold pen?

XQ399. Yes? A. The gold is good but there are different grades of iridium, and grinding, that is the principal thing, and the expense. You can buy manufactured iridium. You cannot buy the Siberian iridium.

XQ400. What is the best quality of iridium? A. Siberian iridium.

1916

XQ401. What brand? A. There may be different grades of that. It is very expensive. It runs up to $200 an ounce some of it. It is hard to get.

XQ402. What kind of iridium do L. E. Waterman & Co use? A. They use that, because I know Fairchild buys the best.

XQ403. How do you know they use that? A. I only know what goods are in the Fairchild pens and Mr. Fairchild himself told me.

XQ404. Looking at a pen can you tell what kind of iridium is in it? A. I could not.

XQ405. The iridium on the pen point is so infinitesimal that the ordinary eye cannot see it? A. You cannot tell until you write with it.

1917

XQ406. I understand that the adjustment of the pen is work done by clerks getting, as you say, from $25 to $35 a week? A. I have known them to get that. Of course you can get young men that can assemble parts I suppose more reasonably than that but an expert gets a very good salary for adjusting pens.

XQ407. How old are these boys that you can get to do that? A. I should judge anywhere from seventeen to twenty, something like that, young men.

XQ408. Those boys would not have had "years of experience" would they? A. No, they get educated that way gradually and work up to be practical mechanics.

XQ409. But on your direct-examination you testified that it required "years of experience" in order to properly adjust pens? A. It would, yes.

XQ410. Which statement do you want finally on the record—that boys seventeen to twenty can do it or that it requires "years of experience"? A. You can learn them to do it, but a first class pen maker has been at it for years adjusting pens. Mr. Waterman—that was his business; he used to file and tinker and get a pen just so before he would let it go out; just the same as every pen has to be examined and adjusted and fitted on to the feed and it takes an expert to do that.

1919 XQ411. In your thirty odd years of experience for how long a time was L. E. Waterman Company known merely as assemblers and adjusters of pens?

Mr. Watson: Objected to as entirely immaterial to any issue in this case.

A. I don't know that. They received their parts the same as I received my parts and assembled them. I don't know how they did business. I was never in their place. I have always been manufacturing pens that way, getting the parts.

XQ412. If you can buy your rubber from Day and your pens from Fairchild you can adjust and assemble those pens so that they will be equal, in workmanship, in parts and in efficiency to the L. E. Waterman Ideal Pens or of any other pen made by the
1920 L. E. Waterman Company? A. If I have their feeds.

XQ413. Which do you consider the best feed in the market? A. I never gave that a thought. If my tongue feed was made right and properly that is the best feed.

XQ414. Is that the feed employed by L. E. Waterman & Company? A. No.

XQ415. Is it employed by A. A. Waterman? A. No.

XQ416. You testified before that you could take a pen made by A. A. Waterman & Co. and adjust it so that it would make a first class writing instrument? A. Yes.

XQ417. Then your main complaint or only complaint is in the adjustment of the pen? A. I think, the way I have been getting my pens, they received no attention at all.

XQ418. Are you speaking now of the pens imprinted A. A. Waterman & Co. or the pens made by that company for you under your own brand? A. I mean my own pens. I never can get them made as I want them.

XQ419. Your standard is very very high is it not? A. My standard?

XQ420. Your personal standard? A. How do you mean. The standard of my pen is very high.

XQ421. The standard that you demand is very high? A. Yes, very high. 1922

XQ422. You are an expert in that line? A. Yes.

XQ423. And you want to get a pen that is superior to anything that ever was manufactured? A. I cannot get that.

XQ424. But that is what you are after? A. That is what I am after.

XQ425. How many pens can an ordinary adjuster assemble and adjust per week? A. I have not given that a thought.

XQ426. Think about it now and answer us? A. A man ought to do four gross of pens a week.

XQ427. That is about a thousand a week? A. Four gross a week.

XQ428. Excuse me; six hundred a week? A. Yes.

XQ429. And that on a salary of about $25 a week? A. I don't know how they pay. Of course there is other work that these experts do besides assembling pens. That has always been a foreman's work, to assemble. 1923

XQ430. Will you give me the name of one assembler or adjuster of pens now receiving from anybody a salary of $25 a week? A. I don't know of anybody. I don't know the name.

XQ431. Where are they employed if you know? A. I don't know where they are. The last one I had was August Eberstein.

XQ432. When did you last have him? A. 1903.

XQ433. What did you pay him? A. I paid him $25 a week.

1924

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ434. You have no personal knowledge that the L. E. Waterman Company buy their gold pens from Fairchild have you? A. Only from what they tell me and what I see in the Fairchild factory.

RDQ435. When did you see any pens there that they said were for Waterman? A. It was a long time ago.

RDQ436. You have not seen any there for several years have you? A. No.

RDQ437. This talk that you had with Mr. Geyer when you were talking about the Day factory and the Waterman Company and saying that the Days controlled the Waterman Company, when did that conversation refer to, what date; when was it? A. I cannot remember the exact time. It must have been Wednesday afternoon I think.

1925

RDQ438. What was the time when you told Mr. Geyer that the Days controlled the Waterman Company; when did the Days control the Waterman Company? A. I didn't tell him the date.

RDQ439. When was it?

A. I don't remember. It is a long time ago.

RDQ440. A great many years ago, before 1901? A. Before that I guess. I cannot tell the exact date.

RDQ441. You do not know anything about the relations between Waterman and the Days, today, do you? A. Nothing whatever.

1926

RDQ442. And you have never known anything about the relations between the Waterman Company and the Days at any time except that the Waterman Company got their rubber from the Days at one time; that is all you know about it? A. Yes.

RDQ443. Do you know whether or not the Waterman Company have been making gold pens or not? A. I don't know anything about that.

RDQ444. You have not known anything about where the Waterman Company made their parts, for a number of years have you? A. No.

RDQ445. No personal knowledge of it? A. Not since 1897.

RDQ446. You do know about the quality of the rubber which is in the Waterman Ideal Fountain Pen, don't you? A. Yes, I can show it to you for twenty years back, the quality.

RDQ447. Has the quality been generally uniform, the same all the time? A. Yes.

RDQ448. And has it been of the same high grade that you have spoken of? A. Yes.

RDQ449. And when you spoke of the rubber in the pens marked A. A. Waterman & Co. you referred to the rubber in the pens that you found on the market? A. Yes.

RDQ450. Found on the market during the last four or five years? A. Yes.

RDQ451. While you were running your factory at Baltimore did you employ adjusters for your pens? A. I did that myself.

RDQ452. You did it yourself? A. Yes.

RDQ453. Do you still do it? A. Yes.

RDQ454. In selling fountain pens of different styles for the A. A. Waterman & Co. of New York; you have had their different styles of pens to sell? A. Yes.

RDQ455. You had the so-called automatic self-filler that they make? A. Yes, I sold a few.

RDQ456. You have had the middle joint pen that they make? A. Yes.

RDQ457. And you had the old style with the joint near the gold pen? A. Yes.

RDQ458. Which of these styles have you found to be the principal one in demand? A. The one with the joint near the pen.

RDQ459. Do you find in your experience that this pen with the joint near the gold pen is generally preferred? A. I do.

RDQ460. And for what reason have you found it has been preferred? A. It is more simple and it does not get out of order; there is nothing there to get out of order. It is a staple article.

RDQ461. And in your experience there are more of the pens with the joint near the gold pen sold than any other kind? A. Yes.

RDQ462. Is it your experience that there are more pens with the joint near the gold pen sold than all the other kinds put together? A. Yes, I think so.

RDQ463. Do you know whether the Waterman Ideal Fountain Pens are used by the United States Government or not?

Mr. Stein: Objected to as absolutely immaterial.

A. Yes.

1931 RDQ464. In what department are they used? A. All departments.

RDQ465. Do you know what the Government pays for those pens?

Same objections.

A. The full retail price.

RDQ466. Is that true of any other fountain pen that the Government buys so far as you know? A. As far as I know—I don't know.

RDQ467. Do you know whether or not the Government buys any other kind of fountain pen than Waterman's Ideal Fountain Pen? Do they use any other kind of pen? A. Yes, they use mine.

1932 RDQ468. Any other kind? A. That I don't know. I don't see any other.

RDQ469. In your experience with the pens marked A. A. Waterman & Co. which you have found on the market, have you found the feeding mechanism of this pen satisfactory? A. Pretty fair.

RDQ470. Is it as good or is it inferior or is it better than a Waterman Ideal Fountain Pen? A. No, sir, it is not.

RDQ471. It is not as good? A. No.

RDQ472. You have spoken in your cross-examination about the A. A. Waterman & Company fountain pens that have come to your attention and you said that you could adjust them. As

you find these pens on the market do they need further adjustment? A. Some of them do, a good many of them. We have lots of trouble with them.

RDQ473. And you testified as to the quality of the rubber in the A. A. Waterman Company fountain pen. Does not the quality of the rubber and the quality of the gold pen have a material part in making a good writing instrument? A. Yes, that is the principal thing.

RDQ474. Does the superior elasticity of the rubber in the Waterman Ideal Fountain Pen concerning which you have testified, have anything to do with making a better joint? A. It certainly has.

RDQ475. Does it improve the joint or otherwise? A. It 1934
improves it.

RDQ476. You referred in your cross-examination to the iridium of the gold pen. Can you show us the difference between a poor pen and a good pen from the iridium on the point? A. Yes, I can show you that.

RDQ477. Will you please show us? A. Just feel of that point (illustrating).

RDQ478. What pen is this that you show me? A. One of my pens. That has a fair finish. This has not got any ink in it but you can feel the writing. You can see how bad it needs a finish.

RDQ479. How do you go to work to make the finish on the pen that you say is defective? A. I take that pen and use a 1935
stone and I have some emery.

RDQ480. And do you do this with every individual pen that you adjust? A. I have to do that.

RDQ481. And every manufacturer that makes a first class instrument has to do the same does he not? A. Yes.

RDQ482. You say in your testimony that you have been selling pens marked A. A. Waterman & Co. Did I understand you to say you wanted to buy pens marked A. A. Waterman & Co.? A. That I wanted to buy them, yes.

1936

RDQ483. And you wanted them marked A. A. Waterman & Co.? A. No, I buy them that way after they are marked that way.

RDQ484. Do you want them marked that way? A. No, I want them in my own name.

RE-CROSS EXAMINATION by Mr. Stein:

RXQ485. Coming down to the two pens with which you just gave a demonstration; the first one which you called "My pen" is a rough finished pen, is it not? A. No, that is not rough finished. That is finished.

1937

RXQ486. Has ink in it? A. Yes.

RXQ487. And has been used for a long time? A. No, only a short time.

RXQ488. How long has it been used? A. It has been used a week here.

RXQ489. How long all told? A. That was a new pen St. Patrick's Day.

RXQ490. And you say that is a finished point? A. Yes.

RXQ491. It is a coarse point, is it not? A. It is half-stub.

RXQ492. It is coarse, a broad point? A. It is a half-stub.

RXQ493. The other one? A. That has not been finished yet.

RXQ494. The other pen that you were endeavoring to demonstrate with has a very fine point, has it not? A. Yes.

1938

RXQ495. Has never been used? A. No.

RXQ496. Has not been finished? A. Has not been finished.

The pens are taken out of the holders in the presence of the examiner and of counsel.

The pen referred to as "My pen," by the witness, and being the coarse half-stub pen and bearing the imprint "The Lancaster Government Pen No. 7," is offered in evidence and marked Defendant's Exhibit A of this date.

1939

The second pen referred to as the "fine pointed pen" described by the witness as unfinished and bearing the imprint "A. A. Waterman & Co., New York No. 7," is offered in evidence and marked Defendant's Exhibit B of this date.

Mr. Watson: Counsel for plaintiff protests against this action of defendant's counsel as the witness has protested against taking these pens from him.

The two pens Exhibits A and B are retained by defendant's counsel.

RXQ497. Did you have any talk with Mr. Watson or anybody else with reference to getting a line of L. E. Waterman pens? A. Never.

1940

RXQ498. So I understand that you have made no arrangement for a line of pens to be supplied to you by L. E. Waterman Company? A. No, sir, that is ridiculous.

RXQ499. Or by any other concern? A. No other concern.

RXQ500. The quality of the rubber in the L. E. Waterman pens I understand has been uniform for twenty years? A. As far as I see them, as they come to my observation, very uniform.

RXQ501. You cannot note any change in twenty years in the quality of the rubber? A. I have not noticed it.

RXQ502. How many middle joint fountain pens manufacturned by A. A. Waterman & Co. have you sold since April, 1910? A. I cannot tell just off-hand. I guess I have sold five or six gross.

1941

RXQ503. How many self-fillers manufactured by A. A. Waterman & Co. have you sold?

Mr. Watson: Objected to as entirely within the knowledge of the defendant.

A. I guess I have sold two or three gross of them.

RXQ504. How many thumb joint pens made by the A. A. Waterman Company? A. I have not had any of them except with my own name on them.

RXQ505. How many of those have you sold with your name on them? A. I guess I have sold 500 or 600.

RXQ506. Made by the A. A. Waterman Company for you? A. Not all by them, no.

RXQ507. How many of those were made by the A. A. Waterman & Co. for you? A. I guess there were not over 200, I don't believe.

RXQ508. How many of the middle thumb joint pens made by A. A. Waterman & Co., but not bearing its imprint, and bearing your own imprint have you sold since April, 1910? A. How many middle joints? I guess I have had a gross or so of them.

RXQ509. How many self-fillers made by A. A. Waterman & Co. and bearing your name have you sold since April, 1910?
1943 A. None whatever.

RXQ510. So I understand since 1910 you have sold five or six gross of middle joint pens made by A. A. Waterman & Co. bearing its name and two or three gross of self-filling pens made by them and bearing their name? A. I cannot tell exactly how many. I don't keep a memorandum in my head.

RXQ511. Are the figures that you have given us substantially correct? A. Pretty near. I am doing the best I can from memory.

RXQ512. According to those figures you have sold six or seven gross of middle joint pens and two or three gross of self-filling pens? A. No, six or seven gross would cover everything

RXQ513. Cover everything? A. I think it would. Mr.
1944 Geyer knows.

RXQ514. And two or three gross of self-fillers? A. No, that would cover everything.

RXQ515. And against which you have sold 500 or 600 thumb joint pens? A. No, I have not sold 500 or 600 thumb joints of their make. I have sold my own.

RXQ516. But all told you have sold, no matter by whom manufactured, 500 or 600 thumb joint pens in the last year? A. More than that a good deal.

RXQ517. How many? A. I couldn't tell you how many thumb joint pens I have sold. I have sold over 1,000 thumb joint pens in a year.

1945

RXQ518. Do you sell Fairchild's pens to the Government? A. I have always sold them.

RXQ519. Has the Fairchild that you have been selling the Government within the last year been a pen manufactured by A. A. Waterman & Co.? A. No.

RXQ520. Who manufactures that pen for you? A. Fairchild.

RXQ521. You still believe that the feeding mechanism of the L. E. Waterman pen is better than the feeding mechanism of the A. A. Waterman pen? A. I think so, yes.

RXQ522. But you believe the tongue feed is the best of all? A. If I could have it made my way.

1946

RXQ523. The tongue feed is only employed by the A. A. Waterman Company? A. Yes.

RXQ524. And is not employed by L. E. Waterman? A. Not made by L. E. Waterman.

By Mr. Watson:

RDQ525. As furnished to you by A. A. Waterman & Co., is the tongue feed perfectly satisfactory to you? A. No, it has not proved satisfactory.

RDQ526. Why not? A. It is not adjusted right.

The Witness: Defendant's Exhibit B of today is a fine needle point while Defendant's Exhibit A is a medium point.

RDQ527. Will you produce a medium point pen similar in size to Defendant's Exhibit B of this date? A. Yes (producing a pen).

1947

Mr. Watson: Plaintiff offers the pen produced by the witness in evidence and asks that it be marked Plaintiff's Exhibit 110.

Marked Plaintiff's Exhibit 110.

RDQ528. Has plaintiff's Exhibit 110 been smoothed and finished? A. No, sir.

Deposition closed.

WARREN N. LANCASTER.

Adjourned to Monday, April 10th, 1911, at 10 A. M.

1948

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

vs.

MODERN PEN COMPANY,
Defendant.

1949

Met pursuant to adjournment at the office of Watson & Raymond, 10 Wall Street, New York, April 10, 1911, at 10 o'clock in the forenoon.

Appearances:

Samuel S. Watson, for Complainant.
Alexander S. Bacon, for Defendant.

WALTER B. RAYMOND, a witness called on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct-examination by Mr. Watson:

1950

Q1. Please state your name, place of residence and occupation? A. Walter B. Raymond, 106 Taylor Street, Brooklyn, New York; lawyer.

Q2. You are one of the attorneys for the plaintiff herein? A. I am.

Q3. And you have been such since this action was started? A. I have.

Q4. Have you made any trips around the country securing evidence for use in this action? A. I have.

Q5. Please state where you have been and what you have found that you consider material to this case? A. I made a trip

1951

in December, 1910. On that trip I went to Delaware, Ohio; Richmond, Ind.; Newcastle, Ind.; Kokomo, Ind.; Peru, Ind.; Huntington, Ind.; Fort Wayne, Ind.; Elkhart, Ind.; Allegan, Mich.; Holland, Mich., and Grand Rapids, Mich.

Q6. What did you find in Delaware, Ohio, material to this action, or in any other of the places mentioned? A. In Delaware, Ohio, I found the firm of Wells & Hardin who were selling the A. A. Waterman & Co. pens as Waterman pens.

Mr. Bacon: Objected to as immaterial and highly improper, to attempt to cumber the record with evidence of this character. The best evidence will be the evidence of the firm itself.

1952

A. (Continued.) I arranged there to take the deposition of Sells Bros., which was taken. In Grand Rapids, Mich., I visited the drug store of Muir & Co. and asked the clerk at the counter what kind of fountain pens they carried.

Mr. Bacon: The same objections.

A. (Continued.) He said they carried Waterman pens. I asked to see the pens that he carried and he took me to the back of the store where there was a large case full of pens. The young man who waited on me showed me a pen which I recognized as a pen marked A. A. Waterman & Co., New York. I asked him whether this was a genuine Waterman pen; he said that it was. I had a magazine with me, a Christmas magazine, and I asked him whether that was the Waterman pen that was advertised in all the Christmas magazines, showing the large display ad of L. E. Waterman Company. He said that it was. He then began to show me how the pen worked. The manager of the store came over and said that he would show me how it worked as I seemed to be handling it rather awkwardly. I asked him the same question that I asked the young man, whether this was a genuine Waterman pen, the pen that was advertised in the Christmas magazines. He said that it was and I said I would purchase the pen. The manager then left for the front part of the store. I asked the young man whether

1953

the pen was guaranteed. He said the pen was guaranteed. I asked him to give me a slip, sales slip, stating that I had purchased the pen so that I could exchange it if it proved unsatisfactory. He wrote out the sales slip, which I have here (producing paper).

Q7. Have you the pen which you purchased at that store? A. I have and the sales slip.

Q8. Is the box which you produce the box in which you purchased the pen that was delivered to you? A. It is.

The pen and box produced by the witness are offered in evidence and marked Plaintiff's Exhibit 111.

1955 Mr. Bacon: Objected to as incompetent, irrelevant and immaterial and I move to strike out all this evidence of conversations with unnamed parties as in no way connected with the defendant.

The sales slip produced by the witness is offered in evidence and marked Plaintiff's Exhibit 112.

Same objections.

A. (Continued.) The young man who sold me the pen said that his name was Muir and he was the son of the proprietor of the store. His initials are on the sales slip. I then walked to the front of the store and saw the manager and asked him whether he thought I could buy any pens at wholesale under the name of Waterman and he said that he thought that I could.

1956 I said, "Where does this concern do business?" And he said "22 Thames Street, New York." He asked me whether I was in business. I told him I was in a similar line. I then asked him whether he would be willing to go on the witness stand and swear that that was a genuine Waterman pen. He said that he would. I then took a card out of my pocket, a business card, and gave it to him and told who I was, that I was attorney for the L. E. Waterman Company. He then said, "I sold that pen to you as an A. A. Waterman pen." I replied that that was the first that I had heard of the initials A. A., that he had sold the pen to me as a genuine Waterman pen, the kind that was advertised in all the magazines. He said, "That is

not so. I sold that pen to you as an A. A. Waterman pen." I then said, "It is fortunate for me that I have a receipt to show the way in which that pen was sold to me." He said, "You have not any receipt." I showed him the receipt and he tried to grab it from me and told me I could not go out of the store with that receipt. I replied I thought he had somewhat of a contract on his hands. I asked to see Mr. Muir. This gentleman said that Mr. Muir was absent from the city, that he would refer the matter to his attorney and that A. A. Waterman & Co. would protect them in any suit that might be brought. That is the first that any "suit" was mentioned, and I did not mention it.

1958

Q9. What was your next experience? A. I came home soon after that. I left again for the West some time in the early part of January, 1911. On January 16th, 1911, I was in Springfield, Ill. I visited a drug store there kept by a man named George W. Cobb. I found that he had a dozen and a half A. A. Waterman & Co., New York, pens. Mr. Cobb tried to sell me one of these pens as a genuine Waterman pen. I gave him my card and explained to him that this was not a pen made by the L. E. Waterman Company, but a pen made by A. A. Waterman & Co., New York. He said that was the first that he had ever known of any distinction between the two concerns.

1959

Mr. Bacon: All this testimony is objected to on the ground that it is immaterial and not connected with the defendant and is pure hearsay.

Q10. What other experience did you have? A. On January 17th, 1911, I was in St. Louis, and visited E. C. Simmons Hardware Company. I asked them whether they had any fountain pens. They said yes "The best pen in the world." I asked them what pens they had and he said Waterman pens. This conversation was had with a man—I believe his name was Johnson, the city salesman, located at the door. He telephoned to the stock room and asked them to send down some Waterman pens. The pens came down and they were pens marked A. A. Water-

man & Co., New York. I asked him whether these were genuine Waterman pens that were advertised in all the magazines. He replied that they were. I then gave him my card and showed him the fountain pens in my pocket which were Waterman Ideal fountain pens. I asked him whether he had ever seen pens marked the way the pens in my pocket were marked. He replied that he thought that they were the same pens that they were carrying in stock. I explained the difference to him and left without buying any pen.

Q11. What was your next experience? A. I was in St. Louis on the 18th of January, 1911. I called at Butler Bros., a big
1961 catalogue house, and asked to see fountain pens. I was put in charge of a city salesman who took me up to the department where these pens were kept. They showed me a great number of pens marked A. A. Waterman & Co., New York. I asked them whether these were genuine Waterman pens. He said, "Yes, these are genuine Waterman pens." I said, "You are sure about that, because a friend of mine once bought a pen that was called a Waterman pen and did not prove to be a genuine Waterman pen." He said, "These are genuine Waterman pens. Our house deals in nothing but genuine goods and you can read from our catalogue what these pens are." He showed me a catalogue and the catalogue said, "Waterman pens," no initials were given in the catalogue. I then proceeded to give him an order. I gave him an order for two dozen pens but when he wrote out the
1962 order the pen was designated by number and not by name, so I left, telling him I would see him later. I came back and saw the manager of Butler Bros., of St. Louis, who was a man named Littledale. I handed Mr. Littledale my card and told him who I represented and he said he had had enough bother over this fountain pen business, that he would buy fountain pens from whom he chose and it didn't make any difference whether they were manufactured in New York or Chicago, they were Waterman pens just the same and he intended to sell them as such. I then explained to him that he did not know what he was talking about, that I represented L. E. Waterman Company. He said, "Don't you come from New York?" I said, "Yes." He

said, "I am sick and tired of this business, I will buy pens from whom I choose." I told him I did not have anything to do with that and he brought out a lot of correspondence that had taken place in a squabble between A. A. Waterman & Company, New York, and A. A. Waterman & Company, Chicago. I then explained to him that I represented the L. E. Waterman Company. He asked me what the difference was and I told him. He told me that he always believed they were selling genuine Waterman pens and had some listed in their catalogue as Waterman pens and no one ever explained to him that there was an L. E. Waterman Company, which was the first and original user of the name Waterman.

Q12. What was your next experience? A. Also in St. Louis. 1964
I called on Blackwell & Wielandy. I asked them what kind of fountain pens they had and among a great variety of other makes was Waterman. I asked to see the Waterman pens. They showed me a pen marked A. A. Waterman & Co., New York. I asked them also whether this was the genuine Waterman pen that was advertised in all the magazines. They said that it was. I said, "Is this the original Waterman Pen?" They said that it was. I started to give them an order for two dozen pens and found that they also sold pens only by their catalogue numbers so I did not conclude the order. I saw a gentleman there who was the head of the merchandising department; the name I cannot recall at the moment but he introduced me to Mr. Wielandy.
I forgot to state, in the Butler Bros. case they called the sales- 1965
man in and the salesman stated that he had always sold these pens as genuine Waterman pens to customers, that he did not know of any distinction between A. A. Waterman & Co., New York, and L. E. Waterman Company.

Mr. Wielandy knew that there was an A. A. Waterman Company, New York, and an A. A. Waterman Company, Chicago, and an L. E. Waterman Company. He took up the matter with a number of his clerks and found that they did not know the distinction but had been selling A. A. Waterman Company, New York, pens as genuine Waterman pens and issued an order that

the pens should in the future be sold only as A. A. Waterman & Co., New York, pens.

Q13. What was your next experience? A. I then went to a man named Louis Hollender, 802 Olive Street, St. Louis. Mr. Hollender runs a combination jewelry and fountain pen shop. I asked him what kind of fountain pens he had. He said Waterman pens. I asked him whether they were the genuine Waterman pens advertised in all the magazines and he said they were. The pens he showed me were marked A. A. Waterman & Co., New York.

Q14. What was your next experience? A. I went to Memphis, Tenn. I there visited the store of F. B. Thayer, a jeweler, 1967 and was waited on by Mr. Thayer, personally. I asked him what kind of fountain pens he had and he said Waterman pens and he showed me a tray of pens marked A. A. Waterman & Co., New York. I asked him whether they were the genuine Waterman pens and he said, "There is only one Waterman pen and this is it." I asked him whether he had ever heard of any other Waterman pens and he said no. I said, "Are you sure this is the genuine Waterman pen?" and he said, "Yes. This is the only Waterman pen that there is on the market." I bought a pen, which I have here, together with the box in which it was sold to me. I asked him for a written receipt for the pen, which he gave me. I produced the box, pen and receipt.

1968 The box and pen produced by the witness are offered in evidence and marked Plaintiff's Exhibit No. 113.

Same objections.

The slip is offered in evidence and marked Plaintiff's Exhibit No. 114.

Same objections.

Q15. What was your next experience?

Same objections.

A. I went to New Orleans. While in New Orleans I called on Haussmann & Son, jewelers, and was waited on by a Mr. Haussmann. He said he was the son of the head of the firm. I

asked him whether he had any fountain pens. He said that he had, Waterman pens. He produced a number of pens marked A. A. Waterman & Co., New York. He explained to me how the pens worked and I asked him whether this was the genuine Waterman pen that I saw advertised in all the magazines. He said that it was and that the Waterman Company was one of the largest advertisers in the world. I asked him whether there was any other Waterman Company and he said that he had never heard of any other Waterman concern. I showed him the magazine that I had with me with the advertisement of the L. E. Waterman Company in it and explained to him the distinction between L. E. Waterman Company and A. A. Waterman & Co. and left. 1970

Q16. What was your next experience?

Same objections.

A. My next experience was in Hattiesburg, Miss., on January 3, 1911, where I visited the Corner Drug Store. I asked for fountain pens. They said they had fountain pens. I asked them what kind. They said Waterman pens. I asked to see them and he took a half a dozen pens marked A. A. Waterman & Co., New York, from a safe. I asked whether these were genuine Waterman pens and he replied they were. I asked him whether these were the pens that were advertised in all the magazines and he said they were. I asked him whether there was any other Waterman pen and he said no. I did not buy a pen 1971 but left the store.

Q17. Did you find the name of the one with whom you had the conversation? A. Yes, the proprietor of the store. His name is Meis I think, or some such name as that.

Q18. What was your next experience? A. My next experience was in Meridian, Miss., on the 23rd of January, 1911, at a book store kept by a man named Fort. Mr. Fort waited on me. I asked him whether he had any fountain pens and he said he had. I asked him what kind and he said Waterman pens. I asked him whether these were the pens that were advertised in all the magazines and he replied that they were. I asked him

whether there was any other Waterman in the business and he said no. I left the store without buying a pen.

Q19. Did you explain to him the difference? A. No, I do not believe I did, in that store. I haven't it so marked here. As I recollect the man he was an elderly man. He said he had been handling these pens for a number of years.

Q20. What was your next experience? A. In the same place, Meridian, a man named Sugarman who kept a cigar store. He had a fountain pen case there. I asked him what kind of pens he carried and he said Waterman pens. I asked him whether these were genuine Waterman pens and he said they were. I asked him whether these were the pens that were advertised in
1973 all the magazines and he said that they were. So I proceeded to purchase a pen. I asked him for a receipt. When I looked at the receipt that he was going to give me it said, "One A. A. Waterman pen." I asked him what those initials meant and he said it was the initials of the Waterman. I said I thought this was a genuine Waterman pen. He said, "It is. This is a variety of it." Mr. Sugarman was a Hebrew and he immediately said, "What are you up to?" I explained to him the difference between the L. E. Waterman Company and A. A. Waterman & Co. and left the store without purchasing a pen.

Q21. What was your next experience? A. My next experience was in Birmingham on the 24th of January, 1911, at the Pope-Patten Drug Company where I saw Mr. Patten. I asked
1974 him whether he kept any fountain pens. He said that he did. I asked him what kind and he said Watermans. I asked him whether this was a genuine Waterman pen; he said it was. I asked him whether this was the pen that was advertised in all the magazines and he said that it was and I bought a pen from him. I got a receipt for it "One Waterman pen." I told him who I was and whom I represented and Mr. Patten asked me whether I would not give him the receipt back and let him take the pen back as he was under a total misapprehension as to there being any other concern named Waterman and he did not want to have me have the pen and the receipt. I talked with him a while and finally gave him the pen and the receipt back.

1975

Q22. What was your next experience? A. A. In Chattanooga, Tenn., in a cigar store corner of Ninth and Market. The store was kept by a man named Klem and in it was a fountain pen man occupying a window and selling fountain pens. I have a picture of that store and the window producing photograph). This man had a sign in the window which said, "Drummers' samples. A. A. Waterman and the Globe Fountain Pens $1."

Q23. Did you find any pens in this man Klem's display marked with the Globe trade-mark of the L. E. Waterman Company? A. I did. I asked him what kind of fountain pens he had and he said Waterman.

1976

Q24. Did he show you, in answer to your inquiry for a Waterman pen, a pen marked with the Globe? A. He did. He also showed me pens marked A. A. Waterman & Co., New York. I asked him whether these were the genuine Waterman pens and he said they were. I asked him whether these were the pens that were advertised so extensively in all the magazines and he said they were. I picked out a pen and asked him for a receipt and he tried to give me a receipt for an A. A. Waterman & Co. pen. I asked him what these initials meant and he said that was the kind of Waterman pen that that was. I asked him whether that was the only Waterman pen that there was and he said no, that there was a man named A. A. Waterman who was a brother of L. E. Waterman; that L. E. Waterman and A. A. Waterman had been in business in partnership together and had a fight over making self-filling pens and A. A. Waterman was now making pens under the name of A. A. Waterman & Co.

1977

Q25. What was your next experience? A. In Birmingham, I visited the store of I. R. Rubenstein. I asked Mr. Rubenstein, who waited on me, personally, what kind of pens he had and he said Waterman pens. He showed me a number of pens marked A. A. Waterman & Company, New York. I asked him whether these were genuine Waterman pens and he said they were. I asked him whether these were the pens that were advertised in all the magazines and he said that they were. I then asked him where these pens came from and he said New York.

1978 *Walter B. Raymond*

I asked him whether this was the only Waterman that there was in the business and he said that it was the only one that he knew and the only one that he handled. I picked out a pen and asked him for a receipt for it and he would not give me a receipt for the pen so I did not purchase the pen.

Q26. What was your next experience?

Same objections.

A. In Chattanooga on the 30th of January, 1911. I visited the store of R. J. Miller, a druggist, and asked him whether he had any fountain pens. He said that he had. I asked him what kind and he said Waterman pens. He showed me a number of
1979 pens marked A. A. Waterman & Co., New York. I asked him whether these were the genuine Waterman pens and he said they were. I asked him whether these were the pens that were advertised in all the magazines and he said that they were. I then asked him whether there was any other Waterman in business and he said no. I then told Mr. Miller who I was and did not purchase a pen from him. Mr. Miller said that he had never heard of any other Waterman concern before that time.

Q27. Did he tell you at any time during the conversation that the pens that he was selling were made by the concern whose advertisement you called his attention to? A. Yes.

Q28. Did you show him the advertisement? A. Yes, I always carried a magazine with me with the advertisement in.

1980 Q29. The advertisement of the L. E. Waterman Company? A. The L. E. Waterman Company?

Q30. In these popular magazines that you have referred to was there any advertisement of A. A. Waterman & Co. pens? A. No, sir.

Q31. What was your next experience? A. In Nashville, Tenn., on the 3rd day of February, 1911. I called at the store of Jensen, Herzer & Jeck, jewelers. I asked them whether they had any fountain pens. They said they had. I asked them what kind and among other makes they mentioned Waterman. I said I wanted a Waterman pen. Mr. Jensen waited on me. He showed me a number of pens marked A. A. Waterman & Co.,

1981

New York. I asked him whether these were the genuine Waterman pens and he said they were. I also asked him whether these were the pens that were advertised in all the magazines and he said they were. I said, "I want to make sure that I am getting a genuine Waterman pen because a friend of mine got stuck some time ago." He said they would never get stuck in his store, this was a genuine Waterman pen. So I selected a pen and bought it. I asked for a receipt for the pen so if I ever came back again and the pen was not satisfactory I would have something to show that I purchased it and he called over a man who was in a little cashier's booth and said, "Mr. Jeck, please make out a receipt for one Waterman self-filling fountain pen $2." The receipt was made out and given to me and I put the pen in the box, which I now produce, together with the pen and the receipt.

1982

The pen and box are offered in evidence and marked Plaintiff's Exhibit 115.

Same objections.

The receipt produced by the witness is offered in evidence and marked Plaintiff's Exhibit 116.

Same objections.

A. (Continued) This occurred at about possibly 11 or 12 o'clock in the morning. I went back to this store about 5 o'clock and saw Mr. Herzer. I told him that I had bought the pen, which I showed him, in the morning; I had gone down to another dealer some few doors below to have it filled and I told the dealer that I had a Waterman pen, the same kind that he was handling and the dealer informed me that the pen was not a genuine Waterman pen. I asked him what he had to say about it. He called Mr. Jensen and Mr. Jensen showed me the name on the barrel and said, "This is a Waterman pen, the only Waterman pen there is on the market, a genuine Waterman pen," and Mr. Jeck came over and joined in the conversation and the four of us had quite an argument whether this was a genuine Waterman pen or not. I maintained that it was not and the three of them claimed that it was, that they had sold them for years and

1983

knew what they were doing; it was a genuine Waterman pen. So after they had become quite heated in the discussion I asked them whether they would be willing to go on the stand and swear to what they had told me. They said that they would. So I produced a card and told them who I was. They immediately switched around and said they had sold that pen to me as an A. A. Waterman pen. The result of it was that I missed my train while they were trying to explain this matter away.

Q32. What was your next experience?

Same objections.

A. My next experience was at 306 Superior West Street in
1985 Cleveland, Ohio, on the 10th day of February, 1911. There was a store there devoted largely to fountain pens. It is run by a man named J. Basheim in a cigar store. It had a big sign over it "Hexter Cigar Company." I saw a young lady in there, who waited on me. I asked her for fountain pens in there and asked her what kind she had and among other kinds she said Waterman. I said I wanted a genuine Waterman pen and she brought out one of the pens marked A. A. Waterman & Co., New York. I asked her whether this was a genuine Waterman pen and she said it was. I asked her whether this was the pen that was advertised in all the magazines and she said it was. I selected a pen and asked her for a receipt for it when she became very excited and said that she knew who I was that I was the one that got
1986 the Standard Drug people in trouble the year before and she would not give me any receipt. I then went up to the other store, I think it was 24 Public Square West, Cleveland. At any rate I have a photograph of the store, run by the same man. I took a picture of the window of the store. The first picture shows the store and the second picture shows the window.

The first picture produced by the witness is introduced in evidence and marked Plaintiff's Exhibit No. 117.

Mr. Bacon: Objected to as incompetent, irrelevant and immaterial, no proof of its being a correct picture and not connected in any way with the defendant.

1987

Q33. Is the picture produced and marked Plaintiff's Exhibit 117 a fair representation of the store? A. It is; I took the picture myself and developed it and printed it.

Q34. The second picture which you have produced, is that a fair representation of the window of the store? A. It is. I took the picture myself and developed it and printed it.

The second picture produced by the witness is offered in evidence and marked Plaintiff's Exhibit 118.

Same objections.

Q35. Continue your answer? A. I went into this store in Public Square West and asked them what kind of pens they had and they said Waterman pens, among other pens, and I asked to 1988
see a Waterman pen and the young lady showed me a pen marked A. A. Waterman & Co., New York. I asked her whether this was a genuine Waterman pen. She said that it was; and I asked her whether this was the pen that was advertised in all the magazines and she said that it was. I selected a pen and asked her for a receipt for it. She said, "I know who you are now. You are the man who was down at the Superior Street store," and she would not give me a receipt for the pen.

Q36. What was your next experience? A. In the Standard Drug Company, Euclid Avenue store, Cleveland, Ohio.

Q37. When was that? A. That was on the same day, the 10th day of February, 1911.

Q38. Please state what experience you had there? A. I 1989
went in the store from the arcade and went to the pen counter and asked what kind of pens they had and they gave a long list of pens and finally said "Waterman pens." I said that I wanted to buy a Waterman pen. The young lady who waited on me whose name was Block showed me a number of pens marked A. A. Waterman & Co., New York. I asked her whether this was a genuine Waterman pen. She said that it was and I purchased the pen and asked her for a receipt for the same. She made out a receipt, "One Wat. S. F. $2.50." The pen and the receipt are in evidence in the suit of the L. E. Waterman Com-

1990 *Walter B. Raymond*

pany against the Standard Drug Company in the United States Circuit Court clerk's office, Cleveland, Ohio.

Q39. What other experience have you had if any? A. I went to Buffalo on the 11th day of February, 1911. I went into a jewelry store kept by Simon Cohen on Main Street and asked him what kind of pens he had. He said he had Waterman pens. He showed me a number of pens marked A. A. Waterman & Co., New York. I asked him whether this was a genuine Waterman pen and he said that it was. I asked whether this was the pen that was advertised in all the magazines and he said that it was. I selected a pen and asked him whether he had ever heard of any other concern doing business under the name of Water-
1991 man. He said there was an L. E. Waterman pen but this was just as much a Waterman pen as the L. E. Waterman pen and that they were brothers, had formerly been in business together and were now doing business separately.

Q40. What was your next experience? A. I then went into the dry goods house of Adam, Meldrum & Anderson, Buffalo, N. Y., and asked them what kind of pens they had. They said they had Waterman's. I asked them whether this was a genuine Waterman pen. The young lady who waited on me said that it was. I asked her whether this was the Waterman pen that was advertised in all the magazines. She said that it was. I said to her, "Now you are sure this is a genuine Waterman pen because if it is not I am going to bring it back." She said, "This
1992 is a genuine Waterman pen." I said, "All right. Give me a sales slip." I purchased the pen; and the pen and the box and the sales slip I now produce.

The pen and box produced by the witness are offered in evidence and marked Plaintiff's Exhibit No. 119.

Same objections.

The slip is offered in evidence and marked Plaintiff's Exhibit 120.

Same objections.

Q41. What was your next experience? A. My next experience was in Mattoon, Ill., on the 6th of March, 1911, where I

visited what is known as the Mattoon News Company, located in the postoffice lobby and run by a man named J. J. Smith. I asked what kind of fountain pens they had. They said Waterman. He showed me a number of pens marked A. A. Waterman & Co., New York. I asked whether this was the genuine Waterman pen that was advertised in all the magazines. They said that it was. I asked whether he had ever heard of any other Waterman Company and he said no that was the only one that there was in the business. 1993

Q42. What was your next experience? A. I went to the store of L. B. Patheal a very small jewelry store.

Q43. In what town? A. Mattoon, Ill. I asked what kind of fountain pens he had. Among other pens he said he had Waterman pens. He showed me a few pens marked A. A. Waterman & Co., New York. I asked him whether this was a genuine Waterman and he said it was. I asked him whether this was the pen that was advertised in all the magazines and he said that it was. I asked him where he bought these pens and he said he bought them of Otto Young, Chicago. 1994

Q44. What was your next experience? A. I then went into a store kept by a man named Welch, a pawn broker. I asked him what kind of pens he had. He said he had Waterman pens and he showed me a number of pens marked A. A. Waterman & Co., New York. I asked him whether this was a genuine Waterman pen. He said that it was. I asked him whether this was the pen that was advertised in all the magazines and he said that it was. I asked him whether he had ever heard of any other concern doing business under the name of Waterman and he said yes, that A. A. Waterman was a brother of a man named L. E. Waterman, that they had had a quarrel about making self-filling pens; that A. A. Waterman was now making a pen which he was selling. 1995

Q45. What was your next experience? A. I then went into Owing's drug store, in Mattoon, Ill., and I was waited on by Mr. Owing. I asked him what kind of pens he had. He had a great variety of pens; among others he said he had Waterman pens. I asked to see a Waterman pen and he showed me a pen marked

A. A. Waterman & Co., New York. I asked him whether this was a genuine Waterman and he said yes. I asked him whether this was the pen that was advertised in all the magazines. He said he did not know, that he had been trying to find out from the salesman who went through there but he was unable to find out from him whether this was the same concern that was doing all the advertising or not.

Q46. Now what was your next experience? A. I then went to Shelbyville, Ill., and I called on a man named Homrighous who kept a jewelry store there. I asked Mr. Homrighous what kind of pens he had. He said he had some Laughlin pens and some pens that he thought were some kind of Waterman pens.
1997 I questioned him about these Waterman pens and he showed me one or two broken pens and one pen in good condition marked A. A. Waterman & Co., New York. He said that he had bought these A. A. Waterman & Co., New York, pens under the belief that they were L. E. Waterman Company pens; some salesman had told him that they were not the genuine Waterman Ideal pens and he was discontinuing the sale of them. I think he said the salesman was a Laughlin salesman.

Q47. What other experience have you had? A. On March 7th, 1911, I went to Decatur, Ill., and called on a man named Williams, an optician, and asked him what kind of pens he had and he said he had Waterman. He showed me pens marked A. A. Waterman & Co., New York. I asked him whether this
1998 was a genuine Waterman pen and he said that it was. I asked him whether this was the pen that was advertised in all the magazines and he said that it was. I asked him whether there was any other concern named Waterman that he had ever heard of and he said there was. He said that he came from New York, and was formerly employed by L. L. Ferguson an optician, 155 Broadway. When he was there there was a concern called L. E. Waterman Company that had a small store on Broadway; that A. A. Waterman Company had a big place at the corner of Cortlandt Street and Broadway. He told me that A. A. Waterman & Co. were the original Waterman fountain pen concern.

1999

Q48. What was your next experience? A. At Detroit, March 17, 1911. I called on Crowley, Milner & Co. I asked them what kind of pens they had. They said Waterman. They showed me a number of pens marked A. A. Waterman & Co., New York. I asked them whether this was a genuine Waterman pen and they replied that it was. I asked the young lady whether this was the pen that was advertised in all the magazines and she replied that it was; and I selected a pen and while I was so doing the store closed, before I could pay for it. I asked her for a receipt and she said she did not know whether she could get a sales slip through that night; so I left. It was after six o'clock at night. This was a very large department store.

2000

Q49. What was your next experience? A. My next experience was in Bucyrus, Ohio. I called on W. H. Graitz drug store and asked him what kind of pens he had. He replied Waterman.

Q50. What date was this? A. On the 16th of March, 1911. He showed me a number of pens marked A. A. Waterman & Co., New York. I asked him whether this was a genuine Waterman pen. He said it was. I asked him whether this was the pen that was advertised in all the magazines. He replied that it was. I left the store and went to see Johnston at the same town. He has a drug store there. I asked what kind of pens he had and he said Waterman. He showed me a number of pens marked A. A. Waterman & Co., New York. These pens were displayed in trays marked "Waterman's Ideal Fountain Pens." I asked him whether these were genuine Waterman pens and he replied that they were. I asked him whether these were the pens that were advertised in all the magazines and he said that they were.

2001

Q51. What was your next experience? A. At Galion, Ohio. I called on a man named Sites who keeps a drug store there. I asked him what kind of fountain pens he had. He replied Waterman and showed me pens marked A. A. Waterman & Co., New York. I asked him whether this was a genuine Waterman fountain pen. He replied that it was. I asked him whether this was the pen that was advertised in all the magazines and he replied that it was. I asked him whether there

were any other Waterman pens than the one that he had. He said no that this was the only Waterman pen there was on the market. I told him who I was and explained the distinction between L. E. Waterman Company and A. A. Waterman & Co., New York.

Q52. What was your next experience? A. At Crestline, Ohio, where I called on Marquart Bros., jewelers. I was waited on by Mr. Marquart. This was also on the 16th of March, 1911. I asked what kind of pens he had and he said Waterman, among others. I told him I wanted to buy a genuine Waterman fountain pen. He showed me a number of pens
2003 marked A. A. Waterman & Co., New York. I asked him whether this was a genuine Waterman fountain pen and he replied that it was; I could see the name on the barrel. I asked him whether this was the pen that was advertised in all the magazines and he replied that it was. I asked him whether there was any other Waterman fountain pen and he said, "No, this is the only one there is on the market."

Q53. What was your next experience? A. I then went to see A. H. Kinsey. He keeps a drug store. I asked him what kind of pens he had. Among others he said Waterman.

Mr. Bacon: I object to this testimony, as Mr. Kinsey's testimony was taken.

A. (Continued.) He showed me a number of pens marked
2004 A. A. Waterman & Co., New York.

Q54. As you have traveled around the country in what class of stores have you found Waterman's Ideal Fountain Pens sold? A. In the better class of stores, usually in the highest class of jewelery stores and the leading stationers of the towns.

Q55. Has that been your general experience in the various places that you have visited in connection with this matter? A. Yes, I have been all over the country, out to the Pacific coast. Wherever I have gone I found the Waterman Ideal Fountain Pens in the best and highest class stores that deal in such things.

Q56. I show you a photograph which was identified by the witness Kernan and ask you if you know anything about the

taking of this photograph? A. Yes, I took these two photographs myself. They are a correct representation of the windows of a man named Carey on Broadway, New York, between John and Fulton Streets on the east side of the way.

Q57. Do you recall about when you took those photographs? A. Yes, it was during the year, 1910; to the best of my recollection it was in the summer of 1910.

The two photographs identified by the witness are offered in evidence and marked Plaintiff's Exhibit 121.

Objected to as immaterial and not connected in any way with the defendant.

2006

Recess.

CROSS-EXAMINATION by Mr. Bacon:

XQ58. You are a lawyer? A. Yes.

XQ59. A member of the firm of Watson & Raymond? A. Yes.

XQ60. Admitted when? A. In 1900, I think.

XQ61. Actively practicing law from 1900 to 1911? A. Yes.

XQ62. In the City of New York? A. Yes.

XQ63. Don't you know, Mr. Raymond, that all the testimony that you have given this morning is hearsay and not legal evidence? A. No, sir. 2007

XQ64. Is it not all hearsay? A. No, sir.

XQ65. Was any of it given under the sanction of an oath? A. No, sir.

XQ66. Did anybody have an opportunity to cross-examine them and know whether they were telling the truth? A. No.

XQ67. On what theory do you make this legal evidence in this case? A. If you want my opinion on it I will give it to you.

XQ68. I would like it? A. This is all evidence of confusion. It is the only possible way in which confusion can be

2008

proved, by going to the trade and finding out from the trade itself the conditions that exist.

XQ69. Could you not have taken the testimony of the people whom you interviewed? A. In some cases, yes; in other cases, no.

XQ70. Why not? A. Because in most of the cases as soon as I disclosed who I was and what I was there for the people immediately turned around and said, "I am selling these pens to you as A. A. Waterman & Co. pens," or "Have sold this pen to you as an A. A. Waterman pen. I have not sold this pen to you as a Waterman. I have not violated the trade name of the L. E. Waterman Company, but I have explained the whole
2009 situation to you."

XQ71. Could they not have been made to swear to these things under oath? A. They might; some of them probably could be called. I don't know how they would testify.

XQ72. Would all of them have denied what you have said about them? A. No, I don't think so. I don't think all of them would but I think a great many of them would.

XQ73. You mean to say that all these people would commit perjury and that you have told the truth? A. Those that I have written receipts from would probably have told how they sold the pen. The others, I don't know. A good many of them would be perfectly fair and tell how they sold the pens.

XQ74. In some instances they said they believed so and so.
2010 You did not cross-examine them to find out whether they had a correct foundation for any such belief? A. I did, yes; in most of these cases that I have told you a brief outline of, they were interviewed by me from some five to ten minutes up to sometimes two or three hours.

XQ75. And in each instance you went in for the purpose of getting evidence? A. To a certain extent, yes.

XQ76. And you used the same formula, "Do you sell the Waterman pens," and "Do you sell genuine Waterman pens." You used that formula in each instance, didn't you? A. Not quite that form.

XQ77. In substance that form? A. Yes.

2011

XQ78. And there was never a single time when you asked them if they sold L. E. Waterman pens as A. A. Waterman pens, or the reverse of that? A. I don't know exactly what you mean by that.

XQ79. Did anybody ever tell you that they were selling A. A. Waterman pens and calling them Ideal pens? A. Yes, there was one case of that kind.

XQ80. What case was that? A. That is a case that I did not enumerate, in Kokomo, Ind.

XQ81. What was the name? A. That was a man who also ran a place in Indianapolis; he ran a combination shop or factory and a store, a pawn shop in Kokomo. I think his name was Smith if I am not mistaken. It was a young girl who 2012
waited on me there and she probably was not over fifteen or sixteen years old. I did buy a pen and I did ask for a receipt.

XQ82. She told you that it was an Ideal? A. She told me that it was an Ideal, yes.

XQ83. And notwithstanding the fact that she told you it was an Ideal pen you did not take a note of it and did not refer to it in your direct-examination? A. No. There are lots that I did not refer to.

XQ84. Did anybody ever tell you that they were selling A. A. Watermen pens and calling them L. E. Waterman pens? A. No, nobody ever told me that.

XQ85. And whenever you went in and asked for a Waterman pen they made no pretense that they were not selling A. A. 2013
Waterman pens? A. Only after I got through with them.

XQ86. If you asked them if there was any difference between the pens they told you that these were A. A. Waterman pens, didn't they? A. No, sir, in very, very few cases. I have omitted most of those cases.

XQ87. Did you find any case where they did not know that they were selling A. A. Waterman pens? A. Yes.

XQ88. In what instance were they selling A. A. Waterman pens and did not know it? A. This man Haussmann in New Orleans is one instance.

2014

XQ89. Give us the exact conversation? A. As near as I can recollect it I asked him whether he had any fountain pens and he said yes and he went over to a little case that was on top of a safe ten feet from the counter and I saw this case and saw that it was marked "A. A. Waterman & Company," and he brought out a number of pens which I saw were marked A. A. Waterman & Co., New York.

XQ90. And the case was marked in very large letters was it not "A. A. Waterman & Co.," that anybody could read? A. I think that was on the case and I think "Modern Pen Company" was on the case also. It was a small two dozen case.

2015

XQ91. And yet he told you that he did not know that he was selling A. A. Waterman & Co. pens? A. Yes, he only knew them as Watermans.

XQ92. He did not know them as L. E. Waterman pens? A. No, he just knew them as Waterman pens.

XQ93. Notwithstanding the fact that he had the sign on the case and the name on the pen? A. I can tell you the way he tried to sell the pen to me. When I called his attention to this he was very much taken back.

XQ94. You have been in Galion, Ohio? A. Yes.

XQ95. In Crestline, Ohio? A. Yes.

XQ96. In Cleveland? A. Yes.

XQ97. In Buffalo? A. Yes.

2016

XQ98. And some other places. This Bucyrus house is within a few miles of Galion? A. Yes.

XQ99. Yet you did not take the testimony of any of these people you have spoken of except one man in Crestline? A. No, I did not speak to many of the fact that I was taking testimony.

XQ100. Why did you not take the testimony of these people in these particular towns where we have already taken testimony, so as to have legal evidence instead of hearsay evidence? A. In a great many cases they would not hear of having testimony taken at all; they were afraid that they were going to get mixed up in something and they absolutely refused to give any testimony.

2017

XQ101. You could have subpoenaed them? A. We might have gone out in Ohio and Indiana and gotten orders I suppose.

XQ102. All this legal evidence that you have taken on these different trips was the best testimony that you could produce? A. No, it was not the best.

XQ103. Why didn't you produce the best? A. Because I could not get people to testify.

XQ104. Not by a subpoena? A. I suppose I might have done that, if we had had the time.

XQ105. You went to a great many towns besides those you have mentioned? A. Yes.

XQ106. You went to a great many places besides those you have mentioned? A. Yes.

2018

XQ107. And in those other towns and to those other individuals you went through the same formulae and asked them for Waterman pens and genuine Watermans pens? A. Yes.

XQ108. And in those other instances they always told you they were the same as L. E. Waterman pens? A. No, I only found two on my whole trip that told me that.

XQ109. Don't that prove to you that people who are dealing with A. A. Waterman goods call them Waterman just the same as those who are dealing with L. E. Waterman goods call their goods Waterman? A. No.

XQ110. Why not? A. In a few cases, where they were ignorant of the existence of the L. E. Waterman Company, or rather ignorant of the initials of the L. E. Waterman Company and ignorant of the fact that the L. E. Waterman Company was the original Waterman pen, they call the A. A. Waterman pens they had, Waterman pens. In the other cases, where they knew better, as soon as I called their attention to the fact that I represented the L. E. Waterman Company, they turned around and switched and said, "I am selling that pen to you as an A. A. Waterman pen."

2019

XQ111. And their testimony if taken in a legal way would then be contrary to yours? A. To a certain extent.

2020

XQ112. How long were you gone on these various trips altogether? A. I cannot tell you that. I was doing other things in the meantime. I suppose I spent possibly two weeks.

XQ113. Not more than that? A. It may have been three weeks.

XQ114. When you were doing the other things you were making inquiries about this too? A. To a certain extent; not very much.

XQ115. You went clear out to Denver on trips, when you went to St. Louis, did you not? A. I did not go out quite as far as that.

XQ116. How far west did you go? A. I was down beyond
2021 St. Louis.

XQ117. And you made inquiries in a great number of towns? A. Yes, I was in a good many towns.

XQ118. And every where you went in and asked for a Waterman pen? A. No, I did not ask for a Waterman pen when I was on this trip. I asked them what kind of pens they had and if they would say Waterman pens, then I would say, "I am looking for a genuine Waterman pen."

XQ119. What is your definition of the word "genuine"? A. The real kind.

XQ120. The true? A. Taking it from its derivation, the real kind.

XQ121. If a man sells A. A. Waterman pens does he sell a
2022 true, genuine Waterman pen? A. No.

XQ122. Why not? A. Because the name Waterman is the trade-mark of the L. E. Waterman Company.

XQ123. Do you mean to say a family name can become a good trade-mark. A. Certainly, unquestionably. I have one in my hat. It is a perfectly good trade-mark.

XQ124. Do you as a lawyer say that the name Waterman is susceptible of being made a good trade-mark unless it was used exclusively by the L. E. Waterman Company for ten years before 1905; that is, the registration mark? A. As to its being a trade-mark, under the common law, I think it can, yes.

XQ125. But it cannot under the statute law? A. Under the statute law it has to be used for ten years prior to 1905.

XQ126. Exclusively. A. Exclusively.

XQ127. And you do not claim that the word Waterman has been used exclusively by the L. E. Waterman Company for ten years prior to 1905? A. I claim that the trade-mark they have registered has been, yes.

XQ128. When was it registered? A. I think in 1906. It is in evidence.

XQ129. You do not claim that for ten years prior to 1905, A. A. Waterman & Co., were not using the word Waterman in connection with the manufacture and sale of fountain pens? A. 2024
I certainly do.

XQ130. That they were not using it? A. Yes.

XQ131. They were using the name A. A. Waterman & Co.? A. To a certain extent, yes.

XQ132. Were they not largely and openly? A. To tell the truth I never followed their advertising if they did any, very closely.

XQ133. Don't you know that they spent thousands and thousands of dollars in advertising? A. No, sir.

XQ134. You do now? A. No, sir.

XQ135. Advertising in the magazines and the papers? A. I know they have had some ads in the magazines but not to any such extent as that.

XQ136. You do not know to how large an extent? A. I 2025
know that I am a pretty wide magazine reader and I have hunted for the last two years for ads and I don't believe I have found any.

XQ137. Mr. Watson has given me a trade-mark "Watermans" registered January 15th, 1907. Was that the earliest registry of this trade-mark? A. I had very little to do with that. I cannot tell you that.

XQ138. You know of your own personal knowledge that for many years prior to 1905, A. A. Waterman & Co., were openly selling and advertising their goods under the name of A. A. Waterman & Co.? A. Yes.

XQ139. And that they used the word Waterman in connection with their sales? A. No.

XQ140. Did they not use the word Waterman in the name A. A. Waterman & Co.? A. That is a different thing. The word Waterman is contained in the designation A. A. Waterman & Co.

XQ141. You went around to these various places and threatened the people with lawsuits, didn't you? A. Never, no, sir.

XQ142. In no instance whatever? A. Absolutely none. I referred them all to you.

XQ143. Did you go to Oswego, N. Y.? A. No, sir.

XQ144. And visit a man named Blatz? A. No, I have not
2027 been in Oswego in fifteen years.

XQ145. Did you go to Mulberry, Ind.? A. No, sir, I never have been there.

XQ146. Did you have anything to do with a man named Ramsey? A. No, sir.

XQ147. Do you know who the L. E. Waterman representative was on March 6th, 1911? A. No.

XQ148. At Mulberry, Ind.? A. I think a man named Sparks had the territory in 1911, Godfrey S. Sparks.

XQ149. Do you know whether or not he went to Mr. Ramsey and told him that they had an injunction against the use of the word A. A. Waterman? A. No, I don't believe he told him that.

2028

Mr. Bacon: I offer in evidence a letter from Mr. Ramsey to the A. A. Waterman Company, New York.

Mr. Watson: Objected to as immaterial and incompetent.

Marked Defendant's Exhibit A of this date.

XQ150. Did you threaten Mr. Cohen of Buffalo? A. No. I told Mr. Cohen as I have told all these people that I have been to see, when they came to a question of talking, that I desired that they communicate with the Modern Pen Company immediately and ask them whether they could sell pens to the public as Waterman pens and genuine Waterman pens?

XQ151. Did you scare the life out of Mr. Cohen? A. I certainly did not. My wife was with me at that time.

XQ152. Did you tell him that the L. E. Waterman Company had an injunction restraining him from selling A. A. Waterman & Co. pens? A. No. I had a copy of the injunction. Sometimes I had five or six copies of the injunction that was issued.

XQ153. Of what injunction? A. The injunction in the Modern Pen Company's suit. I think you have in your hand a copy of it. Sometimes I left them with the people, sometimes I did not; I let them read it.

XQ154. And you were circulating those throughout the country wherever you went? A. No, sir.

XQ155. You were circulating them freely? A. I don't believe I had over a dozen copies altogether when I started out. 2030

XQ156. You know that is not a true statement of what it purports to be? A. No, sir.

XQ157. It purports to be an extract, does it not? A. Yes, sir.

XQ158. All that part of it is left out wherein it affirmatively appears that the defendant has the right to use A. A. Waterman & Co.? A. I don't know of any injunction where that does affirmatively appear.

XQ159. Don't you know that in the injunction as modified and entered on the 10th day of December, 1910, it affirmatively appears that the Modern Pen Company has not been guilty of unfair competition by using the name A. A. Waterman & Company? Do you mean to say that this circular that I have in my 2031
hand is a statement of the whole order signed by Judge Hough and entered on December 10, 1910? A. I think it is; it is the greater part of it. I did not prepare that and I don't know what else there is in the order. I don't believe I ever read the original.

> The printed copy referred to is offered in evidence by defendant's counsel and marked Defendant's Exhibit B of this date.

XQ160. Don't you know that this defendant's Exhibit B of this date is only about one-half of the original order? A. I could not tell you anything about it.

XQ161. Entered on that day? A. I could not tell you anything about it.

XQ162. Who did prepare this? A. I don't know.

XQ163. Where did you get it? A. I think I got it from Mr. Watson or it was on my desk at any rate.

XQ164. Then you got it from this office of Watson & Raymond? A. I took it from here; where it came from, I don't know.

XQ165. Do you know whether this exhibit was printed under the directions of Watson & Raymond? A. No, sir.

XQ166. You don't know who did direct it to be printed? A. I don't know anything about it except what I have told you,
2033 that those were on my desk here. There were about a dozen of them I believe and I put them in my grip before I went away. That is all I know of it. I have three or four of those left.

XQ167. And you got them from this office? A. I got them from my desk, yes.

XQ168. Don't you know that this Exhibit B gives you a very erroneous idea of the order that was actually entered on December 10, 1910? A. No, I do not. I will take pains to compare them after this hearing.

XQ169. Did you go to the Owl Drug Store in Pittsburg, Kans.? A. No, sir.

XQ170. Did you leave or send one of these printed copies
2034 Exhibit B to the Owl Drug Store? A. No, sir, I have never been to an Owl Drug Store in Pittsburg, Kans.

XQ171. I now show you a complete copy of the order of December 10, 1910, and ask you if you think that Exhibit B is a truthful representation of what that order contains (handing witness a paper)? A. I don't know what that order contains.

XQ172. I tell you that that is a complete order, a copy of it? A. You ask me whether this is truthful?

XQ173. Whether the printed extract is a truthful statement of what the order of December 10, 1910, holds, in that the first two pages of that paper which you now have in your hand have

been omitted? A. Let me see that printed paper (looking at Defendant's Exhibit B) I don't see any distinction between this order as it is entered here and this printed one.

XQ174. Is it not a fact that the first two pages of the order that you now have in your hand are not contained in the printed order? A. That is true.

XQ175. And the part that was omitted contains the orders of the Court does it not striking out parts of a previous order and adjudging and decreeing that A. A. Waterman & Co. were not guilty of unfair competition in using the name? A. I don't know about that. That is stricken out from the other order. The order as finally entered as I understand it, has this order—and that is what the printed paper is—the order as finally entered. 2036

XQ176. Does not the order of December 10, 1910, contain a great deal more than the printed order, Exhibit B? A. I don't think so, no, sir.

XQ177. Does not the order of December 10, 1910, recite the striking out of paragraph three of the original order and striking out the words:

> "And it also appearing that the defendant is guilty of unfair competition in trade with the plaintiff by using the name—'A. A. Waterman & Co.' in connection with the marking, advertising and selling of fountain pens and parts thereof" and by striking out the "3" paragraph of said preliminary injunction reading as follows: 2037
>
> "3. Using in connection with the manufacture or sale of fountain pens (other than fountain pens of plaintiff's manufacture) the name 'A. A. Waterman,' or 'A. A. Waterman & Co.' or 'A. A. Waterman & Company' or 'Arthur A. Waterman & Company,' or any corporate, firm or individual name containing the words Waterman, Waterman's or Watermans, or any mark or name containing the word Waterman in any form, whether the same be or be not coupled with other names or initials, or with the initials 'A. A.' or with the initial 'A' or whether the same be or be not used in collocation

2038 *Walter B. Raymond*

with the word 'pen' or 'Fountain Pen' or other descriptive words."

"And it is further ordered, adjudged and decreed that the said order of August 29th, 1910, be and the same hereby is modified so as to read as follows:"

A. The order speaks for itself as to what is contained in it. As I understand the order, the temporary injunction is what is contained on the last page of that typewritten order that you have given me; that which you have given me as printed is a complete copy of that injunction order as it now stands.

XQ178. Does not Exhibit B purport to be an extract from an
2039 order of the United States Circuit Court for the Southern District of New York entered on the 10th day of December, 1910? A. Yes.

XQ179. Entered pursuant to mandate of the United States Circuit Court? A. Yes.

XQ180. This order of December 10th, 1910, is a whole order is it not? A. An extract is not the whole order.

XQ181. You omitted from this extract everything which says that the A. A. Waterman & Co. had a right to use their name, did you not? A. I always explained to the people that I saw that at the present time there was nothing contained in that order to prevent them from selling the pens which they had as A. A. Waterman & Co., New York pens, but that they should not sell
2040 the pens under the order as then issued as Waterman pens.

XQ182. Then why did you circulate a garbled extract of the order of December 10, 1910? A. I do not consider that a garbled extract. I consider that the order as it now stands, the order in the temporary injunction.

XQ183. Don't you find that many of the highest class stores where you have been also carry A. A. Waterman & Co. goods? A. No, sir, I do not.

XQ184. Do not many of the large department stores? A. There is where you sometimes find them, because they advertise in accordance with department store practice Waterman's pens at cut prices. That is the only time when you find them in department stores, when they are doing advertising.

2041

XQ185. Would you not call Granger Freres the largest store in Canada? A. I don't know Granger Freres.

XQ186. Would you not call Warwick Bros. and Rutter of Toronto the largest jobber of the kind in Canada? A. I don't know.

XQ187. Do you know Scranton & Wetmore of Rochester? A. Yes.

XQ188. Are they not the best of their kind? A. There are other stores in Rochester which are of a far higher class.

XQ189. They are jobbers? A. To a certain extent. They have a retail store.

XQ190. L. E. Waterman Company do not sell to jobbers at all? A. No.

2042

XQ191. You sell to Carey, a photograph of whose window you have submitted here this morning? A. Not that I know of.

XQ192. Don't you know that you sell L. E. Waterman pens to Mr. Carey the eccentric advertiser? A. Not that I know of, no. I never heard of it. I would like to know if we do.

XQ193. He has a Boston store, has he not? A. I believe so.

XQ194. Don't you know you sell the Boston Store? A. I don't know anything about it. I don't handle the selling department of L. E. Waterman Company. I know Mr. Carey has bought some of our ink.

XQ195. Mr. Carey is a very eccentric man is he not? A. I have only met him once.

XQ196. And it is a very eccentric business? A. From the outside, yes. 2043

XQ197. He sells all sorts of pens where he can get them in job lots? A. I don't know about that.

XQ198. Do you know that Mr. Carey does not have L. E. Waterman goods on sale in his Broadway, New York store? A. If you refer to these advertisements in the window I do not think it was that that I took those pictures for. I don't know whether he had them or not. I took the picture of that window because of the peculiar style of advertising that there is shown in those pictures. If you will look at those pictures very closely you will find that Mr. Carey in his eccentric way is intending

to advertise the A. A. Waterman & Co. pens and is trying to hide the fact that they are A. A. Waterman pens.

XQ199. You do not claim that A. A. Waterman & Company or the Modern Pen Company have anything to do with Mr. Carey's eccentric advertising, do you? A. I think they have, just as I think the A. A. Waterman Company who sell Basheim in Cleveland have something to do with the ad that appears on that Cleveland sign.

XQ200. In this advertisement of the Cleveland store there is a large sign "Agency for A. A. Waterman & Company"? A. No, you cannot find that there. You find "The agency for the A. A. Waterman Company." That is what I think is there.

2045 XQ201. Do you have any reason to believe that the Modern Pen Company had anything to do with that advertisement or those pictures? A. I believe they had a whole lot to do with the continuance of that. Their salesman was in Cleveland constantly and if this advertisement is not a correct advertisement those salesmen ought to have called Basheim's attention to it.

XQ202. What difference does it make whether he says the A. A. Waterman Company or A. A. Waterman & Co.? A. If you are claiming to hold the right to use the name of A. A. Waterman & Co. under the Kellogg decree. I should say that this use is unfortunate.

XQ203. Do you mean to say you have any evidence whatever that the Modern Pen Company ever saw this window or
2046 this photograph? A. The Modern Pen Company acts as any other corporation does, through its agents and I do believe that the agent of the Modern Pen Company and the A. A. Waterman & Company did see that sign and permitted it to be there.

XQ204. What is the foundation of that belief? A. That sign was a permanent sign. It was not a transient sign, done with loose card board, to remain a day or so, or anything of that kind, that sign was a permanent sign and has been there for months and months.

XQ205. How do you know that they have ever had salesmen call on Basheim? Mr. Geyer tells me they never have had? A. I don't know what Mr. Geyer knows about it.

XQ206. Mr. Geyer tells me also that they have not had any salesman in Cleveland for over a year? A. I don't know what Mr. Geyer says is absolutely so or whether Mr. Geyer knows that there have been salesmen there within a year; because a store right above that Basheim's store, called Blum Cigar Store where they also have a display, a picture of which I have here—a man in there told me that the A. A. Waterman Company salesman had been there some time before.

XQ207. But did not say when? A. A short time before. This was in December.

XQ208. When was this picture of the A. A. Waterman Company taken? A. That picture was taken on February 10, 1911.

XQ209. You don't know how long it had been there? A. It 2048
had been there to my knowledge since some time in December.

XQ210. Then you have not any legal proof that anybody representing the A. A. Waterman Company had ever seen that sign? A. No, but I have Sherlock Holms proof that that was a very old sign at the time when I saw it.

XQ211. Did you find any of these people that told you that any representative of the A. A. Waterman Company had been deceiving them? A. I found it very hard to get any of these people to say what the representative of the A. A. Waterman Company had told them. In most cases they said they did not know who he was, they could not even describe him and they did not know what he said, or, "I don't want to get mixed up in this case at all. Buying fountain pens is only a minor part of my 2049
business and I cannot swear what he said or did not say."

XQ212. You spoke of a conversation with Mr. Kinsey. What did he tell you? A. Mr. Kinsey told me a somewhat different story from what he said on the stand, a little bit stronger story from my side of the case from what he told on the stand.

XQ213. On the cross-examination? A. No, on the direct-examination.

XQ214. He knew perfectly well the difference between L. E. Waterman pens and A. A. Waterman pens, didn't he? A. That is the point that Mr. Kinsey fell down on on his examina-

tion because when I saw Mr. Kinsey he told me that he did not know the difference between the pens, and I have it so marked in my note book, where I put it down immediately after I left him. And that is the reason I called him as a witness.

XQ215. And when he was sworn he told the truth? A. I don't know whether he told the truth or not. I only know what his testimony was and what he told me previously.

XQ216. Is it not a fact that all of these parties if they were put under oath would tell a different story from what you do? A. That I cannot tell. I can only tell what they tell the general public, and I am one of the general public, who buys these pens.

2051 XQ217. Did you meet anybody on that trip who told you that anybody representing the Modern Pen Company had sold them a pen as other than an A. A. Waterman pen? A. Yes.

XQ218. Name the party? A. Mr. Homrighous, of Shelbyville, Ill.

XQ219. Why didn't you have his testimony taken? A. Because Mr. Homrighous would not give his testimony.

XQ220. Couldn't you subpoena him? A. I could and probably will before I get through.

XQ221. You told about a conversation with Mr. Sites, a dealer in drugs in Galion, Ohio? A. Yes.

XQ222. You did not examine him when you were down there? A. No, Mr. Sites would not go on the stand at all and he tried to deceive me in the sale of a fountain pen.

2052 XQ223. Do you think that he knew the difference, that it was a willful deception on his part? A. To the best of my knowledge I think he ought to know the difference.

XQ224. Then do you blame the defendant for any willful and malicious act of any one of the dealers? A. Yes.

XQ225. Why so? A. Because as near as I can make out from a close examination of not only these people but of dozens and probably hundreds besides those whose names I have given here, in not one instance did the man who sold them A. A. Waterman & Company pens explain to them how those pens could be sold to the public or that those pens should be sold only

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as A. A. Waterman & Co. pens and not as Waterman pens, or a genuine Waterman pen or L. E. Waterman Company pens.

XQ226. Do you claim that when a salesman sells these goods as A. A. Waterman & Co. products, that it is their duty to tell them that they are not the same as the Sterling, and the L. E. Waterman and the Ideal and the Globe? A. I claim this, that when a company starts in business under a name which is the same or similar to the name of an older concern in business, that it is the duty of the junior concern to so sell its goods and so give explanation to the dealers handling the goods that the possibility of confusion is practically eliminated.

XQ227. Then I understand you to say that it is in your opinion the duty of the defendant's representative not only to tell the people what they are selling them but that they differ from the L. E. Waterman goods? A. Yes, to clearly distinguish their goods from the goods of the L. E. Waterman Company.

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XQ228. Is not the fact that they tell them that they are A. A. Waterman & Co. manufacture a sufficient distinction? A. Not where the salesmen do the way that Mr. Bartlett did and call the pens a Waterman pen all the time when he is selling them.

XQ229. You heard Mr. Bartlett deny that didn't you? A. I heard Mr. Bartlett say that he sold the pens as Waterman pens and he had a right to sell them as Waterman pens.

XQ230. Do you mean to say that he testified that? A. I certainly do, yes.

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XQ231. Don't you know that he swore that invariably he always told them that they were the product or manufacture of A. A. Waterman & Co.? A. I knew that he swore to that in his direct-examination but on his cross-examination he said that he sold the pens as Waterman pens and he said that it did not make any difference to him how the pens were sold, after they got into the dealers' hands; that was not his business; they belonged to the dealer when he sold them.

XQ232. Do you mean to say that on cross-examination he ever said that he sold any goods as Waterman pens without explaining that they were A. A. Waterman's pens? A. I would

not say exactly that, no, but I will say that he said that he sold the pens as Waterman pens and called them Waterman pens in speaking of them.

XQ233. Did he not say that he never made a sale without explaining to the people that they were A. A. Waterman goods? A. I would have to go through that examination very carefully to find out whether that is there or not. I know that the pens are sold, from what the dealers all over the country tell me, as Waterman pens; that they know them as Waterman pens; and are told to sell them as Waterman pens.

XQ234. Who ever told you that they were told to sell them as Waterman pens? Give the name of any man who has ever
2057 told you that? A. I think Mr. Baker, up in Allegan, said that.

XQ235. Did he say that in his testimony? A. I think so. I may be rusty on that but I have had that said to me a dozen times.

XQ236. On your direct-examination you spoke of Mr. Homrighous of Shelbyville, Ill., and I have it here quoted on my notes that he was "under the belief that these were L. E. Waterman pens." A. Yes.

XQ237. Did he say that he was under that belief? A. Yes.

XQ238. Did he tell you why he was under that belief? A. Yes.

XQ239. Why didn't you give that in your direct-examination? A. I don't know. I perhaps omitted to do it. He told
2058 me he was under that belief because the pens were so sold to him.

XQ240. By whom? A. By the representative of the Modern Pen Company or A. A. Waterman.

XQ241. Did he say who the man was? A. No; he tried to find the name from the bill and he could not find it. The reason that I did not call him as a witness was that he seems to have continued the sale of these pens after he found that they were not the L. E. Waterman goods.

XQ242. And he continued selling them how? A. He continued to sell them as Waterman pens.

XQ243. Then he did know there was a difference between L. E. Waterman pens and A. A. Waterman pens? A. Yes, he

found out the difference after awhile. I think he said that a man representing the Laughlin concern told him the distinction. That first sale to Mr. Homrighous was I think two or three years ago.

XQ244. And the time when he was under this belief was then two or three years ago? A. It was immediately after the salesman had sold him the goods and possibly eight or nine months thereafter.

XQ245. Did you ask Mr. Johnston of Bucyrus, Ohio, to testify? A. No.

XQ246. Why didn't you ask him to testify so as to get legal evidence? You were right near there and on the Galion trip? A. Mr. Johnston was a very peculiar character; he was a very peculiar man. He was a cripple and a very peculiar man. I never talked very much with him. 2060

XQ247. You know that in each one of these instances where we have taken testimony, cross-examination has developed very frequently a different phase of the matter from that indicated in their direct-examination? A. To some extent.

XQ248. And if these parties had testified instead of your testifying for them the cross-examination might have developed a different state of facts? A. No, that was not the purpose. The idea is to show the way these people sell to the public; not how they will testify but the way they represent their goods and try to sell them to the public. That is the purpose of my telling what my experience with these people was. 2061

XQ249. I thought you said a little while ago that it was to show confusion? A. That confusion arises largely from that very thing, the way they sell to the public.

XQ250. Don't you know that long before this suit began, in a printed brief in the New York State Action I admitted that there was a confusion arising from the similarity of names? A. That admission, as I recollect your long statement the other day, was somewhat qualified. What I have testified today shows the way the dealers throughout the country seek to dispose of their goods to the public.

2062

XQ251. But does it show that the Modern Pen Company had anything to do with their matters? A. It could not be so universal as I have found it without the Modern Pen Company and its agents knowing what was going on.

XQ252. How do you know that? A. Well, just by ordinary business sense. If anybody misrepresents your goods or sells any goods under a wrong name and does so systematically, the house is very apt to find it out.

XQ253. You never once asked them if they were selling A. A. Waterman goods but what they told you yes? A. Oh, yes.

XQ254. Did they ever deny that their goods were A. A. Waterman goods? A. I don't know exactly that. I very sel-

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dom asked them that question until after I had disclosed my identity.

XQ255. Then you had tricked them by using the word Waterman or genuine Waterman?

Mr. Watson: I object to the form of the question and its inference. I call the Court's attention to the attempt of counsel to inject something into the record which the testimony of this witness does not justify.

XQ256. Is it not true that you went into each one of these places for the express purpose of entrapping them into saying that they were selling Waterman pens?

Mr. Watson: The same objections.

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A. No. I went into each place and asked them what kind of pens they were selling and when they said Waterman pens I asked them for a Waterman pen.

XQ257. And if you had asked them the kind of Waterman pen they would always have told you, wouldn't they? A. No, I asked them that many, many times.

XQ258. And didn't they always tell you A. A. Waterman goods? A. No, Waterman pens; the same that our own dealers have testified and told me the goods were called for by the public.

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XQ259. Is it not a fact that the public always call for A. A. Waterman goods under the term Waterman? A. No, sir, not if they know what they are calling for.

XQ260. But when they do not know what they are calling for? A. When they call for goods in accordance without advertisement, yes.

XQ261. In accordance with our advertisement; what then? A. You will have to show me the advertisement first.

XQ262. Don't you know that our people have spent hundreds of thousands of dollars in advertising? A. No. You will have to show me.

XQ263. In Buffalo, N. Y., you went to Adam, Meldrum & Anderson? A. Yes.

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XQ264. They told you they did not know the difference between L. E. goods and A. A. goods? A. I won't say that. The young lady at the counter told me that the pen she sold me was a genuine Waterman pen and was the only Waterman pen that was on the market.

XQ265. And you went around the country quizzing young ladies fifteen years old as to technical names? A. This young lady was probably thirty or forty. The young girls I omitted from my testimony.

XQ266. Is it not a fact that you had a lowsuit long ago with Adam, Meldrum & Anderson? A. No.

XQ267. The L. E. Waterman Company? A. Not that I remember.

2067

XQ268. Is it not a fact that they knew perfectly well the difference between L. E. Waterman pens and A. A. Waterman pens? A. If you want me to tell you the rest of what happened up there I will do so.

XQ269. Go on? A. I had purchased the pen and had the receipt and then asked for the head of the concern and was told that Mr. Bishop was the head of the concern. I went around and saw Mr. Bishop and showed Mr. Bishop the pen I had bought and the receipt. I told him who I was and what I was doing. I asked him whether that was the way that he merchandised goods. Mr. Bishop said no; "I see that a wrong has

2068 been done to the L. E. Waterman Company. I want you to tell me more about it." I showed Mr. Bishop a copy of that injunction. Mr. Bishop then sent for his salesman.

XQ270. The printed copy, Exhibit B of today? A. Yes. Mr. Bishop called for his salesman or rather the purchaser, the buyer of goods and he was a man named Lyon. Mr. Lyon came in and immediately began to rail at me and said, "Why didn't you come to me?" I said, "I did not come to you because I thought you knew what you were doing and I did not think the head of the house knew what you were doing." I had with me a number of advertisements that had been issued in the Buffalo papers advertising Waterman pens at cut prices, no initials
2069 being in front of the name. I laid them before Mr. Bishop and I said to Mr. Bishop, "Your house is a big house with a fine reputation. Why don't you sell these goods under the name that is on them?" Mr. Lyon began to talk and he said, "You cannot come in here and tell me how I am to sell my goods." Mr. Bishop turned around, after he had got all through and after I had asked Mr. Lyon whether he was through and said to Mr. Lyon, "You cannot talk to this gentleman in this way. He comes in with a fair statement of something being done in this house and I am going to treat him with all courtesy and you shall do the same. Now just keep quiet until this is over."

XQ271. The head of the house did not know the difference? A. The head of the house did not know the difference.

2070 XQ272. The head buyer— A. The head buyer knew the difference and was merchandising those goods as Waterman pens, knowing the difference and when I called the attention of the head of the house to that the buyer was very much wrought up and said I had no business to jump over his head and go to the principals. I then told Mr. Bishop to take the matter up with the Modern Pen Company.

XQ273. You do not blame the Modern Pen Company because he did wrong, do you, when he knew better? A. I do because they have handled such goods for a number of years; the advertisements of Waterman pens having appeared in the Buffalo papers for years.

XQ274. Why don't you produce some of them? A. I will do so. I asked Mr. Watson where they were this morning. We will produce any number of them.

XQ275. You do not know that the Modern Pen Company has ever seen any of those advertisements? A. I don't know. I am under the belief that they helped to pay for them.

XQ276. What foundation have you for that belief? A. Because their advertising is so extensive.

XQ277. Then this seems to be a case where there was a wide advertisement of A. A. Waterman goods? A. I don't know that it was an advertisement by the Modern Pen Company. There was a local advertisement of these pens.

XQ278. You cannot say that any man connected with the Modern Pen Company knew anything about these things that were told to you on these various trips and concerning which you have testified this morning? A. You mean have I any definite and absolute knowledge of it? 2072

XQ279. Yes? A. No.

XQ280. You had had litigation with the Standard Drug Company some time ago? A. Yes.

XQ281. Then they knew perfectly well the difference between L. E. pens and A. A. pens? A. Yes.

XQ282. You know that the Modern Pen Company at all times claimed that the Standard Drug Company was a stranger to them? A. I know that at the hearing in contempt last Monday Mr. Teller produced a letter dated November, 1910, from the Modern Pen Company in which they said that they had won their suit in New York and that the injunction had been dissolved and for him to go ahead and sell pens. 2073

XQ283. To sell A. A. Waterman pens? A. To sell our pens.

XQ284. Had not they a perfect right to do that? A. No.

XQ285. That was Mr. Teller of the Standard Drug Company? A. Mr. Teller was the agent of the Standard Drug Company.

XQ286. Don't you know that he claimed to be a tenant? A. I don't know what he claimed. I know what he was.

XQ287. Can you swear that he was an agent and not a tenant? A. Yes, because I have seen all the papers.

XQ288. What papers? A. Seen all Mr. Teller's papers in connection with the Standard Drug Company.

XQ289. Is it not a fact that both he and the Standard Drug Company claimed that Mr. Teller was a tenant and paid his rent by a commission on the pens? A. I don't know what that is unless it is an agency.

XQ290. And do you swear that he was an agent and not a tenant? A. Yes.

XQ291. You know it has been claimed that there was collusion between the L. E. Company and the Standard Drug Com-
2075 pany, that they wanted to get rid of Mr. Teller? A. Yes.

XQ292. You know that is the fact today, don't you that they do want to get rid of him? A. No.

XQ293. When you went to see Mr. Cohen of Buffalo didn't you tell him of this injunction, this Exhibit B, which does not give the whole order, and threaten him with a suit? A. No, sir.

XQ294. Give the conversation with Mr. Cohen in Buffalo? A. As near as I can recollect the conversation it was this. Mr. Cohen had a great big Waterman Ideal Pen in his window, one of the big display pens that the L. E. Waterman puts out for advertising purposes; and underneath it at the bottom of his window there was a small sign "Waterman pens at cut prices." And those pens were all A. A. Waterman & Co. pens. I went in
2076 and asked him what kind of fountain pens he had and among the other pens that he said he had were the Waterman pens.

XQ295. Did he sell L. E. Waterman pens? A. I did not see any.

XQ296. Do you know that he did not sell L. E. Waterman Pens? A. I know what he showed me were A. A. Waterman & Co., New York, pens.

XQ297. And if he had one of those big advertising pens of the L. E. Waterman presumably he sold their pens, didn't he? A. No. Those signs get away from the concern and appear in most unusual places. As I recall, Mr. Cohen became very abusive.

XQ298. Then he is the man who said you frightened the life out of him and he sent back his A. A. Waterman pens? A. If Mr. Cohen did anything like that he did not do what I told him to do.

XQ299. What did you tell him? A. What I told him to do was to be sure that he sold those pens as A. A. Waterman & Co., New York pens and for him to communicate with you immediately as to whether or not he had the right, as he claimed that he had, to sell those pens as Waterman pens; and he said in very abusive language in the presence of my wife, that he would do as he pleased about selling those pens. He was going to sell them as Waterman pens and would continue to sell them as Waterman pens until he was restrained. 2078

XQ300. In all of your trips to the south, New Orleans and Birmingham and other places, you never found a single customer whose testimony you wanted to take so as to get legal evidence? A. That is a little far away. I did not think we needed it. I found lots of them whose testimony I would like to take very much indeed.

XQ301. You did not mention Mr. Levy of New Orleans, did you? A. No.

XQ302. Tell us about Mr. Levy? A. I went in to see Mr. Levy and I said to Mr. Levy, "I see you have got a lot of A. A. Waterman & Co. pens." He said, "Yes," and he also carried a line of L. E. Waterman pens. I said, "What do you carry these pens for, Mr. Levy?" "Well," he says, "you know I am a jobber and I get lots of calls for Waterman pens and of course, we cannot sell your pens to the jobbing trade, so we always sell them A. A. Waterman pens." I said, "Do you think that is a good, fair thing for you to do, as far as L. E. Waterman Company is concerned?" "Well," he said, "they want Waterman pens and I give them to them." I said, "Don't you think you should do differently from that? We have always treated you right." "Well," he says, "that is business." 2079

XQ303. Do you blame the defendant for his doing that? A. I blame the defendant because they knew that he was doing it.

2080

XQ304. How do you know that they knew it? A. They could not help it.

XQ305. Because Mr. Levy sells any number of people from Texas and after Mr. Levy has sold them they come back to you, is that any evidence that we knew that he was selling our pens as Waterman pens? I ask you as a lawyer? A. It is only inferential evidence because your salesmen run across these cases all the time and they do not report them to you. Just the same as our salesmen do not report to us all the trouble that they have with A. A. Waterman & Company pens. A salesman will not report any trouble in his territory if he can get out of it; and that is the reason that I went out to see these people instead

2081 of relying on the reports of the salesmen.

XQ306. Didn't you go in to Mr. Levy and pursue about the same questioning that you have with these other people? A. No, sir.

XQ307. Didn't you tell him, "You have been posted and know all about it"? A. No, I saw Mr. Levy carried L. E. Waterman pens and so I did not go into that at all. I had previously learned from the trade around town that Mr. Levy was a jobber.

XQ308. And you do not sell to jobbers? A. We do not sell to jobbers except for their retail trade.

XQ309. In these different town in the south where people said they did not know that there was but one Waterman, are L. E. Waterman pens sold in the same towns? A. Yes.

2082 XQ310. How large is Meridian, Miss., for instance? A. Fifteen or twenty thousand.

XQ311. Do you believe that they told the truth when they said they did not know that there was but one kind of Waterman pen? A. I don't know whether they told the truth or not. I only know what they told me.

XQ312. The L. E. Waterman pen is sold in all those towns where you went? A. Yes, sold universally.

XQ313. And you went to your agent first and asked him where you could get hold of anybody that would be apt to call A. A. Waterman goods Waterman? A. No, I went out without a list of customers. I went right through towns from

store to store and made up my list as I went along. I had a list of L. E. Waterman Company customers but no prospective A. A. Waterman & Co. dealers.

XQ314. When you asked for these sales slips or receipts with the word Waterman on it you did that in order to collect evidence? A. To a certain extent, yes.

XQ315. And to protect innocent people in the sale of A. A. Waterman & Co. pens for a Waterman? A. No, I did it to get their ordinary every day way of selling those pens.

XQ316. And you would sometimes get them from young girls? A. No, sir; not one came from a young girl.

XQ317. This man Klem of Birmingham was what is called a demonstrator? A. He was in Chattanooga, a cigar store. 2084

XQ318. Wasn't he a demonstrator? A. No, he was the proprietor of the store. There was a young man there who was a demonstrator. I have his card somewhere.

XQ319. These demonstrators sell all kinds of pens, don't they that they can get hold of? A. This man was selling what was known as Salz pens. Along with those he had a quantity of the A. A. Waterman & Co., New York, pens and these Globe pens.

XQ320. You told him very plainly that there was a difference between the A. A. Waterman pens and the Globe pens? A. Yes.

XQ321. You did not find anything in him to condemn, did you? A. Except the way he tried to sell these pens and the 2085 way he sold some of the pens while I was there. He sold them as Waterman pens, genuine Waterman pens.

XQ322. Did he have the advertisement out "A. A. Waterman"? A. Yes.

XQ323. So that anybody who bought a Waterman knew that he was getting an A. A. Waterman pen? A. No, sir; not from his story.

XQ324. Not from his advertisement? A. Well, the advertisement was more of a come-on for his story when he got them inside.

XQ325. Have you got Butler's catalogue? A. I have one of them some place.

XQ326. You have not produced it? A. No.

XQ327. They have a New York office, don't they? A. Yes.

XQ328. And the goods that they sell in St. Louis, they get from this office? A. No, sir; each one of their departments buy separately as I understand.

XQ329. Don't you know that all the pens that they get in St. Louis are bought through the New York Office? A. No, I do not.

XQ330. Mr. Geyer tells me that they make an exception in fountain pens and buy them all through the New York house
2087 and that they do not sell a pen to St. Louis direct. A. Mr. Littledale I think was grossly misinformed as to the way they bought.

XQ331. And so was Mr. Butler in Chicago? A. Yes.

XQ332. In Delaware, Ohio, you did not call Mr. Wells or Mr. Hardin as a witness when you were there? A. No.

XQ333. Don't you know they sell L. E. Waterman goods? A. At the time I was there they had two or three old second-hand L. E. Waterman pens and that is all they did have.

XQ334. Well, when I was there they had more L. E. Waterman goods than they did A. A. goods; I saw them with my own eyes? A. They did not have them when I was there. What they had were all second-hand goods.

2088 XQ335. They had a dozen L. E. Waterman pens and about half a dozen A. A.? A. When I was there they only had two or three L. E. Waterman pens and they were all second-hand.

XQ336. They have a house in Columbus don't they? A. No, Mr. Wells has a house in Columbus.

XQ337. Mr. Hardin told me that they got their goods from Columbus? A. The L. E. Waterman Company does not sell Mr. Wells. We tried to sell him for years and have never been able to.

XQ338. Do you mean to say that Mr. Wells of Columbus does not handle L. E. Waterman pens? A. My information comes from visiting the store and from conversation with Mr.

Hudson who is the L. E. Waterman Company representative in Ohio who went to see him twice on this last trip. Mr. Wells said he was very much interested in Waterman pens but he never handled them.

XQ339. Is it not because he was mad with L. E. Waterman and will not trade with them but gets them from some other store? A. I don't know where he gets them but he is not L. E. Waterman's agent, so far as I can find out.

Deposition closed.

(Signature waived.)

Plaintiff's Exhibit No. 117.

092 **Plaintiff's Exhibit No. 118.**

093

Plaintiff's Exhibit 112. 2095

$2.00 12-16, 1910.

Received from W. B. Raymond Two Dollars, For Waterman Ft. Pen.

MUIR & COMPANY,
W. L. M.

Plaintiff's Exhibit No. 114.

No. 27039

2096

Bought of FRANK B. THAYER,
No. 85 Union Ave., etc.

Salesman FBT. Memphis, Tenn., 1/19/1911.

Mr. W. B. Raymond,
Ft. Payne, Ala.

1 Waterman Pen $2.00

PAID.

Plaintiff's Exhibit No. 116.

2097

Nashville, Tenn. 2/3/1911.

Mr. W. B. Raymond

In Account With
JENSEN, HERZER & JECK,
Jewelers and Opticians
402 Union Street,

1 Waterman Self filling Fountain Pen $2.00

PAID, Feb. 3, 1911.

2098 **Plaintiff's Exhibit 120.**

Customer's Voucher,
ADAM, MELDRUM & ANDERSON CO.,
Buffalo, N. Y.

BK
454308

2/11/1911.

1 Waterman Pen $2.00

Three invoices produced by the defendant, of shipments and sales of fountain pens by the defendant, imprinted "Royal Ideal Pens," to John Saadi of Washington, D. C., are offered in evidence and marked Plaintiff's
2099 Exhibit No. 121.

Same objections.

Plaintiff's Exhibit 121.

(Bill Head)

MODERN PEN COMPANY
Sole Selling Agent for
A. A. WATERMAN & Co.

2100 (Picture of Fountain pen stamped A. A. Waterman & Co., New York.)

Modern Self-filling and Middle-Joint.

FOUNTAIN PENS, GOLD PENS AND LINCOLN FOUNTAIN PENS 2101

125 Greenwich Street,—22 Thomas Street.

New York, 7/10/09.

Sold to
J. Saadi,
602-9th St., N. W.,
Washington, D. C.
Due 8/10/09.

		Our					
					One Wheel	7.45	
144	Imprinted	(703)	12	6.00	Net	72.00	
72	"	(A La)	11	4.50	"	27.00	
72	"	(A)	14	4.50	"	27.00	2102
24	"	(503)	15	9.00	"	18.00	
						151.45	

Labels
Special Boxes.

(Same Bill-head as above)

New York, 10/13/09.

Sold to
J. Saadi,
602—9th St., N. W.,
Washington, D. C. 2103
Due 11-13-09.

		Our				
216	Imprinted	(A)	14	4.50		81.00
72	"	203	12	6.00		36.00
48	"	503	15	9.00		5.00
72	"	A-La	11	4.50		27.00
24	Mah. Trays					6.96
						186.96
2 Gross Mod. Clips				2.75	Net	5.50
						192.46

2104 *Plaintiff's Exhibit 121*

(Same Bill-head as above)

New York, 12/4/09.

Sold to
J. Saadi,
604-9th St., N. W.
Washington, D. C.
Due Jan. 4, 1910.

144	Imprinted	(A)	14	4.50	Net	54.00
144	"	(203)	12	6.00	"	72.00
144	"	(La.)	11	4.50	"	54.00
36	"	(503)	15	9.00	"	27.00

2105

207.00 Forward

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12	Feeds	11		Net		1.00
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12	"	15		"		1.00
1 Gross Mod. B. Clips				"		2.75
						237.75

24 Mah. Trays (Balance of former order) No Charge.

RICHARD W. BARKLEY, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, age, and place of business? A. Richard W. Barkley; residence, Montclair, Essex Co., New Jersey.

Q2. You are more than twenty-one years of age? A. I am upwards of twenty-one.

Q3. What is your business? A. I am a solicitor of patents and expert in patent causes.

Q4. Where is your office? A. 220 Broadway, New York.

Q5. What experience and education have you had that would 2108
fit you for an expert in patent causes? A. I am a graduate of the United States Naval Academy at Annapolis from which institution I graduated in 1883. I was honorably discharged from the navy in 1885, and in 1886 I entered the United States Patent Office as assistant examiner, which position I held for four years and four months when I resigned to take up my present line of work. As patent attorney I have prepared a great many applications for patents and prosecuted the same, and generally to a successful conclusion.

Q6. Have you ever testified in patent causes or causes involving patent matters? A. I have.

Q7. How long have you been so engaged? A. About ten or twelve years in that line. I have also given opinions in writ- 2109
ing upon the validity of patents and have made validity and infringement searches.

Q8. Have you examined United States Letters Patent No. 744,642, granted to Harry W. Stone, dated November 17, 1903? A. I have, and understand the same.

Q9. Have you examined United States Letters Patent No. 290,820, granted to William Vale, December 25, 1883, and compared it with the Letters Patent to Stone just referred to?

Mr. Bacon: This is objected to as incompetent, irrelevant and immaterial. This is not a patent suit and the validity of any patent is not in question.

A. I have.

Q10. Have you examined United States Letters Patent No. 387,686, granted to Ignatz Leutner, and compared the same with the Stone patent just referred to?

Same objections.

A. I have.

Q11. Do you understand the said patents to Vale and Leutner? A. Yes.

Q12. Have you examined United States Letters Patent No. 713,927, granted to E. W. Warriner, November 18, 1902, and compared it with the said patent to Stone? A. I have.

2111 Q13. Will you please compare the said patent to Stone with the said patents to Vale Leutner and Warriner just referred to? A. The patent to Stone relates to a fountain pen comprising a barrel *a*, one end of which is closed by the nib holder *b*, and the other end of which is closed by a screw-threaded shank c^1, which engages with a threaded opening in the end of the barrel. Outside the barrel the shank c^1 is provided with a knob or nut *c* which is pinned or rivetted thereto. Within the barrel and having its ends fast to a reduced portion b^2 of the nib-holder and to the end c^2 of the shank is a rubber tube or ink-sack *e*. By twisting the knob *c* the greater part of the air can be expelled from the rubber tube *e*, after which, by inserting the nib end of the pen in ink and untwisting the rubber tube, the

2112 ink is forced into the rubber tube by atmospheric pressure. Externally the shank is screw-threaded to engage with a threaded opening at that end of the barrel *a;* so that the rubber tube is also stretched, as well as twisted up, in the process of depriving it of air. The pen is also provided with a nib or pen protector *d* which is adapted to be placed upon either end of the barrel, and it is stated in the claim that the nut *c* is of less diameter than the bore of the said cap, the object being to be able to put the cap on and off the rear end of the holder without disturbing the cap or twisting the rubber sack *e*.

The patent to Vale has a cap *h* for covering the nib of the pen; but it does not appear to be placed upon the other end of

the barrel, but the other elements of the claims of the Stone patent are present in the Vale patent.

In the patent to Leutner there are present the same elements as in the Stone patent in suit, the twisting head or nut *a*, corresponding with the nut *c* of the Stone patent and having the same function and working in the same way, as shown in Figs. 1 and 2. The Leutner patent mentions a cap to be screwed upon the end *1* to protect the pen point but makes no provision for screwing the same upon the other end of the holder. I would observe, however, that the nut *a* of the Leutner patent is of less diameter than the barrel of the pen.

The patent to Warriner, No. 713,927 shows a cap *b* which 2114
he calls "a nib-protector, which is interchangeably applicable to each end of the holder in the customary manner" (page 1, lines 33 to 35). This patent to Warriner contains the barrel, the nib-holder, the rubber sack and the twisting member, all acting in substantially the same manner and for the same purposes in the Stone patent in question. The external diameter of the nut *j* by which the rubber sack is twisted and untwisted, is less than the internal diameter of the nib protector *b*. This is clearly shown in Fig. 1 of the drawing of the Warriner patent where the nut *j* is shown at the right-hand side thereof as being separated by a clear space from the inside of the sectioned cap *b*, while at the left-hand side of the nut *j* the heavy shading by the draftsman on the inside of the sectioned cap *b* fills up this space. The rules of the Patent Office provide that in drawing the light 2115
shall be considered as coming from the upper left-hand corner; from which it results that the heavy shading is at the right-hand side of the figures, otherwise no doubt the same clear space would be shown at the left-hand side of the cap *j*, as is shown at the right-hand side.

An inspection of Fig. 2 of the Warriner patent shows that the diameter of the nut *j* is less than the cylindrical part immediately beneath it upon which the cap *b* fits in Fig. 1, herewith shown.

The claims of the Stone patent each calls for this less diameter of the nut than the bore of the cap to permit the latter to be

freely applied to and removed from the rear end of the barrel and this feature is clearly shown by Warriner.

By Mr. Bacon:

XQ14. Is it claimed? A. No. This feature of the smaller diameter of the nut is one which in my opinion is merely mechanical skill.

By Mr. Watson:

Q15. Do you find anything shown or claimed in the said Stone patent which is new or patentable over what is shown, described or claimed in the patent to Vale that you have described? A. I
2117 see nothing in it that calls for the exercise of the inventive faculty, and it could not, therefore, be patentable, in my judgment, over the Vale patent.

Q16. Do you find anything shown or claimed in the said Stone patent which is new and patentable over what was shown in the patent to Leutner which you have described? A. The same answer.

Q17. Do you find anything new claimed or described in the Stone patent which is new and patentable over what is shown in the patent to Warriner which you have described? A. The Warriner patent is substantially identical with the Stone patent, and I see nothing whatever in the Stone patent in the way of patentability over Warriner.

2118

CROSS-EXAMINATION by Mr. Bacon:

XQ18. The officials in Washington had all of these patents before them when they issued the Stone patent, didn't they? A. Presumptively they had.

XQ19. And it takes an action in equity to determine whether the Stone patent is good, or not? A. It might be tried at law as well, before a jury.

XQ20. You would not claim that the result of any such action would not be problematical? A. It ought not to be problematical.

XQ21. Does the official examiner in Washington, having all the patents before him, issue patents where there is no reasonable probability that they are good? A. I have seen a good many patents of that sort.

XQ22. You are a professional expert, are you? A. I suppose you might call me that.

XQ23. And you examined these patents before you came here, at the request of Mr. Watson? A. Yes.

XQ24. And he paid you for it? A. Not yet.

XQ25. You are in hopes to get better pay in proportion as your testimony is satisfactory; is that it? A. No, sir, it is nothing of that sort at all.

2120

XQ26. You expect to be paid liberally for what you have done? A. I expect to be paid what I agreed to take.

XQ27. How much did you agree to take? A. $25.

XQ28. And that is all your opinion is worth? A. It is worth more than that, I think, in some cases. I go something by the size of the case.

XQ29. Then the reason you made such a cheap price as $25 was because you knew that whether or not this was a good patent had nothing to do with this case? A. I had already given an affidavit in this case and which I wished at the time to make a great deal stronger than I did, which Mr. Watson did not think necessary to have made stronger, on the question of non-patentability.

2121

Mr. Bacon: Will the Commissioner kindly read the question?

(The last question is read by the Examiner.)

The Witness: I had more regard to the time; and besides I don't think the question is altogether clear.

XQ30. Is that the reason you answered entirely different questions the first two times? A. I was guessing somewhat at the meaning of the question, trying to answer what I supposed to be the point you were driving at.

2122

Mr. Bacon: Will the Commissioner kindly read the original question again, and I will ask the learned expert what he thinks it means?

(The Examiner reads the question as follows):

"Then the reason you made such a cheap price as $25 was because you knew that whether or not this was a good patent had nothing to do with this case?"

(The witness writes down the question as read by the Examiner.)

Mr. Bacon: The Commissioner will note on the record that the witness has had to take this question down in long hand and study it over so as to find out what it means.

2123

Mr. Watson: Counsel for complainant asserts that it appears on the record that the witness is justified.

The Witness: I think I will come back and ask to have the question set in intelligible form.

XQ31. I will ask the witness if he, as a graduate of the Naval Academy, and an expert patent lawyer, does not understand plain English? A. When it is plain, I do.

XQ32. I will ask him if that question is grammatical and perfectly plain—after an interval of three minutes on the record? A. I see no substantial meaning in the question.

XQ33. I will ask the learned expert if the question does not mean that he received such a low price as $25 for his services because the question that he was expected to elucidate had nothing to do with the issues in this case for unfair competition? A. I did not bother myself about what the issues were. It was the amount of time it would take me and the amount of work; but I did hear incidentally that there was something about trade-mark.

2124

XQ34. Is the validity of a patent properly at issue in an action about trade-marks? A. Not that I know of.

(Signature waived.)

2125

Plaintiff's counsel offers in evidence copy of United States Letters Patent No. 290,820, issued to W. Vale.

Marked Plaintiff's Exhibit 122.

Also copy of United States Letters Patent, No. 387,686, issued to I. Leutner.

Marked Plaintiff's Exhibit 123.

Also copy of United States Letters Patent No. 713,927, issued to E. W. Warriner.

Marked Plaintiff's Exhibit 124.

Mr. Bacon: I move to strike out the patents on the ground that it is hearsay and in no way connected with the defendant.

2126

Adjourned to Tuesday, April 11, 1911, at 10:30 A. M.

2127

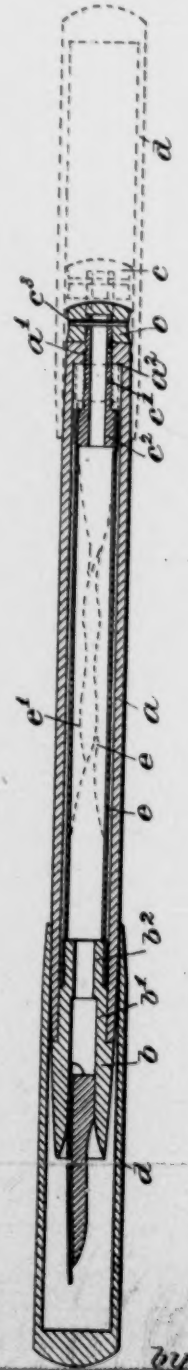
No. 744,642. PATENTED NOV. 17, 1903.

H. W. STONE.

FOUNTAIN PEN.

APPLICATION FILED FEB. 19, 1903.

NO MODEL.



Witnesses,

Inventor,
Harry W. Stone,

No. 744,642.

UNITED STATES PATENT OFFICE.

HARRY W. STONE, OF NEW YORK, N. Y., ASSIGNOR TO ARTHUR A. WATERMAN, OF WINCHESTER, MASSACHUSETTS, AND WILLIAM G. FRAZER AND HOBART W. GEYER, OF NEW YORK, N. Y.

FOUNTAIN-PEN.

SPECIFICATION forming part of Letters Patent No. 744,642, dated November 17, 1903.

Application filed February 19, 1903. Serial No. 144,031. (No model.)

To all whom it may concern:

Be it known that I, HARRY W. STONE, a citizen of the United States, residing in the city of New York, borough of Brooklyn, in the county of Kings and State of New York, have invented an Improvement in Fountain-Pens, of which the following description, in connection with the accompanying drawing, is a specification, like letters on the drawing representing like parts.

This invention relates to fountain-pens wherein a flexible sack within the barrel of the pen is used as an ink-reservoir.

The object of the invention is to provide a construction whereby the pen may be easily filled without soiling the hands and without the use of extraneous means, such as a dropper.

One form of my invention is illustrated in the accompanying drawing, in which *a* represents the barrel or body of the pen, and *b* the pen-stock proper, which is mounted in one end of the hollow barrel. This pen-stock is provided with a shank *b'*, which forms a friction-joint with the barrel. The part *b* is also provided with an extension or neck b^2, to which the flexible ink sack or reservoir *e* may be attached by any desirable means, such as wire or thread. This sack or reservoir may be made of a section of flexible rubber tubing or any other suitable material. The opposite end of the main barrel is provided with a screw-threaded bore a', which is of less diameter than the bore of the barrel, leaving an integral shoulder a^2 at this extremity of the barrel. Mounted in this bore is a screw-threaded shank c', having a neck c^2, similar to the neck b^2, upon which the opposite end of the flexible sack *e* is mounted. The outer end of this shank c' is provided with a knob or nut *c*, which is firmly secured thereto by any suitable means, such as a rivet c^3. The diameter of this nut *c* is somewhat smaller than that of the barrel *a* for a reason hereinafter set forth.

The device is also provided with a cap *d*, which may be slipped over the end of the barrel and which covers the pen when the latter is not in use and which may be transferred to the opposite end thereof when the pen is in use.

As will be seen from the drawing, the opposite ends of the barrel or body portion are somewhat tapered, and the pen-stock and the nut are correspondingly tapered in continuation thereof. The internal diameter of the cap *d* is larger than that of the pen-stock or the nut, and therefore engages the barrel of the pen when in position without contacting with either the pen-stock or nut.

When it is desired to fill the pen, the cap *d* is removed and the nut *c* is screwed to the left, thereby extending the same, together with the shank c' and the attached sack *e*, as shown in dotted lines, and at the same time distending the sack *e*, as shown in dotted lines *e* e'. This movement serves to collapse the sack and expel the greater part of the air therefrom. Upon now submerging the pen-stock *b* in ink and screwing the nut to the right or back into normal position the sack *e* will assume its normal distended condition, thereby drawing up a supply of ink by atmospheric pressure.

Should it be necessary from time to time to cause the ink to flow more copiously out upon the pen, this may be done by turning the nut *c* to the left slightly, thereby expelling a slight amount of ink from the reservoir of the pen.

When the pen is in use, the cap *b* may be removed from the pen and slipped upon the opposite end of the barrel, as shown in dotted lines. By reason of the fact that the nut *c* is tapered to a diameter slightly less than that of the bore of cap *d* it is obvious that it would be at all times impossible for the cap *d* to rotate said nut, and thereby accidentally agitate the ink-reservoir, when the cap is being placed upon or removed from the shank of the pen. This construction makes it practically impossible to accidentally cause the pen to spurt.

My invention is not restricted to the par-

ticular embodiment thereof herein disclosed, but obviously may be varied within the spirit and scope of the invention.

I claim—

1. A fountain-pen comprising a barrel, a cap adapted to cover the pen and also to fit over the rear end of said barrel, a flexible reservoir within said barrel, an exposed twisting member therefor at the rear end of said barrel and of less diameter than the bore of said cap, whereby the latter may be freely applied to and removed from the rear of said barrel without danger of turning said twisting member and twisting said reservoir.

2. In a fountain-pen, a barrel, a body portion having oppositely-tapered ends, a pen-point mounted at one of said ends and a cap adapted to fit over either tapering end of said barrel to cover the pen-point when the latter is not in use, and to be carried upon the rear end when the pen-point is in use, a flexible reservoir within said barrel or body portion, and an exposed reservoir twisting member at the rear of said barrel or body portion, and of less diameter than the bore of said cap to permit the latter to be freely applied to and removed from the rear of the said barrel or body portion without danger of turning said twisting member and its reservoir.

In testimony whereof I have signed my name to this specification in the presence of two subscribing witnesses.

HARRY W. STONE.

Witnesses:
ERNEST A. REED,
JUSTIN D. HANSCOM.

Plaintiff's Exhibit 122.

(No Model.) 2 Sheets—Sheet 1.

W. VALE.

FOUNTAIN PEN HOLDER.

No. 290,820. Patented Dec. 25, 1883.

FIG. 1

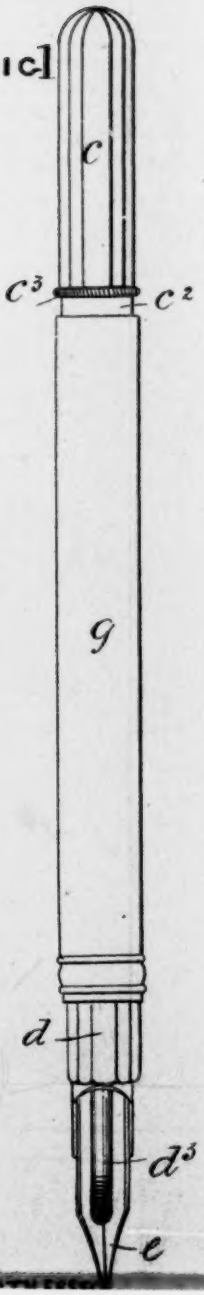


FIG. 2.

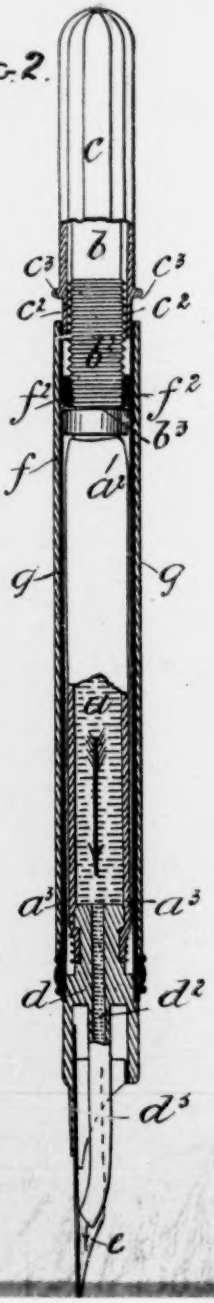
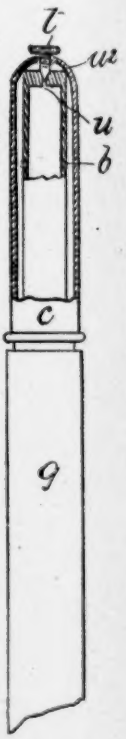


FIG. 3.

FIG. 3A



Witnesses

INVENTOR

W. VALE.

FOUNTAIN PEN HOLDER.

No. 290,820. Patented Dec. 25, 1883.

FIG. 4

FIG. 5

FIG. 6

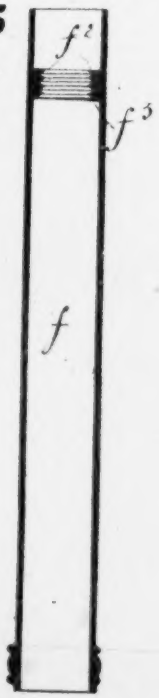


FIG. 7

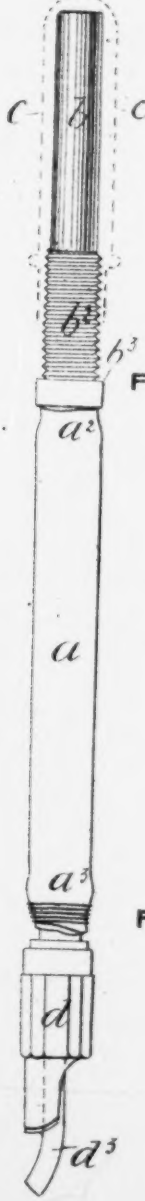


FIG. 8

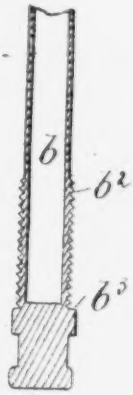


FIG. 9

FIG. 10

WITNESSES

Henry Skinrett,

Miles C. Hughes

INVENTOR

William Vale

COPY BOUND CLOSE

UNITED STATES PATENT OFFICE.

WILLIAM VALE, OF BIRMINGHAM, COUNTY OF WARWICK, ENGLAND.

FOUNTAIN PEN-HOLDER.

SPECIFICATION forming part of Letters Patent No. 290,820, dated December 25, 1883.

Application filed November 6, 1883. (No model.) Patented in England September 14, 1883, No. 4,401.

To all whom it may concern:

Be it known that I, WILLIAM VALE, a subject of the Queen of Great Britain, residing at Birmingham, in the county of Warwick, England, have invented certain new and useful Improvements in Reservoir or Fountain Pen-Holders or other Writing-Instruments, for which I have received Letters Patent in Great Britain, No. 4,401, dated September 14, 1883;) and I do hereby declare the following to be a full, clear, and exact description of the invention, reference being had to the accompanying drawings, which form part of this specification.

The object of my invention is to construct pen-holders or other writing-instruments containing a reservoir of ink or writing-fluid, which, by a slight rotary movement imparted to the terminal mount of the holder, causes a supply of fluid to flow to the nibs of the pen or writing-instrument, and on the reverse movement of the mount the writing-fluid instantly recedes again to the reservoir.

The reservoir or chamber for containing the writing-fluid consists, essentially, of an elastic or hollow cylinder composed of caoutchouc, india-rubber, or other suitable elastic material, the upper end of which said elastic tube or reservoir is connected to a short length of metal tubing (hereinafter called the "reservoir-mount") closed at its bottom. The said reservoir-mount has an external collar formed at its junction with the elastic tubular chamber, and immediately above the said collar the mount is wormed for a short distance with a slow-threaded screw, and above the wormed part is left plain.

To the lower end of the elastic reservoir the pen-holding mount is attached, and running in the axis thereof a small tube, bent at its end, conveys the writing-fluid from the reservoir to the nibs of the pen. A tubular casing or barrel, screwed internally at its upper end, incloses the elastic reservoir, and connects the top and bottom mounts. The internal screwed part of the barrel or casing takes into or engages with the screw of the reservoir-mount. The terminal cap for operating the reservoir covers and is attached permanently to the reservoir-mount, so that the operating terminal mount and the reservoir-mount described move together.

The action on propelling the terminal mount of the pen-holder is as follows: On the reservoir or chamber having been supplied with writing-fluid, on propelling the holder, the reservoir-mount is rotated, and advanced axially within the internal screw of the casing, so that the elastic or yielding reservoir is twisted spirally through its entire length to an extent dependent on the amount of propulsion. The effect produced by the twisting described is to reduce the capacity of the reservoir, and consequently to urge or drive forward the writing-fluid through the conveying tube or channel to the nibs of the pen, thereby supplying the said pen with an intermittent quantity of ink as the act of propelling is from time to time repeated. The motion of propelling is limited by the abutment-edge of the propeller-mount, and the repelling by a stop on the reservoir-mount coming against the shoulder of the screwed part in the inclosing case or barrel. On rotating the propeller-mount in the reverse way than that as before described, repelling is effected. The twisted and partially-contracted caoutchouc tube or elastic is uncoiled or straightened out, resuming its normal state, and in so doing the ink left in the pen (or for refilling the reservoir) instantly recedes or flows up the conducting-tube into the reservoir, as before described. Therefore the pen-holder or writing-instrument both propels and repels at pleasure.

I will now proceed to describe, with reference to the accompanying drawings, the manner in which the same is to be performed.

Figure 1 represents in front elevation, and Fig. 2 in side elevation, partly in longitudinal vertical section, a reservoir or fountain pen-holder constructed according to my invention, the reservoir being filled ready for use. Fig. 3 shows the same in action, the ink in the reservoir being forced therefrom by coiling spirally the chamber or reservoir, as represented. The other Figs. 3', 4, 5, 6, 7, 8, 9, and 10 represent the parts separately. Fig. 4 is the outer casing of the holder. Fig. 5 is an elevation of the propelling cap. Fig. 6

CLOSE IN CENTER

shows a section of the barrel inclosing the reservoir. Fig. 7 shows in elevation the reservoir with its top and bottom mounts. Figs. 8, 9, and 10 show in section the principal parts separately.

The same letters indicate the same parts in the above figures of the drawings.

a is the reservoir or chamber, composed of caoutchouc or india-rubber, for containing the reservoir of ink or writing-fluid. The upper end, a^1, of the elastic chamber or cylinder *a* is connected to a terminal mount, *b*, closed at its lower end. The mount is wormed externally with a slow-threaded screw, b^2. This reservoir-mount is connected permanently by soldering, or otherwise, to the terminal or operating cap *c*, so that this cap and the mount *b* move together when operating the pen-holder. The lower end, a^2, of the elastic reservoir *a* is connected to the pen-holding mount *d*, and in the axis of the said mount a tubular channel, d^2, communicates with the reservoir of ink, and through which said channel ink or writing-fluid flows to the nibs of the pen *e*. *f* is a tubular casing or barrel inclosing the elastic or yielding reservoir *a*, and connects the top mount, *b*, and bottom mount, *d*. The said inclosing barrel or casing *f* is screwed internally at f^1, which takes upon or engages with the screw b^1 of the mount *b*. The barrel *f* is surrounded by an external covering, *g*, of vulcanite or other suitable material.

In order to supply the pen with ink or writing-fluid, the action of the parts is as follows: The reservoir or chamber having been supplied with the necessary writing-fluid, on propelling the cap *c*, Fig. 2, the reservoir-mount *b* is rotated and advanced axially down the barrel *f* through a distance proportionate to the amount of propelling by b^2 of the mount *b* worming within the screw f^2 of the barrel *f*, and at the same time the cap *c* is lowered or advanced within the upper end of the barrel, in which end c^2 of the cap *c* slides, thereby diminishing the distance (as in Fig. 3) between the end of the barrel and collar or stop c^3, which limits the motion of the cap within the barrel, so that in consequence of the mount *b*, attached to the upper end, a^2, of the elastic or yielding chamber, having been turned or rotated several times by the propelling action of the cap (while the lower end, a^2, of the said reservoir is held stationary) it acts upon the elastic or yielding reservoir, so as to twist it spirally through its entire length, as represented in Fig. 3 of the accompanying drawings. The effect produced by the twisting described and represented is to reduce the internal capacity of the reservoir, and consequently to urge or drive forward the writing-fluid through the channel d^2, and conveying-tube d^3 to the nibs of the pen *e*, as shown at Fig. 3, and thereby supplying the said pen with an intermittent quantity of ink, as the act of propelling is from time to time repeated. The moving of the ink-reservoir, is limited by the abutment c^3 of the cap *c*, while the repelling is limited by the shoulder b^3 of the mount *b*, coming against the under side, f^3, of the screwed part f^2, of the inclosing-barrel *f*. On rotating the cap *c* in the reverse way than that as before described, repelling is effected. The twisted and partially constricted caoutchouc or india-rubber tube or reservoir *a*, as in Fig. 3, is uncoiled or straightened out, the parts resuming their normal positions, as represented in Figs. 1 and 2, and in so doing the ink left in the pen (or for refilling the reservoir) instantly recedes or flows up the conducting-tube by partially rarefying the reservoir by opening out its folds or coils and increasing its internal area, as shown in Fig. 1, so that ink at the mouth of the conducting-tube recedes up the said tube d^3 into the reservoir-chamber, as described. Therefore the pen-holder or writing-instrument both propels and repels at pleasure. The cap *h*, Fig. 4, covers the lower mount, *d*, when the pen-holder is not in use. When the flow of ink is required to be made continuous instead of intermittent, as before described, a small hole in communication with the reservoir is uncovered. The refilling is effected by temporarily stopping or closing the said hole in order to rarefy the interior of the ink chamber or reservoir by the raising of the point of the screw *t* out of the seat u^2 of the passage *u*, thereby admitting air to the ink-chamber and causing a continuous flow. On closing the mouth of the hole *u* by the point of the screw and repelling the mount, ink flows back into the reservoir for refilling or otherwise, as shown at Fig. 3^A.

Having described the nature of the said invention, I wish it to be understood that I claim—

1. In a fountain or reservoir pen, the combination, with the exterior casing and the stylus or point, of an elastic reservoir communicating with the said stylus and provided at its end with a movable plunger, whereby it may be compressed and its contents discharged upon or into the stylus, substantially as and for the purpose described.

2. In a fountain-pen, the combination, with an external casing and a stylus, of an elastic reservoir communicating with the stylus and adapted and designed to be twisted and its contents thereby discharged, substantially as described.

3. In a fountain-pen, the combination, with an exterior casing, of an elastic reservoir attached at one end to a stationary mount and at the other end to a movable mount swiveled in the casing, whereby the reservoir may be twisted and its contents discharged, substantially as described.

4. In a fountain-pen, the combination, with the exterior casing and the stylus, of an elastic reservoir communicating with the stylus and attached to a plug screwing into the upper end of the casing, substantially as described

5. In a fountain-pen, the combination of an elastic reservoir, attached at one end to a stationary mount and at the other to a screw-threaded mount, with a stop to limit its movement, substantially as described.

6. In a fountain-pen, the combination, with the exterior casing, of an elastic reservoir provided with a discharging-tube and adapted to be spirally twisted to discharge its contents through said tube, substantially as described.

7. In a fountain-pen, the combination, with the exterior casing and an elastic reservoir having an outlet at one end of said casing, of a movable plunger at the other end of said casing, adapted to impinge upon said reservoir and cause it to discharge its contents, substantially as described.

8. The combination of casing *g*, mount *d*, outlet-tube d^2, and elastic reservoir *a*, with the movable screw-threaded plunger *b* and cap *c*, substantially as described.

In testimony that I claim the foregoing I have hereunto set my hand this 15th day of October, 1883.

WILLIAM VALE.

Witnesses:
HENRY SKERRETT,
MILES E. HUGHES.

(No Model.)

I. LEUTNER.

RESERVOIR PEN HOLDER.

No. 387,686. Patented Aug. 14, 1888.

Fig: 1.

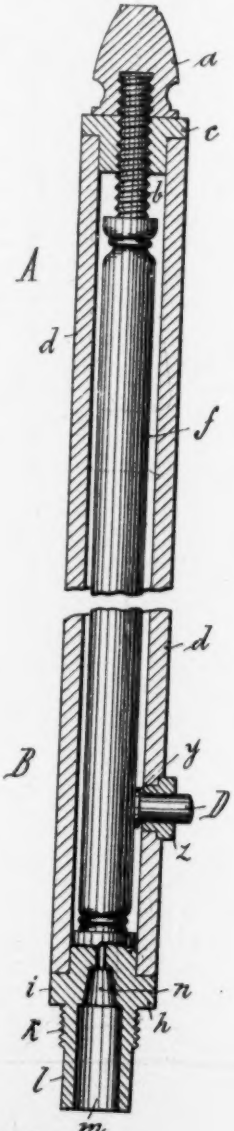


Fig: 5.

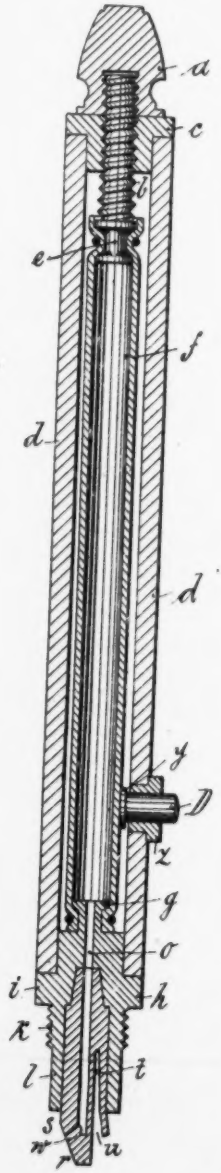


Fig: 2.

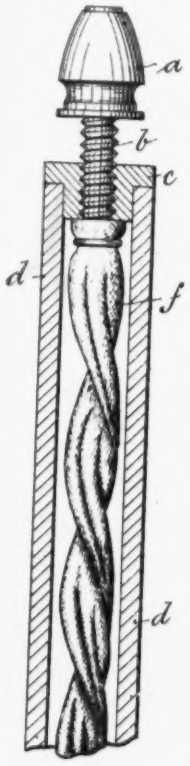


Fig: 3.

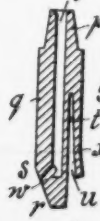
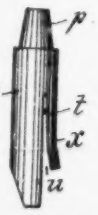


Fig: 4.



Witnesses.
C. Bowser.
A. R. Brown

Inventor.
Ignaz Leutner.
By Chas J. Gooch
Attorney.

UNITED STATES PATENT OFFICE.

IGNAZ LEUTNER, OF HALLE-ON-THE-SAALE, PRUSSIA, GERMANY.

RESERVOIR PEN-HOLDER.

SPECIFICATION forming part of Letters Patent No. 387,686, dated August 14, 1888.

Application filed May 10, 1886. Serial No. 201,712. (No model.) Patented in England March 29, 1886, No. 4,368.

To all whom it may concern:

Be it known that I, IGNAZ LEUTNER, of Halle-on-the-Saale, Prussia, Germany, have invented certain new and useful Improvements in Reservoir Pen-Holders, (for which a patent was issued to myself and another in Great Britain on the the 29th day of March, 1886, numbered 4,368,) of which I declare the following to be a specification.

This invention relates to improvements in reservoir pen-holders in which the ink-reservoir is located in the interior of the holder, and is composed of a closed tube of india-rubber or other appropriate water-tight elastic material.

Figure 1 is a broken longitudinal section of the holder, with the elastic reservoir in elevation, on an enlarged scale. Fig. 2 is a section of the upper part of the holder, with the knob screwed out and the elastic reservoir extended and put under torsion. Fig. 3 is a section of the clamp for holding the pen or writing-instrument, said clamp being inserted in the forward end of the holder. Fig. 4 is an elevation of Fig. 3. Fig. 5 is a longitudinal section of the complete holder.

The upper knob, *a*, is securely connected to the screw *b*, which runs through a suitably-flanged nut, *c*, which is inserted within and constitutes a stopper for the rear end of the cylinder or casing *d* of the holder.

The longer end of the screw *b* is provided with two suitable collars or flanges, between which the same is annularly recessed at *e*, so that the elastic reservoir *f* can be securely attached to the same by means of an elastic ring, or in other suitable manner.

The reservoir *f* consists of a piece of india-rubber tubing, which is, as aforesaid, attached securely to the forward end of the screw *b*. The forward end of the said reservoir *f* is attached to a stopper, *h*, provided with the flange and annularly recessed rear end, *g*. This solid stopper *h* is inserted in the forward end of the main tube *d* and protrudes a suitable distance into the interior of the same, so as to form a perfect closure, and also serve to retain the forward end of the elastic reservoir *f*, which is securely fixed to the annularly-recessed rear part, *g*, of the said stopper *h*, while the inward movement of the stopper is hindered by the flange *i*, which is of like diameter and runs perfectly flush with the main tube or cylinder *d*. This said stopper is furthermore provided with screw-threads to receive a suitable cap for protecting the pen or writing-instrument, and forward of these said screw-threads *k* with a plain annular surface, *l*, and is further provided with a boring of three various diameters, *o n m*.

The boring *o*, which can be reamed out somewhat at its rear end, is in communication with the elastic reservoir, and when the pen-clamp is inserted also with the boring *v* of the same, as will be described later on in this specification.

The boring *n* is made somewhat conical, to receive the conical end *p* of the pen-clamp, while the boring *m*, into which the part *q* of the said clamp is inserted, is made of cylindrical form.

The pen-clamp is preferably made of vulcanite, ebonite, or other similar material, and is at its rear end turned off, or so formed that the conical part *p* is obtained, which, as aforementioned, is fixed or inserted into the conical boring *n* of the stopper *h*, while the tongue *x* of the clamp serves to hold the part *q* securely in the cylindrical part *m* of the stopper.

The pen-clamp, or the part employed for holding the pen or writing-instrument, is provided with a central boring, *r*, corresponding with the boring *o* of the stopper *h*, which said boring *v* is in communication with a short canal or boring, *w*, which connects at the one end with the boring or canal *v*, while the other open end is formed in the inclined surface *r s* at the foremost end of the clamp, and beneath the pen or writing-instrument, which is inserted between the outer surface, *q*, of the clamp and the inner surface of the cylindrical boring *m* of the stopper.

A tapered slot, *t u*, is made at the rear of the boring *r*, so as to form a spring-tongue, *x*, which serves to hold the clamp *q* securely in the boring *m* of the stopper *h*.

D is a small pin or stud provided at its inner end with a suitable head or flange, *y*, and which passes freely through an ebonite, vulcanite, or other bushing, *z*, while the head or flanged end is in contact with the elastic reservoir *f*, so that if the reservoir is provided

with ink or writing-fluid and pressure is exerted on the outer end of the said pin or stud D the elastic reservoir will be compressed and ink or writing-fluid forced to flow into the pen or other writing-instrument.

In order to fill the reservoir *f* with ink or writing-fluid, the knob or button *a* is screwed out, and as the space in the interior of the main tube *d* is longer than the said reservoir the elastic tubular reservoir *f* is not only extended, but so twisted that the air contained in the said reservoir is expelled. This position of the knob or button *a* and the elastic reservoir *f* is represented in Fig. 2 of the accompanying drawings. The pen or writing-instrument is now inserted into writing-fluid until the canal or boring *w* is covered by the said writing-fluid, whereupon the knob or button *a* is screwed back again into contact with the flanged nut *c*, so much suction will be created that the reservoir will be entirely filled with writing-fluid, which, after withdrawing the pen and pen-holder from the fluid in the ink-stand or other receptacle, will be retained in the reservoir *f* by the pressure of the atmospheric air, and will only then be caused to flow from the boring *w* when pressure is exerted on the pin or stud D, the capacity of the reservoir thus decreased and the writing-fluid caused to pass from the same through the borings *o r w* to the pen or writing-instrument. The arrangement of the boring *w* at an incline to the boring *r* prevents too large a quantity of ink from flowing into the pen.

When not in use, a suitable cap can be screwed over the writing-instrument to prevent the same from being injured, for which said purpose the screw-threads *k* on the stopper *h* are employed. It will from the foregoing specification be evident to all connected with this branch of industry that the various parts of my improved reservoir pen-holder can be modified in various ways without in any way departing from the tenor of my invention.

Having now particularly described and ascertained the nature of my said improvements in reservoir pen-holders and in what manner the same is to be performed, I declare that what I claim is—

1. In a reservoir pen-holder, the combination, with a cylinder or casing having an ink-reservoir therein, of a stopper closing the front end of said tube and having a longitudinal ink-conveying passage communicating with the ink-reservoir and an outwardly-extending tubular portion, and a pen-clamp adapted to fit within said tubular extension of said stopper, and having a longitudinal ink-conveying passage, and at its outer end a transverse ink-conveying passage, and a spring-tongue adapted to hold said pen-clamp in position within said stopper, substantially as set forth.

2. A reservoir pen-holder comprising an open-ended cylinder or casing, a stopper closing the rear end thereof and having a threaded longitudinal bore therein, a screw extending through said bore and having a recessed and collared inner end and at its outer end an operating-knob, a longitudinally-bored stopper closing the front end of said casing and having an annularly-recessed inner end and an outwardly-extending outer end, an elastic reservoir connected at its respective ends with the inner ends of said screw and front stopper, a reservoir-compressing pin having a flanged inner end and extending transversely through an opening in the side of the casing and a pen-clamp seated within the outwardly-extending tubular portion of the front closing-stopper and having a spring securing-tongue and longitudinal and angular ink-conveying channels, substantially as set forth.

3. The combination of the cylinder or casing *d* and flexible reservoir *f* with the knob *a*, screw *b*, nut *c*, stopper *h*, clamp *q*, and the pressure-pin D, substantially as and for the purpose described in the specification, and shown in the accompanying drawings.

In witness whereof I have hereunto signed my name in the presence of two subscribing witnesses.

I. LEUTNER.

Witnesses:
MAX RESCHKE,
C. BORNGRAEBER.

Plaintiff's Exhibit 124.

No. 713,927. Patented Nov. 18, 1902.

E. W. WARRINER.

STYLOGRAPHIC OR OTHER FOUNTAIN PEN.

Application filed July 18, 1902.

(No Model.)

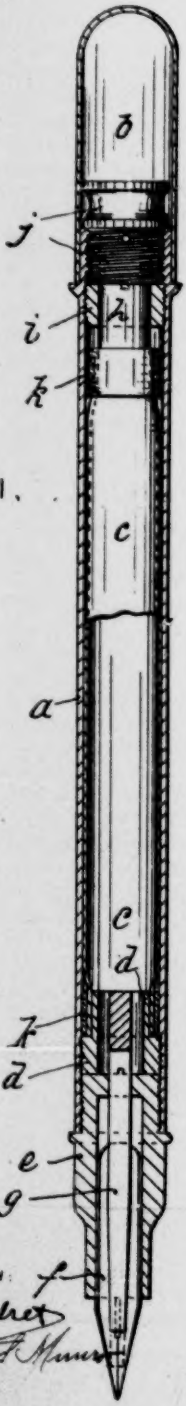


FIG: 1.

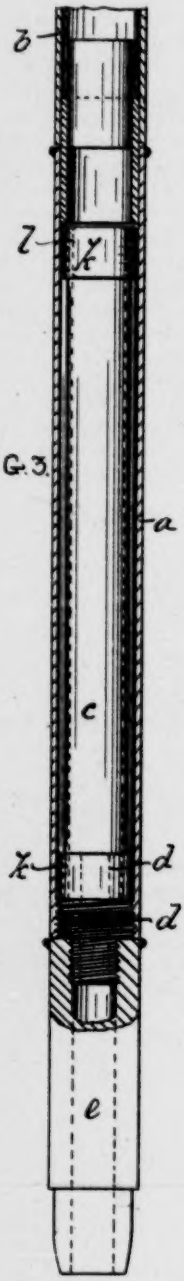


FIG. 3.

FIG: 2.

Witnesses:
Marion J. Lebret
Florence S. Munro

Inventor:
Edward W. Warriner,
By H. H. de Vos,
Attorney.

UNITED STATES PATENT OFFICE.

EDWARD WILLIAM WARRINER, OF SHEFFIELD, ENGLAND.

STYLOGRAPHIC OR OTHER FOUNTAIN-PEN.

SPECIFICATION forming part of Letters Patent No. 713,927, dated November 18, 1902.

Application filed July 18, 1902. Serial No. 116,030. (No model.)

To all whom it may concern:

Be it known that I, EDWARD WILLIAM WARRINER, a subject of the King of Great Britain and Ireland, and a resident of Attercliffe, Sheffield, county of York, England, have invented certain new and useful Improvements in Stylographic or other Fountain-Pens, (for which I have filed an application for British patent, No. 21,075, dated October 21, 1901;) and I do hereby declare the following to be a full, clear, and exact description of the same.

This invention relates to stylographic and other fountain-pens, and has for its object to avoid the necessity for any separate device for charging the ink-reservoir, and to this end is characterized by providing the pen with a collapsible and expansible ink-reservoir having means of coiling so as to collapse it to expel air therefrom and of uncoiling it or allowing it to uncoil to allow it to expand, so as when the nib-holder end is immersed in ink to become charged with the latter by atmospheric pressure.

On the accompanying drawings, Figure 1 represents a sectional elevation showing the expanded ink-charged or normal condition of the reservoir. Fig. 2 represents a like view at right angles to Fig. 1, showing the collapsed condition of the reservoir; and Fig. 3 represents a modification with the nib and ink-feeder removed.

a represents the body or holding part of the pen, and *b* a nib-protector which is interchangeably applicable to each end of the holder in a customary manner.

c represents the collapsible and expansible ink-reservoir, which preferably consists of india-rubber, but may consist of a bladder or other suitable impervious material, and extends from near one end of the holder, at which it is secured and its end is open, to near the other end of the holder, at which it is movable relatively to the holder and its end is closed.

Referring to Figs. 1 and 2, the secured end of the reservoir is vulcanized or cemented to a hollow ferrule *d*, which screws into the holder end and is firmly located by the nib-holder *e*, which carries the nib *f* and ink-feeder *g* and screws into the holder end into abutment with the ferrule, the ink-feeder projecting into and taking its supply from the hollow ferrule, which opens into the reservoir.

The movable end of the reservoir is vulcanized or cemented to a stem *h*, which works in a collar *i*, (which screws into and is adjustable in the holder end,) and beyond the collar is fitted with a turning head *j*, which screws into the holder end and projects beyond the latter sufficiently to be capable of being taken hold of and turned. The reservoir ends may be further secured to the ferrule *d* and stem *h*, respectively, by surrounding collars *k*.

When it is required to charge the reservoir with ink, the head *j* is turned with an unscrewing motion in the holder end, which causes the reservoir to twist, so as to collapse and expel any contained air, and upon the nib-holder end being immersed in ink and the head *j* reversely screwed the reservoir expands and the ink is forced thereinto by atmospheric pressure.

In the modification represented in Fig. 3 the secured end of the reservoir *c* is vulcanized or cemented to a hollow plug *d*, which screws into the adjacent ends of the holder *a* and nib-holder *e* or may be made integral with the latter. The end of the reservoir by which it is turned is stopped by a plug *l* and is free from any connection to the holder by which it is inclosed, so that upon the holder and reservoir-carrier *d* being disconnected the reservoir can be charged by twisting it and by untwisting it or allowing it to untwist while the nib-holder end is immersed in ink.

What I claim as my invention, and desire to secure by Letters Patent, is—

In combination, a holder, a collapsible and expansible ink-reservoir contained within the holder, a hollow ferrule secured within one end of the reservoir and adapted to screw into the holder at one end so as to secure the reservoir at such end, a nib and ink-feeder holder adapted to screw into the holder so as to lock the ferrule with the ink-feeder projecting thereinto, a stem secured within the other end of the reservoir and having a head

adapted to screw into the holder end and to project therefrom, and a collar adapted to screw into the holder end and to guide and limit the movements of the stem so as to control the collapsion and expansion of the reservoir, as set forth.

In testimony whereof I have signed this specification in the presence of two subscribing witnesses.

EDWARD WILLIAM WARRINER.

Witnesses:
EDWIN LISTER,
RALPH SKELTON.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

vs.

MODERN PEN COMPANY,
Defendant. 2192

Met pursuant to adjournment at the office of Watson & Raymond, 10 Wall Street, New York, April 11, 1911, at 10 o'clock in the forenoon.

Appearances:

Walter B. Raymond, for Complainant.
Alexander S. Bacon, for Defendant.

ERNEST LUTZER, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Raymond:

2193

Q1. Please state your name, place of residence and occupation? A. Ernest Lutzer; I reside at 173 West 81st Street, New York City. I am a merchant.

Q2. Will you state in your own words your experience, and the experience that you had in buying a fountain pen; tell us when you bought it, where you bought it, and what was said to you and what was said by the person selling the pen to you? A. I bought a pen about two months ago at 42nd Street. I don't know exactly where, whether it was between Madison Avenue and Third Avenue. I passed by a house and saw in the show window a sign. The sign said "Waterman Fountain

2194 *Ernest Lutzer*

Pens. Bargain Sale $1.25." For that reason I went in and asked the fellow if they were genuine Waterman fountain pens and he answered me that they were Waterman fountain pens and for that reason I bought one.

Q3. Was there anything said to you about how you could get the pen repaired? A. I asked him before I went out, if I had any trouble with the pen and should not be able to come in this neighborhood, and he told me, "You can drop in any of the fountain pen stores and they will fix it for you."

Q4. Did the pen work? A. No, the pen does not work. It is leaking all the time.

2195 Q5. What did you do? A. For that reason I passed by, downtown here, the real Waterman fountain pen store and I presented it to the lady in the store and she looked at the pen and she told me that is not our pen. So of course I was surprised to hear that. I thought I had the real Waterman pen. Then she sent for a gentleman, I guess it was the manager. I don't know the name of the gentleman.

Q6. When did this happen? A. Yesterday, about noon time, about half-past one I guess.

Q7. Is this the pen that you produce? A. That is the pen I bought, yes.

Q8. Will you read on that pen its marks? A. The pen is marked "A. A. Waterman & Co., New York. Patented December 12, 1899."

2196 Q9. Did the clip come on the pen? A. No, I bought that myself.

Q10. You bought that in the same place? A. In the same place, yes.

Q11. How much did you pay for that pen? A. $1.25.

The pen referred to is offered in evidence and marked Plaintiff's Exhibit No. 125.

Q12. Had you previous to the time that you purchased this pen ever known Waterman's pens? A. Yes, I knew of Waterman's fountain pens already in the old country.

Q13. How did you know of them—through advertisements? A. Through advertisements, yes.

Q14. Had you ever used any of them? A. No, I had never used any before.

Q15. But you had seen advertisements? A. Yes, I had seen advertisements. I have seen them myself in the old country.

Q16. Did you know the price at which the Waterman pens were sold? A. Yes, $2.50.

Q17. When you saw this sign of the bargain sale you thought you were getting something cheap? A. Yes.

CROSS-EXAMINATION by Mr. Bacon: 2198

XQ18. Was this pen repaired yesterday? A. They fixed it up a little bit. They took some tissue paper and cleaned it out.

XQ19. And that is all there was the matter with it? A. That is all.

XQ20. Did they tell you that the only thing the matter was that the section was not screwed on tight? A. No, they did not tell me anything about it. The gentleman that I spoke to said he would be very pleased if I could give testimony regarding this sale. I told him he should excuse me that I had an appointment at half-past two uptown and I could not be there at three o'clock.

XQ21. How much did they say they would pay you for testifying? A. I received $2.10. I received this paper. When I came home last night it was in my room. 2199

XQ22. You promised them to testify yesterday? A. Yes, I promised them.

XQ23. Did they promise you any sum of money at that time? A. No.

XQ24. Did they tell you how much they were going to pay you? A. Not at all.

XQ25. Do you claim that there is anything the matter with this pen now? A. Yes, it is leaking.

XQ26. Where is it leaking. Show us where it leaks? A. It was leaking all the time. It was leaking this morning. Mr. Watson here—

2200

XQ27. He tightened it up? A. Tightened it up.

XQ28. When you fill that pen you have to unscrew it near the pen? A. Yes.

XQ29. Then when you screw it back if you don't screw it clear down, it leaks? A. Yes.

XQ30. Would not that be true of any pen? A. Of course if I don't screw it tight, but I am strong enough to screw it pretty tight.

XQ31. Do you swear they charged you $1.25 for that pen? A. Yes, I can swear.

XQ32. Do you know who sold it to you? A. I don't know the gentleman personally.

2201

XQ33. Do you know the name of the place? A. No, I don't know the name of the place. I only know in that store there was a steam laundry in the rear. They have that place in the show window in the front.

XQ34. Didn't he tell you that the catalogue retail price of that pen was $1? A. No.

XQ35. He sold it to you for $1.25? A. Yes.

XQ36. And you don't know his name? A. No.

XQ37. And you don't know what man waited on you? A. No.

XQ38. You cannot exactly tell where the place was? A. I could not exactly say the number but if I would go there today I could find out easy where it is.

2202

XQ39. Well, I advise you to go there and get 25 cents back?

By Mr. Raymond:

Q40. Didn't I see some ink on your fingers where you were handling that pen? A. Yes.

By Mr. Bacon:

XQ41. You just unscrewed it didn't you? A. No, I didn't unscrew it. I just opened it a little bit.

XQ42. Opened it? A. No, I didn't open it. Just rubbed it.

XQ43. How long did they take in fixing it yesterday? A. It didn't take a minute. He didn't do anything with it. He only took some tissue paper and rubbed it.

XQ44. And screwed it on a little tighter? A. Yes.

XQ45. In other words, when you filled the pen— A. I could not say exactly whether they screwed it tighter.

XQ46. When you filled the pen you did not screw it down tight, is not that all there was to it? A. No, I don't believe so. I believe I am strong enough to screw it tight enough.

XQ47. Are you a German? A. Yes.

XQ48. What part of Germany do you come from? A. Saxonia. 2204

XQ49. How long have you been here? A. Five years.

XQ50. You understand English very imperfectly? A. I understand perfectly. I cannot speak very perfectly.

By Mr. Raymond:

Q51. Are you here in answer to a subpoena? A. Yes.

Q52. Is this the paper that you received (showing witness the paper)? A. That is the paper that I received.

Q53. And with that paper you received $2.10. A. $2.10.

Plaintiff's counsel offers in evidence the subpoena above referred to.

Marked Plaintiff's Exhibit 120.

Mr. Bacon: I object to cumbering the record with the subpoena. 2205

Deposition closed.

Signature waived.

FREDERICK BRICE IRVINE, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Raymond:

Q1. What is your name, residence and occupation? A. Frederick Brice Irvine; Hotel Narragansett; Civil and Mining Engineer.

2206 *Frederick Brice Irvine*

Q2. Are you here today in response to a subpoena? A. I am.

Q3. Will you state in your own words when, where and how you bought a fountain pen in Mexico City? A. The latter part of February of this year I was in Mexico City. I went into a stationery store on Avenue Sixteenth of September; that is one of the principal business streets there; about five or six doors from the American Club. In the direction of the Porters Hotel. It was an American stationery store. I asked the clerk for a Waterman pen. He showed and recommended to me a pen, a new patent, the name of which I do not remember. I
2207 repeated to him that I wanted a Waterman pen and he showed me several pens which I supposed were regulation Waterman pens, one of which I purchased. Here is the pen (producing a pen).

Q4. How is that pen marked? A. The pen is marked A. A. Waterman & Co., New York. "Automatic Self-Filling Modern."

Q5. Did you see the name on the pen at the time you purchased it? A. Yes, I saw the name Waterman on it.

Q6. How had you gained your knowledge of Waterman pens prior to this time; how familiar were you with the store on Broadway and Cortlandt Street? A. I had been there previously.

Q7. Did you at the time you purchased this pen in Mexico City think that you were buying a pen of the same manufacture
2208 as those that were sold at Broadway and Cortlandt Street? A. Yes.

Q8. What did you do when you came back to the United States? A. This pen is a self-filling pen and I went into the store there and asked them how it should be operated to the best advantage.

Q9. You went in thinking it was a pen of their manufacture? A. I did.

Q10. When did you go into the store? A. About three days ago.

CROSS-EXAMINATION by Mr. Bacon:

XQ11. How long have you had the pen? A. Since the latter part of February.

XQ12. Do you like it? A. I don't think I would buy another one of the same design.

XQ13. You have not had trouble with it? A. No particular trouble.

XQ14. It writes well? A. Yes, it writes well.

XQ15. And is easy to fill? A. Yes, it is easy to fill.

XQ16. Nice and clean, no ink in the joints, under the fingers? A. No. 2210

XQ17. No complaint to make at all? A. The pen operates satisfactorily in a way but the reason that I buy a Waterman pen is I know exactly what they are, the Waterman Ideal Pen; I know exactly what they are and I know they will be repaired at a very moderate rate if I break them.

XQ18. And they will not repair one of the other? A. I would not know where to go for it.

XQ19. And that is the only reason that you would not buy another? A. I know what the Waterman pen is and I do not know what this pen is.

XQ20. You have used it some months? A. Some months.

XQ21. You have carried it all the time? A. No.

XQ22. How long did you say you had had it? A. Since the latter part of February. 2211

XQ23. Of this year? A. This year.

XQ24. It never has given you any trouble at all? A. It did not seem to me that this pen held very much ink and I did not know whether I was filling it properly. In other words, it seemed to run dry very quickly. That was the reason I went into the Waterman store and asked to get the reservoir full.

XQ25. What did they tell you? A. They said it was not one of their pens.

XQ26. And they would not tell you how to screw that knob on the end? A. Yes, they did tell me and they filled the pen for me.

XQ27. And you are a civil engineer and you needed instructions as to how to fill a pen like that? A. Yes.

XQ28. Didn't they show you in Mexico City? A. I filled the pen in the office where I bought it.

XQ29. He did not show you how? A. He showed me how to turn it to the full extent of the spring but it did not seem to me that the reservoir lasted as long as it should.

XQ30. You don't know the name of the man that sold it to you? A. No.

XQ31. He told you it was an A. A. Waterman, didn't he? A. No, he told me it was a Waterman pen.

2213 XQ32. You said that you read the name on the barrel? A. I glanced at it. I saw the name Waterman. That was enough for me.

XQ33. You read English very well. You saw A. A. Waterman there? A. Undoubtedly.

XQ34. When you bought it? A. Yes.

XQ35. You knew that there was an Ideal? A. No, I didn't know that there were two; I never heard of it until I bought this pen.

XQ36. Are you willing to swear that he did not tell you that he was selling the A. A. Waterman pens? A. No, I would not swear to that.

XQ37. He might have told you? A. Might have told me.

2214 XQ38. How did you come to testify here? A. I came to testify in this way. I took this pen in here to learn whether I was using it to its highest efficiency or not, and they at once told me it was not one of their pens and asked me if I would testify.

XQ39. You don't know whether they had L. E. Waterman pens in Mexico City in this store or not, do you? A. No, I don't know.

XQ40. How old are you? A. Thirty-one.

Signature waived.

It is stipulated that the signatures of all the witnesses are waived unless other wise noted on the record.

Rebuttal 2215

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

vs.

MODERN PEN COMPANY,
Defendant. 2216

Testimony taken for final hearing on behalf of the plaintiff, in rebuttal, before Frederick M. Adams, an Examiner of this Court, on the 22nd day of April, 1911, at 11 o'clock in the forenoon, pursuant to notice hereto annexed.

Appearances:

Samuel S. Watson and Walter B. Raymond, for Plaintiff.
Alexander S. Bacon, for Defendant.

WALTER B. RAYMOND, a witness produced on behalf of the plaintiff, having been heretofore duly sworn, deposes as follows: 2217

Direct-examination by Mr. Watson:

Q1. Did you have any conversation with Asa A. Spear regarding the sale of any property of A. A. Waterman & Co., Frazer & Geyer Company, or the Modern Pen Company, or any of them? A. I did.

Q2. Did you hear the testimony of Mr. Spear in this case on behalf of the defendant? A. I did.

Q3. Did you represent or say to Mr. Spear in that conversation that you represented the L. E. Waterman Company? A. No, sir.

2218 *Walter B. Raymond*

Q4. What was said, if anything, in any conversation with Mr. Spear regarding the parties to the negotiation? A. We had draft contracts, and those draft contracts stated who we represented. I only stated, if I stated at all who I represented, I represented the Aiken-Lambert Company and the proposed Modern Pen Company of New York.

Q5. Did you represent the L. E. Waterman Company in those negotiations? A. No, sir, I did not.

CROSS-EXAMINATION by Mr. Bacon:

2219 XQ6. With whom did you first have any conversation with reference to the proposed negotiation for the purchase of A. A. Waterman Co.'s assets and name, representing the L. E. Waterman Co., or any one else; give us the name of the individual? A. The only person I ever talked to at all about the matter was Mr. Watson. I never discussed the purchase of the name with him at all.

XQ7. Did you ever talk with Mr. F. D. Waterman? A. Yes, I had a talk with Mr. Waterman.

XQ8. With relation to this purchase? A. Somewhat in relation to it, yes.

XQ9. What was that conversation? A. I told Mr. Waterman that I would not have anything to do with the negotiations in any manner, shape or form, if there were to be any negotia-
2220 tions they would have to be outside of me.

XQ10. That was in that year? A. Well, I do not know, I think that was way back in 1906 or 1907, when the matter was first broached.

XQ11. These draft contracts in evidence were prepared by Mr. Watson? A. Yes, sir.

XQ12. And there was not then and never has been any Modern Pen Company of New York? A. I do not know of any.

XQ13. And that was simply the name of a dummy corporation that was to be organized for the purpose of taking over those businesses? A. No, not a dummy corporation, a corporation.

XQ14. A mythical corporation not yet organized? A. No, not a mythical corporation, a proposed corporation.

XQ15. And who was to take the stock of that corporation? A. I do not know, it never got to that point.

XQ16. There is no question, is there, that the same people who owned L. E. Waterman Company also owned Aiken-Lambert Company at that time? A. No, sir, there are outside interests in Aiken-Lambert Company and there are not in the L. E. Waterman Company.

XQ17. Are there any outsiders except those who hold stock for the purposes of qualifying them as directors? A. Yes, I believe there is.

2222

XQ18. You are not certain of that? A. No, I never was an officer or director of the Aiken-Lambert Company and never had anything to do with its internal management. It has always been my understanding that there were outside interests in that, directly or indirectly.

XQ19. You have never represented the Aiken-Lambert Company? A. Yes, I have represented them, a lot of work for them.

XQ20. Are not the stockholders of the L. E. Waterman Company substantially the same as the Aiken-Lambert Company? A. No, sir.

XQ21. How much difference is there? A. I cannot tell you, I have not the stock books, but I know there are stockholders in the Aiken-Lambert Company that were not stockholders in the L. E. Waterman Company.

2223

XQ22. Are not their interests nominal? A. No, sir.

XQ23. Will you swear they are real, substantial interests? A. Yes.

XQ24. How much of the stock of the Aiken-Lambert Company is owned by the L. E. Waterman Company? A. I cannot tell you.

XQ25. A majority? A. I do not know.

XQ26. Some? A. I think so, I am not positive of it; I have not the books.

XQ27. Have you ever seen the books? A. No, I do not think I ever saw the books.

XQ28. Did Mr. Waterman or Mr. Ferris of the L. E. Waterman Company ever speak to you about the desirability of making this purchase? A. Why, at one time they spoke to me, that they were in the market to buy a lot of machinery for the Aiken-Lambert Company and about the same time some parties connected with the Modern Pen Company stated that they had a lot of machinery for sale. That is the way the negotiations arose in the first place, simply on a machinery basis.

XQ29. Nothing was said at any time about buying the name of the A. A. Waterman Company? A. No, sir.

2225

XQ30. You are sure of that? A. Yes, sir. It was mentioned at one time, but I took the position they did not have any trade name to sell.

XQ31. Who mentioned it? A. Mr. I. E. Chapman.

XQ32. Well, then, why did Mr. Watson put into each one of these draft agreements a very noticeable statement that they were to convey the name of A. A. Waterman & Co., and that they were entitled to use it? A. As I recollect that, Colonel, it came to a point where they wanted to throw in everything that they had in this proposed sale of the machinery, and Mr. Watson simply put in everything they had or claimed any right to so there would be no question as to what was conveyed.

XQ33. At that time did not the Aiken-Lambert Company

2226

have a full complement of machinery? A. No, sir, it did not.

XQ34. Did they want to buy some old second-hand machinery? A. It was not represented as old second-hand machinery.

XQ35. They did not care anything for the patents? A. Well, the patents were included, as I understand it, in those proposed contracts.

XQ36. They wanted nothing but machinery? A. The machinery was what they were after, yes, sir.

XQ37. Do you remember that they began to manufacture on one of the A. A. Waterman Co. patents, and that there was some correspondence between me and the L. E. Waterman people on that point?

Mr. Watson: Objected to.

A. I did not know anything of that.

XQ38. Didn't you know that they gave as an excuse for violating one of our patents that they expected to be the owner of it under those negotiations?

Mr. Watson: Objected to as not the evidence.

A. I did not know anything of that, Colonel. I never saw that correspondence until a long time afterwards; I did not know anything of it at all.

XQ39. What persons representing the defendant did you talk with? A. Mr. Spear, I. E. Chapman and W. L. Chapman. 2228

XQ40. Any one else? A. No, I do not think so.

XQ41. What persons representing the plaintiff did you talk with? A. I did not talk to anybody as representing the plaintiff.

XQ42. Did you talk with Mr. Watson? A. I spoke to Mr. Watson.

XQ43. Who else, what other individuals? A. I think Mr. Ferris spoke to me about it.

XQ44. What did he say? A. I do not recall, except it was something about wanting to look at the machinery, or something of that kind.

XQ45. Is there more than one Waterman connected with the plaintiff? A. Yes, sir. 2229

XQ46. What are their names? A. Well, there is F. D. Waterman, president, there is Lewis E. Waterman, the vice-president, there is Fred S. Waterman, I think he is assistant treasurer there now.

XQ47. What relationships do they bear to one another? A. F. D. Waterman and Fred S. Waterman are brothers and nephews of Lewis E. Waterman, the founder of the company, and cousins of Lewis E. Waterman, the vice-president of the company, who was a son of the founder of the company. There is Mrs. Waterman, Mrs. Sarah D. Waterman.

XQ48. The widow? A. She is the widow.

2230

XQ49. Which one of these Watermans did you talk with? A. I talked with Mr. F. D. Waterman, I think that is all. I think L. E. Waterman, or Junior, as they call him, said something at one time about it, but he is on the road most of the time.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ50. In your talks with Mr. Ferris, was he representing the L. E. Waterman Company, or the Aiken-Lambert Company? A. The talks were solely in reference to supplying the Aiken-Lambert Company with machinery.

2231

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ51. What was the exact conversation about that? A. Why, he said they had taken over, that he was interested in this Aiken-Lambert Company, I think he said he was their manager, and that they were talking over a new line of pens, going to make a new line of pens, and that they were going to enlarge the old Aiken-Lambert factory and put out this line of cheap pens and put them out very extensively, and that they wanted a lot of machinery to do it.

RXQ52. Was anything said about machinery for Canada? A. No, not at that time.

2232

RXQ53. At any time? A. I think at one time there was some talk about buying machinery for another company up in Canada.

RXQ54. The L. E. Waterman Company, Limited? A. The L. E. Waterman Company, Limited.

RXQ55. And they did not know where they wanted this machinery for, is that it? A. No, those were two distinct times, Colonel, a year or so apart. First off it was solely on the Aiken-Lambert Company.

RXQ56. When did the L. E. Waterman people take over the Aiken-Lambert Company? A. You have got me on dates; I think it was sometime between 1906 and 1908, somwhere around in there.

RXQ57. When did they institute their Canadian factory? A. I do not know.

Deposition closed.

Signature waived.

SAMUEL S. WATSON, a witness called on behalf of the plaintiff, being duly sworn, deposes as follows:

Direct-examination by Mr. Raymond:

2234

Q1. Please state your name, age, residence and occupation? A. My name is Samuel S. Watson, and I live in New York City, and I am attorney for the plaintiff herein, and am a practising lawyer.

Q2. Did you ever have any conversation with Mr. Ward D. Williams? A. Yes.

Q3. Did you hear the testimony of Mr. Ward D. Williams at yesterday's hearing in this case? A. Yes, sir.

Q4. Now, will you state in your own words as nearly as you can, the conversations which you had with Mr. Williams? A. I could only state in substance the conversations at this time. I did not recognize Mr. Williams when I first saw him yesterday on the stand, although I recall the interview. I did not recognize the man; I think he must have changed considerably since then. He came here with the drafts of the contracts which had been prepared and the talk was as to the terms of the transfer that was being discussed, largely pertaining to the form of the contract.

2235

Q5. Did you at any time tell him whom you represented? A. The drafts of the contracts that he had showed the parties, and I remember no conversation as to who I represented, or that that matter was discussed at all.

Q6. Did you tell him that you represented the L. E. Waterman Company, or the Watermans, and that they were purchas-

2236

ing property that was described in the contract? A. I am sure I did not, because that was not the fact.

Mr. Bacon: I ask that the cross-examination be suspended until some future hearing, as I have certain exhibits that I want to produce.

Adjourned to Tuesday, April 25, 1911, at 11 A. M.

UNITED STATES CIRCUIT COURT,

2237

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY, Plaintiff,

vs.

MODERN PEN COMPANY, Defendant.

Met pursuant to adjournment at the office of Watson & Ray-
2238 mond, 10 Wall Street, New York, April 26, 1911, at 11 A. M.

Appearances:

Samuel S. Watson and Walter B. Raymond, for Plaintiff.
Alexander S. Bacon, for Defendant.

SAMUEL S. WATSON, resumes the stand.

Cross-examination by Mr. Bacon:

XQ7. Is it not a fact that the name Aiken-Lambert was not introduced into these negotiations for the purchase, until about

December, 1908? A. I could not say when the name actually came out, Aiken-Lambert; I don't remember.

XQ8. The negotiations began early in 1907, did they not? A. They began and were, you might say, immediately broken off. The negotiations—by reference to my letter, to refresh my recollection—began, as far as my personal knowledge of them is concerned, with these letters which I had here at my office in April, 1907, with Isaac E. Chapman.

XQ9. Then they were immediately broken off, were they? A. Yes.

XQ10. And renewed again in 1908, when this correspondence took place, already in evidence? A. There may have been something in between, but I do not recall just what happened. There 2240
was correspondence; the two letters were written by me, copies of which I now produce, to Isaac E. Chapman, and mailed to him in due course, April 18, 1907, and April 20, 1907. I do not recall that there was any negotiation after that for some time, although there may have been.

XQ11. Did you submit this paper, containing three options, for the payment of the purchase price on this attempted purchase (showing witness the paper)? A. I don't remember whether I did or not. I do not remember doing it. I may have done it.

XQ12. Such an option must have come from you; it could not have come from us, could it? A. As to that I don't know. I have no recollection now of ever seeing any of this stuff before. I have seen these printed certificates but not in connection 2241
with this matter. I know that there was talk about what we call credit certificates. I do not recall that paper.

XQ13. Do you remember the substance of the paper, that it contained three options, to wit, by cash February 1, 1908, $10,000; by note due May 1, 1908, $5,000; by note due August 1, 1908, $10,000; with a 60 day renewal privilege, 5 per cent interest during such period. Was there any such option as that? A. Not that I know of. There was never at any time any option that I ever heard of. The fact is that the parties never got to a point of agreement at all, as far as I know. All of the propositions or negotiations, or whatever you choose to call it,

were tentative and never at any time reached what would be called an option or an agreement to that effect.

XQ14. Was there a second option, as follows: "Or pay the amount of A. L. Company's certificates;" followed by a copy of Aiken-Lambert Company's blank certificates such as I now show you (handing witness a paper)? A. I don't know that I understand what you mean by an option. Do you mean that that was the option that was given to me to submit to my client or do you mean an option, an offer, on the part of my clients to buy?

XQ15. I mean according to this paper there were three options submitted by you to the Chapmans; one, cash and notes
2243 as already read; two, payment in Aiken-Lambert Company's certificates; three, payment in A. A. Weekes-Hoskins Company, Broadway, New York, preferred seven per cent stock? A. In answer to that I can say that there was never any option or definite offer made by me at any time; that the offers, so-called, were merely tentative propositions to see if a ground could be agreed upon; that they were all tentative and never had been agreed to by anybody, but were merely bases for negotiations which I hoped would result in some agreement. No agreement was ever reached.

XQ16. Do you know the fact that F. D. Waterman presented this paper to Mr. Chapman, containing three options; one, cash and note; two, Aiken-Lambert's certificates; three, payment of
2244 A. A. Weekes-Hoskins Co. preferred seven per cent stock? A. I have no personal knowledge of it at all.

XQ17. Is it not a fact that an offer of $25,000 was agreed upon and then it came to be simply a question of how this should be paid, either in cash and notes, in Aiken-Lambert's certificates or A. A. Weekes-Hoskins Co. preferred seven per cent stock? A. No, I don't think that there was any agreement or offer of the nature you mention. There was an understanding between Mr. W. L. Chapman and myself that that price would be agreeable to him and that he was going to secure the assent of the sellers and that I told him that I did feel reasonably positive

that I would be able to secure the consent of the buyer, but that is as far as that proposition ever got.

XQ18. Don't you remember that Mr. Chapman rejected the tender of Aiken-Lambert's certificates and of A. A. Weekes-Hoskins Company preferred stock? A. They never accepted it; that is true. I don't say they rejected it. There was a good deal of talk about the thing and about all these things. That negotiation extended over a long period of time. There were a good many talks and tentative offers, if you choose to put it that way, and talk about various ways of paying or taking over the property, but there was never any agreement reached by any of the parties. 2246

XQ19. Is it not a fact that A. A. Weekes-Hoskins Co. failed shortly after this offer was rejected? A. As to that I do not know. I think they failed some time, but when or how long after, I do not know. I have no personal knowledge of when they failed or that they actually failed, if at all.

XQ20. Will you tell us about the strike that is now going on in the factory of the L. E. Waterman Company; is it a strike for higher wages? A. It is the first time that I have heard that there was any strike. You surprise me to say that there is one.

XQ21. Don't you know that there has been a strike going on for some little time? A. I never have heard of it before.

XQ22. Were you aware of the fact that Mr. F. D. Waterman swore to a complaint in Milan, Italy, wherein he stated that 2247 there was no such firm doing business in New York as A. A. Waterman & Co.? A. No.

XQ23. You knew there was such a firm, didn't you? A. I have no personal knowledge except what I have learned in this suit, as to the actual existence of the firm. I have never been in their place. I have never seen their sign. I have heard that there was such a firm, yes.

Mr. Bacon: I call for the production of checks signed Aiken-Lambert by Mr. F. D. Waterman, treasurer, to the order of A. A. Waterman & Co.; dated April 17, 1907,

May 10, 1907, July 26, 1907, October 5, 1907, October 30, 1907, February 7, 1908, July 8, 1908, March 19, 1909, September 11, 1909, April 14, 1909,—on or about those dates.

A. Those checks are not in my control or in the control of the plaintiff.

XQ24. Is not the Aiken-Lambert Company in the control of the plaintiff? A. It is a separate corporation.

XQ25. Does it not own a majority of its stock? A. I think it does, directly or indirectly. As to that I have no personal knowledge.

2249 XQ26. And does it not have substantially the same officers in the L. E. Waterman Company and Aiken-Lambert Company? A. No, I think not. There are five directors in the L. E. Waterman Company and I think there are seven directors in the Aiken-Lambert Company. There are only two of those persons that hold office in both companies.

XQ27. F. D. Waterman is an officer in both? A. Yes.

XQ28. And Mr. Ferris is an officer in both? A. I am not sure about Mr. F. D. Waterman, but I believe he is. He has been, but whether he is at present or not I don't know.

XQ29. Mr. Ferris is an officer in both? A. I believe he is, yes.

Deposition closed.

2250 Signature waived.

Mr. Raymond: I offer in evidence the two letters referred to by Mr. Watson, dated April 18th, 1907, and April 20th, 1907, addressed I. E. Chapman. These letters were duly mailed and stamped in a sealed envelope addressed to I. E. Chapman, Whitehall Building, New York.

Mr. Bacon. Objected to as immaterial and irrelevant, not having been received.

Marked Plaintiff's Exhibit No. 142.

Plaintiff's Exhibit 142 2251

Mr. Bacon: I waive objection to the competency of the circulars or any other matter that is contained in the printed book.

The following are the letters referred to by Mr. Watson, in his deposition:

Exhibit 142.

(Letter-head of Watson & Raymond.) 2252

New York, April 18 1907.

I. E. Chapman, Esq.,
Whitehall Building,
New York, N. Y.

Dear Mr. Chapman:

Pursuant to your request the writer has taken up the matter of the Modern Pen Company and A. A. Waterman & Co. with our clients and the matter has been carefully considered at length, and we regret to report to you that there appears to be no prospect whatever of effecting any arrangement. Our clients state to us that the conclusion of their consideration of this matter is that they cannot now use the above mentioned concerns with advantage; they state to us that they might use the 2253
tools and machinery but could not use to advantage any other property of the concerns, and that if you desire to dispose of the tools and machinery alone they would be willing to consider their purchase; the balance of the property of the two concerns do not appear to interest them at all.

We are of the opinion therefore that unless you care to dispose of the tools and machinery alone that further negotiations would be useless.

Very truly yours,
WATSON & RAYMOND.

SSW/AL

2254

(Letter-head of Watson & Raymond.)

New York, April 20, 1907.

I. E. Chapman, Esq.,
Whitehall Building,
New York, N. Y.

Dear Mr. Chapman:

Since my conversation with you over the telephone last evening, I have earnestly thought over the matter of the Modern Pen Company and A. A. Waterman & Co., and am at a considerable
2255 loss to know just how to re-open the negotiation, in as much as our clients expressed themselves quite positively that the matter did not interest them. Upon inquiry we find that the memoranda formerly furnished us respecting the assets of the two above mentioned concerns have either been mislaid or lost. If you would furnish us with another memorandum showing the approximate assets of the concerns and indicate the basis on which you are prepared to deal, this would pave the way to re-opening negotiations.

Yours truly,
SAMUEL S. WATSON.

SSW/LS

2256

WILLIAM I. FERRIS, recalled on behalf of the plaintiff:

Direct-examination by Mr. Watson:

Q1. You have testified that you have charge of the pen factory of the plaintiff? A. I do.

Q2. What kind of iridium does the plaintiff use in the manufacture of its gold pens? A. Native, hard iridium.

Q3. Have you never used what is commonly called in the market or in the trade soft iridium? A. We have not.

Q4. When you have purchased pens from other factories were these pens always made under your supervision or direction? A. They were.

Q5. And what kind of iridium did you have used in the manufacture of pens which you obtained from outside factories? A. We always insisted on hard points.

Q6. Hard iridium points? A. Hard iridium points.

CROSS-EXAMINATION by Mr. Bacon:

XQ7. Do you mean to say, Mr. Ferris, that your pens that sell for $2.50 have never been pointed with manufactured or soft iridium? A. I do. 2258

XQ8. All through the years? A. Yes.

XQ9. Do you mean to say that you have got in your whole factory including Aiken-Lambert and the L. E. Waterman forces, half a dozen grinders who are competent to grind native iridium? A. I do.

XQ10. How many such grinders have you? A. All of them.

XQ11. How many of them are there? A. Seventy grinders; I think in the neighborhood of seventy grinders altogether.

XQ12. Is it not a fact that some of those grinders are very young men and boys? A. Some of them are young men.

XQ13. Some of them are girls? A. No.

XQ14. Some of them would be called grinders? A. Some apprentices. 2259

XQ15. How many of them are apprentices? A. At the present time very few that have not been at the business for several years. I may add that any pens that are ground or worked on by apprentices are always inspected by the older or experienced pen makers.

XQ16. How long have you been manufacturing pen points at all—the L. E. Waterman Company? A. Making gold pens?

XQ17. Making gold pens? A. About ten or eleven years.

XQ18. Do you mean to say that you still make all of the gold pens that you use in your fountain pens? A. No, as I previously testified, we have some made outside.

2260 *William I. Ferris*

XQ19. By whom? A. A few made by M. T. Horn and a few made by Fairchild.

XQ20. Anybody else? A. Not at the present time.

XQ21. How long ago did you have your gold pens made by other people than those just named? A. We discontinued entirely in the last year or two; and for the previous years we gradually grew less until there are only a very few made later.

XQ22. By whom were they made? A. Some made by Mabie, Todd & Bard, and some by Armeny & Marion.

XQ23. Are those the only people that you buy from? A. Yes, those are the only people I recall.

XQ24. There is a strike now going on in your factory? A. 2261 No.

XQ25. There has been very recently? A. Not in the gold pen factory.

XQ26. In the fountain pen factory? A. A little in the assembling department.

XQ27. Is that now going on?

Mr. Watson: Objected to as immaterial to any issue in this case.

A. No, sir.

XQ28. The strike is now on? A. No, sir.

XQ29. When did it stop? A. Some of the young men that were connected with the work left and they came back in three 2262 or four days at the most; some of them were away; there were one or two that we did not care to take back.

XQ30. How long ago was this? A. It all occurred in the past week.

XQ31. How many do you have in your assembling department? A. In what we call the assembling department. I think there are in the neighborhood of forty people altogether. That is, they do various things in connection with assembling.

XQ32. Some of them are girls? A. They do the labeling.

XQ33. Some of them are boys or very young men? A. No young men men under sixteen years of age.

XQ34. How many between sixteen and twenty-one? A. I cannot tell.

XQ35. About?

Mr. Watson: Objected to as entirely immaterial to any issue in this case and the counsel for plaintiff moves to strike out all this testimony as unnecessarily padding the record.

A. There may be a dozen or more. A great many of them are errand boys and do miscellaneous work about the room.

XQ36. How many of the assemblers are expert men who make, say $25 a week, or upwards? 2264

Mr. Watson: The same objections.

A. All of them are experts that finally pass on the pens.

XQ37. How many of these sixty or seventy assemblers are experts who make $25 a week, or upwards? A. Not sixty or seventy assemblers.

XQ38. How many assemblers are there? A. I believe I stated in the neighborhood of forty in the room altogether, in the assembling room.

XQ39. How many assemblers?

Mr. Watson: The same objection and motion.

XQ40. How many expert assemblers who make $25 a week or upwards? A. I do not say that there are any. 2265

XQ41. How many are expert assemblers? A. All of them that finally pass on pens.

XQ42. How many are they? A. I should say a dozen or fifteen.

XQ43. And all the rest of them are denominated non-experts, are they, of those forty? A. No, they are experts in assembling, but the more skilled, or the ones that work in the department that we call the inspection department, they finally pass on pens so that there is no possible chance of any going out that are not in first class shape.

XQ44. How many in the so-called inspection department? A. In the neighborhood of a dozen.

XQ45. Did you know as a fact that Mr. F. D. Waterman swore to the complaint in Milan, Italy, that there was not any such firm doing business in New York as A. A. Waterman & Co.? A. I do not.

XQ46. You do know that there is such a firm? A. It is the defendant in this case.

XQ47. You have known that for many years, have you not? A. I have known of the existence of the name, but understand that there have been many changes one way and another in the firm.

2267 XQ48. Don't you know that Mr. F. D. Waterman, in 1907 to 1910, as Treasurer of the Aiken-Lambert Company, sent a dozen or more checks to the order of A. A. Waterman & Co.? A. I do not.

XQ49. Don't you know of any such checks? A. Not to my personal knowledge.

XQ50. Have you ever heard of them? A. The A. A. Waterman & Co.?

XQ51. Yes, checks to the order of A. A. Waterman & Co., signed by F. D. Waterman? A. I don't know whether I have; may be possibly that it has happened though. I believe they have had some repairs which may have been sent to them.

XQ52. These were checks for repairs? A. I don't know as
2268 to that. It is possible.

XQ53. How many floors of your factory are devoted to the manufacture of gold pens by the L. E. Waterman Company? A. Three floors in the pen making proper and a four floor in the assembling.

XQ54. Is that devoted exclusively to L. E. Waterman work or in part to Aiken-Lambert Co. work? A. There may be some nibs made for Aiken-Lambert.

XQ55. Do the Aiken-Lambert Company make any nibs there at your factory? A. Not now.

XQ56. Then that is a joint factory of Aiken-Lambert and L. E. Waterman Company? A. No, it is the factory of L. E. Waterman Company.

XQ57. Do Aiken-Lambert Company have any factory of any kind outside of this factory that you call L. E. Waterman's? A. They have a rubber factory and a pencil factory.

XQ58. What do they make in the rubber factory? A. They make rubber holders that they use.

XQ59. But everything else that they make they make in your factory? A. I don't understand just what you mean by that.

XQ60. What do they manufacture? A. They make fountain pens. Do you mean the whole manufacture?

XQ61. Yes? A. They manufacture the rubber holders, the mountings, silver pencils, novelties, etc.

XQ62. Where are the novelties made? A. Made in their 2270
pencil factory.

XQ63. Where are the Aiken-Lambert gold pens made? A. Some of them are made in our factory, the Waterman factory. I believe they have some made outside.

XQ64. Do you make a good many pens in the Waterman factory that are not marked Waterman or Ideal? A. Very few.

XQ65. How are they marked? A. Some are marked for the Aiken-Lambert Company with their name.

XQ66. Any other name? A. There may possibly be some other name. Some pens are stamped "14 karat."

XQ67. Then the Aiken-Lambert Company has gone out of the pen point business? A. The manufacture of gold pens. 2271

XQ68. They have gone out of that business? When did they go out? A. Last year, 1910.

XQ69. They had been gradually giving up their manufacture of gold pens some time before that A. No, their factory continued on about the same that it had for several years.

XQ70. Did you in 1909, as manager of the Aiken-Lambert Company, have any intention of increasing the plant of the Aiken-Lambert Company with more machinery, for the making of gold pens? A. Not to my recollection.

XQ71. Did you during the year 1908? A. In the early years when I had charge of the factory we increased it over what it had been running for years previous to that.

2272 *William I. Ferris*

XQ72. When was that? A. That is three or four years ago.

XQ73. You did not have any such intention in 1907, 1908 and 1909? A. I think 1907 would be about the early part of it.

XQ74. Did you have any such intention in 1908? A. The condition was about the same. Most of this change was made when I was first connected with it.

XQ75. When was that? A. The first year. I think it dates three or four years back.

XQ76. Can you tell whether it was as early as January, 1907, when you first went there? A. I cannot state definitely as to that.

2273 XQ77. As late as December, 1908, did you want any more machinery for Aiken-Lambert? A. Not for the gold pen department.

XQ78. Did you want more machinery in December, 1908, for the pen holder department, manufacturing rubber holders? A. It is possible we could use more then.

XQ79. Did you as a representative of Aiken-Lambert attempt to buy machinery for the manufacture of gold pens or rubber holders, owned by the Modern Pen Company or A. A. Waterman & Co., in December, 1908? A. I don't remember the exact date. I remember of looking at their machinery.

XQ80. What was that to be used for,—the Aiken-Lambert factory? A. In connection with our Canadian factory.

2274 XQ81. And not Aiken-Lambert? A. Not principally. We might have used a very little of it there.

XQ82. But you did not want it very much did you—that machinery? A. We could have used it at the time.

XQ83. You could use it now or at any time couldn't you? A. I don't know. We don't have need for it. We store it but that is not putting it to a good use.

XQ84. Is it not a fact that in December, 1908, you did not have any particular use for an increased amount of machinery either in the manufacture of gold pens or holders? A. I don't recollect the exact time. There was a time when we could use machinery in connection with our Canadian plant but as to that

being the exact date, I don't just remember without looking it up.

XQ85. But you did not want any for the New York plant, either L. E. Waterman Co. or Aiken-Lambert? A. Very little.

XQ86. Did you have anything to do with the negotiations for the purchase of the Modern Pen Company and A. A. Waterman & Co.? A. I looked at the work.

XQ87. And you consulted with Mr. F. D. Waterman? A. At his suggestion I went there and looked it over.

XQ88. Did you have any talk with Mr. Watson? A. I believe I did.

XQ89. Is it not a fact that what you wanted was the trade name more than you did the machinery? A. No, that would have been of no use to us. 2276

XQ90. Didn't you start to manufacture pens under one of our patents and then discontinue it when we called your attention to it, stating that you expected to become an owner or licensee? A. I don't recollect anything of the kind.

XQ91. Is it not a fact that what you wanted to do was to buy the trade name so as to have the name Waterman all to yourself? A. No, we had the name Waterman before.

XQ92. Was not that one of the principal assets that you were buying, or attempting to buy? A. No, we were interested, as I said before, in the machinery to use in connection with our Canadian plant, principally.

XQ93. Was there any Modern Pen Company of New York organized in connection with the Canadian plant? A. Not to my knowledge. 2277

XQ94. Did Aiken-Lambert have anything to do with the Canadian plant? A. No.

Mr. Watson: I move to strike out all the testimony in regard to the plant and all that sort of thing as having no connection with the issues in this case.

2278 *William I. Ferris*

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ95. How many employees has the L. E. Waterman Company in its factory at 40 Fletcher Street? A. You mean the gold pen factory?

RDQ96. (Question is repeated.) A. In the neighborhood of 150 or 175 people, to my recollection.

RDQ97. About how many employees are engaged in the manufacture of the rubber parts of fountain pens in the factory at Seymour? A. I believe there are over two hundred.

RDQ98. How many employees have you at the main office, 173 Broadway, New York? A. Some 175 to 200.

2279 RDQ99. Do you have branch stores at Boston, Chicago and San Francisco? A. We do.

RDQ100. Is it not a fact that you had very little to do with these negotiations to which Colonel Bacon has referred in his cross-examination? A. My principal interest was in connection with the machinery as to how far and to what extent we could use it—make use of it.

RDQ101. Will you look at the pen points which I now show you and tell me the kind of iridium the pens are pointed with? I show you Defendant's Exhibit A-69? (The witness takes the pens to the window where he can get better light.) A. The pens are mutilated and in bad shape. One of them has only one point on and the iridium that is left on the pen shows indication of

2280 being tampered with in some way. It is pretty difficult to tell without testing them, just what condition they are in.

RDQ102. Do the pens look as if they had met with some accident or been repointed? A. They have met with an accident, or are mutilated; I will not say they have been repointed. They are in such condition that it is impossible to tell what grade of iridium is on the point without testing them.

RDQ103. Testing them in what way? A. On a lathe or by an oil stone or a file.

RDQ104. Can an expert tell the quality of iridium on the point of a gold pen with any certainty by merely examining them through a magnifying glass such as ordinarily used by pen

makers? A. It would be difficult to tell if the iridium had the polished or finished point—highly polished point. A certain grade of iridium which might not be very hard could be polished and given a lustre of the appearance of a hard point.

RDQ105. Have the color of a hard point? A. Have the color of a hard point.

RDQ106. From what you are able to judge of these pens, Defendant's Exhibit A-69, through a magnifying glass are you able to say or is anybody able to say whether the iridium is soft or hard? A. It would be difficult to tell. They might not be the very hardest iridium but they do not have the appearance of being what is known as soft iridium, on a certain grade of pens. 2282

RDQ107. Do you believe any expert could tell from an examination through a glass whether the pens Exhibit A-69 are hard or soft iridium? A. It is possible but I doubt it.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ108. You have not examined Exhibit A-69 through a microscope but simply with the naked eye? A. I used a glass.

RXQ109. Today? A. Yes.

RXQ110. That was a pocket glass that you had with you? A. Yes.

RXQ111. It was not the usual glass used by pen makers? A. Used by some. 2283

RXQ112. Have you ever ground pens? A. I have.

RXQ113. How much? A. More in an experimental way.

RXQ114. How many have you ever ground? A. I should say several dozen.

RXQ115. In how many years? A. Running through several years.

RXQ116. How many years? A. Since I have been interested in the manufacture; in the neighborhood of ten years.

RXQ117. You are not prepared to say that a man who is working eight hours a day for twenty-five dollars in grinding pen points and who examined A-69 through a large microscope,

brought in for the purpose, could not tell whether or not they were manufactured of hard iridium? A. I question whether he could tell if the points were finished points, with polish on them, whether they were hard or medium hard. In iridium there is very hard and what is called soft point iridium and there are intermediate hardnesses.

RXQ118. Soft iridium is what is called manufactured iridium, is it not? A. Commonly so but there are a great many pieces of soft iridium found in the native iridium.

RXQ119. You are not prepared to swear that the iridium on Exhibit A-69 is not manufactured iridium? A. It does not have that appearance.

2285 RXQ120. You are not willing to swear that it is not manufactured iridium? A. What do you mean by manufactured iridium?

RXQ121. Well, don't you know, you an expert pen maker? A. With different people, what one calls manufactured another calls something else.

RXQ122. I mean by manufactured iridium a mixture of native iridium and platinum so combined as to join the two metals? A. To make it soft?

RXQ123. I ask you the question. Is not that so-called manufactured iridium? A. I am not sure about that.

RXQ124. And is not the trade name of manufactured iridium this combination of hard iridium and platinum? A. Not nec-

2286 essarily. I have seen some of it as soft as platinum and it was a question whether it had very little iridium in if any at all.

RXQ125. If you wanted to buy manufactured iridium would not people who deal in it know what you mean if you ask for that? A. It is possible. We never use it, only I have seen samples of it.

RXQ126. Don't you know that that was manufactured or so-called soft iridium used on those very cheap 25 cent pens that you bought of A. A. Waterman & Co? A. I know the points were soft.

RXQ127. Don't you know it was manufactured iridium and manufactured according to the sample you submitted? A. I

do not. The sample as I recall it and tested it, was a hard point.

RXQ128. Did you get hard points? A. No, they were soft points.

RXQ129. And you did not expect to get the best quality of hard iridium on a 25 cent pen did you? A. We did when we submitted a sample of a hard point.

RXQ130. Is there hard iridium on the first sample that you sent down for a quotation? A. To my recollection I tested it and it was a hard point.

RXQ131. How did you test it? A. Tested it with an oil stone.

2288

RXQ132. Can you tell by testing on an oil stone the difference between manufactured and unmanufactured iridium? A. I can tell whether it is hard or soft.

RXQ133. Can you tell whether it is manufactured or native? A. It is possible, as I understand it, to make the manufactured hard.

RXQ134. By testing on a stone can you certainly determine whether the point is made from native iridium or manufactured iridium? A. I will not say as to that but I can tell whether it is a hard or soft point.

RXQ135. L. E. Waterman & Company do not sell to jobbers at all, do they? A. No, sir.

RXQ136. You sell through Mexico? A. We sell pens in Mexico.

2289

RXQ137. Do you sell them on consignment? A. I don't know as to that. I know we send pens there. As to the details of it I am not clear.

RXQ138. Your principal factory is in Fletcher Street? A. Yes.

RXQ139. And that is where you have about 150 or 175 employees? A. Yes.

RXQ140. And there you make ink? A. The Waterman Company does not make ink.

RXQ141. Do not some of those 150 or 175 employees make ink? A. No.

RXQ142. What are they employed in doing? A. All work in connection with the gold pens, assembling and various other work connected with the fountain pen holders.

RXQ143. The ink company is a subsidiary company, is it? A. No, it is an independent company.

RXQ144. And it has its factory in the same building? A. Yes.

RXQ145. Are any of those 150 employees used in turning barrels? A. No.

RXQ146. Do Aiken-Lambert Company turn any barrels in that factory? A. They have a room there.

RXQ147. Are they included in the 150 or 175? A. No.

2291 RXQ148. Is there an office force down there? A. No, not what we understand as an office force. There are three or four that attend to office work.

RXQ149. How many of that 150 are girls or women? A. I think about half a dozen.

RXQ150. How many are young men under twenty-one? A. That is pretty hard to tell. We have a good many people in the neighborhood of eighteen or twenty years old. We have a great many older.

RXQ151. Are one half of them under twenty-one? A. It is pretty hard to tell. I hardly think so.

RXQ152. A great many of them are employed in purely unskilled work, are they not? A. A great many are apprentices or

2292 have been, and do the work and it is all inspected afterwards by people that have served a long time at it, to see that the work is in proper shape before it is finally passed out of the manufacturing department.

RXQ153. How many of the 150 are experts who make $25 a week or upwards? A. I won't say that any of them make more than $25 a week, though there are a few.

RXQ154. About how many? A. There are some heads of the different departments that are paid more than $25 a week.

RXQ155. How many of them are paid more than $20 a week? A. There are quite a number.

2293

RXQ156. How many of this 150, about; I don't expect you to be accurate? A. I should say possibly a dozen to twenty. The great part of them are paid in the neighborhood of $20 a week.

RXQ157. The Messrs. Day at Seymour manufacture rubber cables and a great many things besides pens, do they? A. Not to my knowledge.

RXQ158. Don't you know that they manufacture other things besides penholders? A. I know they do not.

RXQ159. That is the only thing they manufacture? A. That is the only thing.

RXQ160. Who else do they manufacture for besides you? A. As I testified before, I think they make a few pens for Mr. Brown. I think that is practically all except a few rubber holders for gold dip pens.

2294

Deposition closed.

Signature waived.

JOHN SEILER, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Watson:

2295

Q1. Please state your name, place of residence and business? A. John Seiler; 976 East 9th Street, Brooklyn; gold pen maker.

Q2. You are employed by L. E. Waterman Company? A. Yes.

Q3. Foreman of the gold pen factory? A. Yes.

Q4. How long have you been employed by L. E. Waterman Company? A. Ten years.

Q5. And all this time you have been foreman of the gold pen factory? A. Yes.

Q6. How long have you been a gold pen maker? A. Twenty-nine years.

2296 *John Seiler*

Q7. Are you familiar with the iridium which is used by L. E. Waterman Company in manufacturing gold pens in their factory? A. Yes.

Q8. What kind of iridium is it that is used in the manufacture of gold pens in the L. E. Waterman Company's factory? A. Commercial iridium.

Q9. Is it hard or soft? A. Hard points.

Q10. Hard iridium? A. Yes.

Q11. Has that been a fact all the time that you have been employed by L. E. Waterman Company, that they have used hard iridium for their gold pen points? A. Yes.

2297 Q12. Have you ever known at any time any gold pens made in the L. E. Waterman Company factory which were made of anything but hard iridium points? A. No, sir.

CROSS-EXAMINATION by Mr. Bacon:

XQ13. How much do you pay for commercial iridium? A. I don't know. It averages anywhere from $52 up.

XQ14. An ounce? A. Yes, an ounce.

XQ15. This iridium of commerce comes in very small specks, does it not? A. Yes.

XQ16. And do you use it all in the manufacture of pens? A. Not all, no.

XQ17. What proportion do you reject? A. Well, what ever
2298 may be soft.

XQ18. What proportion would that be? A. Anywhere from 20 per cent.

XQ19. To what? A. Possibly 40 per cent—from twenty to forty, whatever it may be.

XQ20. Do you know what manufactured iridium is? A. Yes.

XQ21. What is it? A. It is an iridium that has platinum in it; that is, what I have seen of it.

XQ22. Do you have the same kind of iridium on a pen that retails for $2.50 as one that retails for $6? A. Yes.

XQ23. Just the same? A. Just the same.

2299

XQ24. Are you prepared to say that in your $2.50 pens you have not used in a very large proportion of cases a soft iridium? A. No, sir.

XQ25. Do you buy the iridium yourself? A. No.

XQ26. Do you inspect all of these pens? A. Not all, no. I am in touch with the iridium at all times.

XQ27. You do not pretend to inspect every pen that is manufactured? A. No.

XQ28. How long has L. E. Waterman Company been manufacturing gold pens? A. Ten years.

XQ29. They do not manufacture all the pens that they use? A. Not to my knowledge. I don't know. I don't know what pens they have made outside.

2300

XQ30. But they are having pens made all the time outside, are they not? A. Not that I know of.

XQ31. You don't pretend to say that now you manufacture in your factory all the gold pens that they used? A. I cannot say when they have them made outside and when they do not, because I am not in touch with that part of the business.

XQ32. You don't know anything about the assembling? A. I have an idea of the assembling but I am not in touch with it now. I have not charge of that.

XQ33. What is the difference between a gold pen that sells for $2.50 and one that sells for $6? A. There is more gold in it, larger size. The workmanship is just as good. The only difference is in the weight of the gold.

2301

XQ34. How much more value would there be in the largest pen than the smallest pen?

Mr. Watson: Objected to as immaterial to any issue in this case.

A. How much in value?

XQ35. In gold value? A. I could not answer that off handed.

XQ36. About?

Mr. Watson: The same objection.

A. Well, I don't know.

XQ37. How many grinders have you in your factory? A. About eighty-five.

XQ38. Are they all manufacturing pens that are marked Waterman's Ideal? A. No, sir.

XQ39. What are they marked? A. Some are Aiken-Lambert.

XQ40. And some Remex? A. There are some Remex, yes, very few.

XQ41. Pen & Ink? A. Not to my knowledge. I have not made any pen and ink of late.

XQ42. Any other names that you mark them? A. We have
2303 what we call—it is an Aiken-Lambert pen.

XQ43. A great proportion of what you make are simply stamped "14 karat," without any name, are they not? A. Aiken-Lambert?

XQ44. No, all kinds? A. The great proportion of our pens?

XQ45. A large proportion? A. No, a very small portion are stamped just "14 karat."

XQ46. How much? A. I don't imagine there is over 5,000 or 10,000 altogether stamped 14 karat alone.

XQ47. The rest are all marked how? A. L. E. Waterman Company; L. E. Waterman Ideal.

XQ48. All of them? A. Outside of Aiken-Lambert, yes.

XQ49. How many do you make for Aiken-Lambert in a
2304 year? A. I have not the slightest idea.

XQ50. How many grinders do you have? A. Eighty-five.

XQ51. Yours is what is called an open shop? A. Yes, an open shop.

XQ52. How many union men have you among those eighty-five?

Mr. Watson: Objected to as immaterial and irrelevant to any issue.

XQ53. How many of them would be called expert grinders? A. About sixty.

XQ54. How many of them make $25 a week and upwards? A. There are not any.

XQ55. Do you mean to say that your expert grinders make less than $25 a week? A. Yes.

XQ56. About how much do they make? A. $20.

XQ57. How many of those eighty-five are young men under twenty-one? A. About twenty or twenty-five.

XQ58. How young are the youngest of those eighty-five experts? A. About seventeen or eighteen, some are, grinding pens.

XQ59. How long have they been in the business? A. Two or three years.

2306

XQ60. And you call them experts? A. No, sir, I have not called them experts.

XQ61. I asked you how many of the eighty-five experts—A. I didn't say I had eighty-five experts. I said I had eighty-five grinders.

XQ62. How many experts have you? A. About sixty-five—from sixty to sixty-five.

XQ63. How many of them are under twenty-one? A. None.

XQ64. You have nothing to do personally with the selection of iridium? A. It comes under my notice; I pass on it, when it is purchased.

XQ65. Do you mean to say that the man who selects the iridium from the commercial article and determines what shall go in the pens, does not get over $25 a week? A. Yes.

2307

XQ66. Does he only get $20? A. Yes.

XQ67. How long has he been in that business? A. Possibly twenty years.

XQ68. And only gets $20 a week now? A. Yes.

XQ69. This strike, this last week, was not in your department I suppose? A. No.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ70. You testify that you make from 5,000 to 10,000 pens marked 14 karat. How many pens do you turn out in a year

in the L. E. Waterman factory, gold pens? A. Do you want a past record of the average or what we are doing today?

RDQ71. What you are doing today? A. About twenty thousand a week.

RDQ72. How many did you make last year? A. Well, off hand I would say possibly 350,000.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ73. Is it not a fact that about 40 per cent of all the pens that you grind come back as waste? A. No, sir.

2309 RXQ74. And are rejected? A. No.

RXQ75. Because not made by experts? A. No.

RXQ76. What percentage? A. I don't know. That is not true.

RXQ77. How large a percentage? A. I don't know anything about what comes back from the trade; I am not in touch with that at all, as far as that goes.

RXQ78. What percentage of those pens in the shop that are started to be made are turned back because not perfect? A. What do you mean—in the inspection?

RXQ79. Yes? A. Before they leave the pen shop at all?

RXQ80. Yes. Is it about 40 per cent? A. No, sir, it is not.

RXQ81. How much—twenty-five? A. No, about twenty.

2310 That is all according to the various styles that we make.

RXQ82. Then about twenty per cent that are ground do not pass inspection? A. No, I won't say.

RXQ83. Is not that what you said a moment ago? A. I know, but I was going to explain in regard to the grinders. Most all our work is special work and the grinders will go to what is called D point or E point and will examine them and if we find it is not according to the sample we turn it back; but that work is not destroyed.

RXQ84. What is done with it? A. The grinder fixes it up again and he passes it in.

RXQ85. He regrinds it? A. Yes.

RXQ86. Why do you say that all your work is special work? A. Most all of our work I say is special work.

RXQ87. Then at your factory on Fletcher Street you only make specialty pens; is that the fact? A. No, what I would call special work. The outside grinders as a rule when they come in there know absolutely nothing about grinding styles. We have different styles all through the shop. We have to match steel pens a whole lot in our work.

RXQ88. Your pens are divided into certain grades and styles? A. Yes.

RXQ89. One man will make the same grade and same style day after day? A. No.

2312

RXQ90. Do you change them every day? A. No, we have different styles that we have to grind from day to day.

RXQ91. How much does a pen weigh that sells for $2.50, for the completed pen?

Mr. Watson: Objected to as immaterial and incompetent.

A. About two and three-fourths pennyweight per dozen.

RXQ92. How much do they weigh in pens that sell for $6 the completed pen?

Mr. Watson: The same objections.

A. Between five and six pennyweight per dozen.

2313

RXQ93. And the gold is worth about 60 cents a pennyweight? A. About that; 61 or 62.

RXQ94. You have been a grinder how long? A. I have been grinding pens about twenty years.

RXQ95. Before you were superintendent you were a grinder were you? A. Yes.

RXQ96. What shop were you in? A. E. S. Johnson & Company.

RXQ97. Is that all? A. Yes.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ98. Did you ever know of any lot of pens made in the L. E. Waterman Company factory that went out of the factory and then came back as rejected? A. No.

RDQ99. The rejection you speak of is that pens that fail to pass the inspectors are turned back to the grinder to correct? A. To correct; that is all.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ100. And that is a high as twenty per cent? A. No, I won't say that. Some grinders have very few during the
2315 week. Others have more. The exact amount I could not say.

RXQ101. How many apprentices do you have?

Mr. Watson: Objected to as not proper re-cross examination and as irrelevant and immaterial.

A. Between twenty and twenty-five.

RXQ102. They are grinding pens all the time? A. No.

RXQ103. What are they doing? A. Doing other work in the shop.

RXQ104. Then apprentices do not grind? A. They grind part of the time.

RXQ105. How many hours a day will they grind? A. I don't know. It is all according to the other work they have to do.

2316 RXQ106. Those apprentices are grinding pens every day? A. Some of them, not all of them; some days they don't grind.

RXQ107. When pens are sent out to the trade, they are inspected first by the inspectors? A. Yes.

RXQ108. How do they inspect them? A. By examining them.

RXQ109. With what? A. With a glass.

RXQ110. A magnifying glass? A. Yes.

RXQ111. Is that the only way they inspect them? A. Yes.

Deposition closed.

Signature waived.

Adjourned to Thursday April 27, 1911, at 10:30 A. M.

William G. Frazer 2317

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

vs.

MODERN PEN COMPANY,
Defendant. 2318

Met pursuant to adjournment at the office of Watson & Raymond, 10 Wall Street, New York, April 28, 1911, at 10:30 A. M.

Appearances:

Samuel S. Watson and Walter B. Raymond, for Plaintiff.
Alexander S. Bacon, for Defendant.

WILLIAM G. FRAZER, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Raymond:

Q1. What is your name, residence and occupation? A. William G. Frazer; 507 Monroe Street, Brooklyn; employed by the American News Company. 2319

Q2. In what capacity? A. Manager of the Postal Card Department.

Q3. Are you the William G. Frazer who was formerly a member of the firm of A. A. Waterman & Co.? A. Yes.

Q4. When was that firm formed? A. I think it was in January, 1901, if I remember the date correctly.

Q5. Who were the members of that firm? A. Arthur A. Waterman, Hobart W. Geyer and myself.

Q6. Did that firm have any connection with any previous firm of A. A. Waterman & Co.? A. No.

Q7. Did it have any connection with any previous firm of which A. A. Waterman was a member? A. No, sir.

Q8. Was this a successor of any firm of which A. A. Waterman & Co. was a member? A. No.

Q9. Or ever had been a member? A. No, sir.

Q10. Did you take over the assets of any previous firm of which A. A. Waterman was a member or with which he had any connection? A. No, sir.

Q11. Did you pay any debts or liabilities of any previous
2321 firm of which A. A. Waterman was a member? A. No, sir.

Q12. Or with which he had any connection? A. No, sir.

Q13. Who conducted these negotiations which led to the formation of this firm in 1901? A. I did largely.

Q14. With whom did you negotiate? A. Mr. Waterman.

Q15. Where? A. Both in Boston and New York.

Q16. Did Mr. Geyer take any part in these negotiations? A. Not in the preliminary negotiation, no, sir.

Q17. Did he take any part in the drawing of these contracts? A. He did, yes.

Q18. Did he go over the details of the contracts with you? A. Yes.

Q19. Did you have any discussion with Mr. Geyer as to the advisibility of making these partnerships? A. Oh, yes, surely.
2322 That was part of the discussion.

Q20. You did not assume to do the whole business simply on your own say so? A. I did not, no, sir.

Q21. Mr. Geyer and yourself were equally interested in the business? A. Yes, we were.

Q22. What capital did A. A. Waterman bring to this partnership? A. Cash capital do you mean?

Q23. Yes? A. He did not bring any.

Q24. Did he bring any goods or merchandise? A. No merchandise, no.

Q25. What did he bring into the partnership? A. Some patents and some parts of tools that were used, I believe, in the factory in Somerville—West Somerville.

Q26. What did these tools consist of? A. I could not tell you. They were not of apparent value, so far as using them was concerned.

Q27. Were you in charge of the factory of Frazer & Geyer Company? A. Yes.

Q28. Do you know whether or not these tools were actually used, and dies were actually used, in the manufacture of pens by your concern? A. They were not used by Frazer & Geyer Company, no, sir.

Q29. Were they used by A. A. Waterman & Co.? A. I could not answer that positively. Mr. Stone was the foreman at West Somerville and he came with Mr. Waterman and brought some of these things with him; how many or how few they used I could not say. 2324

Q30. Were there very many? A. No, sir; they were not of appreciable value.

Q31. You did not consider that as a valuable asset to the concern? A. No, sir.

Q32. Had you previously manufactured pens of the same design and kind as you manufactured after A. A. Waterman came with the concern? A. Do you mean gold pens?

Q33. Gold pens? A. Yes, we have.

Q34. How about rubber holders? A. The holders made after A. A. Waterman came to New York, some of them were of a different nature from those that we had made before.

Q35. Were these changed from time to time, these designs? 2325
A. Yes.

Q36. That has been the case ever since you have had anything to do with the gold pen business? A. Yes, it is continually changed.

Q37. How long had you had any connection with the fountain pen business? A. I guess about twelve or thirteen years.

Q38. At that time? A. No, about eight years at that time, eight or nine.

Q39. That is, you began business some time in 1893 or 1894? A. If that figures out correctly; it was eight or nine years previous to that time.

2326 *William G. Frazer*

Q40. That you had been actually engaged in the manufacture of gold pens? A. Yes.

Q41. Were you familiar, at the time you made this contract with A. A. Waterman, with the fountain pens that were generally known on the market? A. I think so, yes.

Q42. Did you know the pens that were made by L. E. Waterman Company? A. I did.

Q43. Do you know under what general trade name those pens were known? A. Yes.

Q44. What was it? A. Ideal.

Q45. Was that the only trade name under which they were known? A. L. E. Waterman.

2327

Q46. Do you know how they were generally called for by the public? A. No, I don't think I know anything about that.

Q47. Or how they were called for by the trade? A. The trade would usually call them Waterman pens.

Q48. They were widely advertised pens at that time? A. Extensively advertised, yes.

Q49. And well known? A. Yes.

Q50. How long had you known these Waterman pens? A. Previous to that date, you mean?

Q51. Yes? A. Almost immediately after I became associated, or became interested in the fountain pen business.

Q52. Did the fact that this man's name was Waterman have anything to do with the formation of this partnership under the

2328 name of A. A. Waterman & Co.?

Mr. Bacon: Objected to as immaterial.

A. Yes.

Q53. Was that one of the influencing reasons for making the partnership? A. One of the reasons.

Q54. After this contract was entered into early in 1901, were there other contracts entered into between yourself and Mr. Geyer and Mr. Waterman? A. Yes.

Q55. And modifications of contracts? A. Yes.

Q56. Who took part in these subsequent negotiations? A. Mr. I. E. Chapman came in then and became quite prominent

with all the negotiations or contracts that were made after he came in.

Q57. Did Mr. Chapman take a prominent part in negotiations of these subsequent contracts? A. He did.

CROSS-EXAMINATION by Mr. Bacon:

XQ58. Mr. I. E. Chapman never had anything to do with the practical management of the factory, did he? A. No, sir.

XQ59. He knew nothing about the manufacture of pens? A. No.

XQ60. He was a member of the corporation of Merritt & Chapman Derrick and Wrecking Company? A. I believe he 2330
was.

XQ61. And devoted his attention to that? A. Yes, I presume so.

XQ62. And he was the financial backer of the new combination of A. A. Waterman & Co. and Frazer & Geyer Co., was he not? A. Yes.

XQ63. And he and his friends put in by far more money than all the others put together, didn't they? A. Yes.

XQ64. I call your attention to the articles of copartnership of January 9, 1901, already in evidence and to the following clause:

"Said Arthur A. Waterman shall contribute all his time, energy and experience to the business of said firm and also all 2331
the tools, dies, records and designs and other articles and assets belonging to said Arthur A. Waterman and recently in use in the business of a former firm of A. A. Waterman & Co. together with the use of all patents now owned by him for fountain pens, to be used and employed in common between them for the support and management of said business to their mutual profit and advantage." That is a correct statement, is it? A. I think it is correct, yes. It sounds familiar.

XQ65. Do you know how many patents Mr. Waterman brought into the concern? A. I don't remember the exact number, no.

XQ66. Quite a number, was it not? A. I think only two or three.

XQ67. You immediately began to manufacture pens under his patents? A. Under some of them, yes.

XQ68. From that time up to 1905 you were continually changing and improving your pens? A. Yes, tried to.

XQ69. It was your earnest endeavor to make every pen better than his older brother; is that right? A. What do you mean by older brother?

XQ70. His twin brother? A. We were always trying to improve the quality of the goods we manufactured, yes.

2333 XQ71. And as far as you know, the pens that you manufactured in 1905 were as good as the best pens on the market? A. Yes, I think they were.

XQ72. That applies to gold pens and to the fountain pen complete? A. Yes.

XQ73. And especially you believed that the self-filling pen and the middle joint pen were the best designs on the market? A. Yes.

XQ74. They were far superior to end joint pens? A. That would be a matter of taste. We thought they were better as a selling proposition.

XQ75. Is it not a fact as to the end joint pen, which had to be unscrewed in order to fill, that after a time the little screw would become worn loose so that the pen would sweat or leak
2334 at that joint under the finger? A. Only a very small percentage of the well manufactured end joints would leak at the joint.

XQ76. During the year you were in business you had a great many Ideal pens come in to be repaired? A. It depends upon what you mean by a great many. We had some of every make come in.

XQ77. And they were generally leaky at the joint? A. That was very often the trouble.

XQ78. And there had been no material change in the construction of the end joint pens for the last twenty years? A. Not so far as I know. The shape of the joint has been changed.

XQ79. That is to say, the end joint pen manufactured today by the L. E. Waterman people and by the A. A. Waterman people excepting as far as the feed is concerned, is substantially the same as it was many years ago? A. Yes.

XQ80. And you looked upon the middle joint and self-filling pens manufactured by A. A. Waterman & Co. as a substantial improvement over the end joint pen? A. Yes.

XQ81. You have no doubt of that today, that it is a substantial improvement? A. No, I have not any doubt of it.

Mr. Watson: I move to strike out this whole line of testimony as not proper cross-examination, as new matter and that the defendant makes the witness his own as to new matter. 2336

XQ82. Do you know who was a member of the firm of A. A. Waterman & Co. which immediately preceded the formation of your firm in 1901? A. Do you mean do I know his name?

XQ83. Yes? A. Mr. Gibson, I believe.

XQ84. Had he not died about a year before? A. I don't know.

XQ85. There was a firm of A. A. Waterman & Co. that immediately preceded yours? A. I think there was, yes.

XQ86. And that had been manufacturing pens at Somerville, Mass.? A. I believe so, yes.

XQ87. Do you know who was the "Company" of that firm? A. No, I do not. 2337

XQ88. Mr. A. A. Waterman's principal fort was that of a salesman, was it not? A. Well, I don't think so, fully, before he came to New York.

XQ89. He had been a manufacturer and inventor? A. Yes.

XQ90. And had been the real inventor in a number of patents that were taken out in the names of other people? A. I don't know.

XQ91. You do know that he owned a good many patents, don't you? A. No, I do not.

XQ92. Several? A. Two or three or four, I think he owned.

2338 *William G. Frazer*

XQ93. When did you first hear of Mr. A. A. Waterman and his manufacture of Waterman pens under his own name? A. What do you mean by his own name?

XQ94. A. A. Waterman & Co.? A. I presume three or four years before the partnership was formed.

XQ95. From about 1898? A. I think about that, yes, or earlier.

XQ96. From that time up until 1905, there was continually manufactured and sold on the market pens which bore the imprint of A. A. Waterman & Co.? A. There were two or three breaks. I don't know whether they were continually manu-
2339 facturing them or not.

XQ97. When was the break? A. The first one was when he was associated with Mr. Lockwood of the Davidson Rubber Company.

XQ98. When was that? A. That was some time previous; I have not the date; three or four years I guess.

XQ99. Was there any time that he was not manufacturing pens and marking them either A. A. Waterman or A. A. Waterman & Co.? A. I could not answer the question.

XQ100. But you do know that from January 9, 1901, up to 1905, pens were continuously and openly manufactured, sold and advertised throughout the United States and foreign countries, imprinted A. A. Waterman & Co.? A. Yes.

XQ101. And after you began to manufacture pens bearing
2340 that imprint how were they designated by the trade? A. We were manufacturing them and put the name A. A. Waterman & Co. on them and sold them as such.

XQ102. The trade knew them as such, did they? A. I believe so.

XQ103. And after you began to manufacture A. A. Waterman & Co. pens how did the trade designate the L. E. Waterman product? A. I don't know.

XQ104. Didn't they make a distinction by calling them Ideal pens? A. Some may and some may not.

XQ105. Then you don't know about it? A. I don't know.

XQ106. Do you know how individuals denominated the L. E. Waterman pens after the A. A. Waterman pens were on the market? A. No, I do not; I have not any idea.

XQ107. During what years were you actually engaged in the manufacture of fountain pens? A. I think it was twelve or thirteen years previous to 1905.

XQ108. That would be about 1893 or 1894? A. I think so.

XQ109. And during that time did you manufacture the entire fountain penholders, sections, feed and pen points? A. Not all the time, no.

XQ110. During what period did you manufacture the whole product? A. At first I did not manufacture anything. 2342

XQ111. What did you do? A. I had them made by other people, and assembled them together and sold them.

XQ112. Then you simply did the assembling? A. Yes.

XQ113. For how long a period? A. Perhaps a year and a half.

XQ114. Did it take any machinery to assemble? A. No.

XQ115. How many men did you employ? A. It depends on the number of pens we were selling.

XQ116. About how many? A. That varies. I may sell a full gross this week and next week five or six or eight gross. It all depends on the state of the business.

XQ117. How many pens could a man assemble in eight hours? A. I could not tell. 2343

XQ118. About how many? A. I could not tell.

XQ119. A man could assemble a complete pen in about a minute, couldn't he? A. I would hardly think so.

XQ120. Was it more than two minutes? A. I cannot tell you. It is a guess; I don't know.

XQ121. It is very short? A. Not a long time, no.

XQ122. Did it take men of very high skill to do that? A. Yes, it takes skill to do it.

XQ123. Men that receive very high wages? A. The men we employed in the beginning happened to be girls.

XQ124. And they did assembling? A. Yes.

2344 *William G. Frazer*

XQ125. And they were skillful assemblers? A. Yes.

XQ126. How much did you pay them a week? A. I think about $10 a week.

XQ127. When you were doing the most and employing men how much did you pay them a week for assembling?

Mr. Raymond: I object to all this line of testimony as immaterial and irrelevant and not proper cross-examination.

A. It is only a guess as to the salary. Somewhere around $15 or $20 a week.

2345 XQ128. For how many years do you say you made the completed pen—everything? A. Just subsequent to the time when the partnership was formed with Mr. Geyer, was when we began to make the goods complete.

XQ129. About 1899? A. About a year after we formed the copartnership.

XQ130. Then you began to manufacture the completed pen about 1900; that is, before you began the copartnership of A. A. Waterman & Co.? A. Yes, a good while before.

XQ131. And from about 1900 to 1905 you made the completed pen? A. It is longer than that. 1901 was when the A. A. Waterman & Co. copartnership was formed. I was speaking of the partnership which he and I formed.

XQ132. Much earlier? A. Much earlier.

2346 XQ133. Are you a practical pen manufacturer? A. Yes.

XQ134. Did you ever inspect pens to see whether they were properly made or not? A. Yes.

XQ135. Can you tell by inspection of a pen whether it is properly constructed? A. I can tell by testing it.

XQ136. You are able to test pens? A. I was.

XQ137. Can you tell whether a point is native iridium or manufactured iridium? A. No.

XQ138. Couldn't you tell that with a magnifying glass? A. No.

XQ139. Could you do it by testing it on paper? A. No.

XQ140. What do you mean by inspecting pens? A. To see whether the joints are properly fitted together; see whether the feeds are properly fitted together in the section; to see if the ink flows freely through the feed and to see if the pen points are smooth.

XQ141. How would you determine the smoothness of a pen point? A. I would write with it.

XQ142. That is the only way you would inspect it? A. Yes.

XQ143. You had grinders under you? A. Yes.

XQ144. They had to be men of great skill, did they not? A. Yes. 2348

XQ145. When you took in Mr .Waterman as a partner in 1901, he already had a large business in vending pens did he not? A. I thought he had.

XQ146. And he brought that all to you? A. He brought what he had, I guess.

XQ147. And for two or three years after he came in A. A. Waterman & Co. made a good deal of money, didn't they, paid large dividends? A. They paid dividends regularly, yes.

XQ148. How large were those dividends? A. I think it was ten per cent on the preferred stock and I think six per cent on the common stock.

XQ149. Was it not much more on the common stock? A. I don't think it was, no.

XQ150. That was after Mr. Waterman came in? A. Yes. 2349

XQ151. The Chapmans became identified with this enterprise as early as about 1901, didn't they? A. After the copartnership was formed, yes.

XQ152. Very shortly after? A. Yes.

XQ153. When you went into the Waterman partnership you agreed to furnish a certain amount of credit did you not, to A. A. Waterman & Co.? A. That was the understanding, yes.

XQ154. And did you get this credit largely through the Chapmans? A. Subsequently, yes.

XQ155. And within a very short time they owned a majority of the stock of the Frazer & Geyer Company did they not? A. Yes.

XQ156. And had advanced about thirty thousand dollars to the enterprise outside of their stock? A. Yes.

XQ157. For which they took notes? A. Yes.

XQ158. And the Frazer & Geyer Company and A. A. Waterman & Co. gave them a chattel mortgage? A. Yes.

XQ159. These notes were joint notes of the A. A. Waterman & Co. and Frazer & Geyer Co.? A. I think they were.

XQ160. Signed by one and endorsed by the other? A. Yes.

Mr. Raymond: I object to all this testimony as immaterial and irrelevant, and improper cross-examination and I move to strike it out.

2351 XQ161. Then very early in the Chapmans' connection with the enterprise there was a pooling agreement, was there not, whereby your stock and Mr. Chapman's stock and his friends' stock were put together in a voting trust?

Mr. Raymond: The same objections.

A. The common stock, yes.

XQ162. The common stock only had voting power? A. Yes.

XQ163. And by means of that pooling agreement your management was preserved and could not be changed; is not that a fact? A. No, sir, it is not.

XQ164. Did not this stock have to be voted as you and Mr. Chapman jointly should agree? A. Yes.

2352

Mr. Raymond: I object on the same grounds; further that the contract, the pooling agreement, is the best evidence.

XQ165. And if you and he did not agree there could be no change from the then condition? A. That is right.

XQ166. And you were the sole manager? A. I was the general manager of the company, yes.

XQ167. Do you remember the conditions in 1905, when the company needed more money? A. I have a faint recollection of that, yes.

XQ168. And the Chapmans refused to put up any more? A. Yes.

XQ169. They demanded a reorganization and an assessment of the stock? A. Yes.

XQ170. And I believe at first you consented tentatively to go in did you not? A. At first I did not do anything. Afterwards I consented to come in and sign the reorganization paper.

XQ171. And then after that when Mr. Waterman's attorney, Mr. Weaver, sent a notice around to the stockholders you refused to be bound by your first agreement did you not? A. No, I did not.

XQ172. Is it not a fact that you and Mr. Geyer withdrew from that agreement? A. It is not; no, sir. 2354

XQ173. You remember that Mr. Waterman did and his attorney? A. I don't remember it; no, sir.

XQ174. Don't you remember that fact? A. No, I do not.

Mr. Raymond: Same objections.

XQ175. Don't you remember that as a result of that circular sent out by Mr. Weaver, threatening a receiver, that certain suits were brought against you, Mr. Waterman and Mr. Geyer? A. I have entirely forgotten the circular and have no recollection of seeing it.

XQ176. You remember the suits being brought? A. Yes.

XQ177. And then there was a new scheme of reorganization; don't you remember that? A. No, sir, I do not. 2355

XQ178. Then your recollection of the details of that friction is not very good? A. Well, I remember enough of them.

XQ179. Do you remember that you brought suit afterwards? A. I defended a suit.

XQ180. Didn't you bring a suit? A. To have receivers appointed for A. A. Waterman & Co., yes.

XQ181. And that was after the reorganization was so perfected, was it not? A. No.

XQ182. Are you sure of that? A. I certainly am.

XQ183. Don't you know that the receiver was long after the organization of the Modern Pen Company? A. No, sir, it was not long after.

XQ184. How long after? A. It was not after, I say.

XQ185. How long after? A. It is not long after at all; it is not after at all. I said it was not long after.

XQ186. Do you think it was before the organization? A. Yes, I know it was before.

XQ187. Mr. A. A. Waterman during his connection with A. A. Waterman & Co. when you were a member of it, always insisted on keeping certain control of the manufacture, did he not, as to the designs and the workmanship? A. Yes, that was part of the understanding.

XQ188. And he was on the road as a salesman most of the time? A. Part of the time.

2357

XQ189. And he sold a very large part of the product that was manufactured by the Frazer & Geyer Company? A. He did not, no, sir.

XQ190. Do you know what proportion he did sell? A. Perhaps one-quarter or one-fifth, depending on the volume of the business for any particular year.

RE-DIRECT EXAMINATION by Mr. Raymond:

RDQ191. Did you ever sign any transfer of your rights in the firm of A. A. Waterman & Co., composed of yourself, Mr. Geyer and Mr. Waterman? A. I signed a transfer, yes—assigned a transfer.

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RDQ192. To whom? A. The Frazer & Geyer Company.

RDQ193. Did you ever make any assignment to the firm of A. A. Waterman & Co. composed of A. A. Waterman, W. L. Chapman and I. E. Chapman? A. No, sir.

RDQ194. This assignment that you made to Frazer & Geyer Company was to simply cover the merchandise? A. No, all the profits that might accrue from the business which A. A. Waterman & Co. did were assigned to the Frazer & Geyer Company.

RDQ195. That was back in 1901, was it not, the first year of your business? A. Yes, about the first year of the business.

RDQ196. Did you make any other assignment to Frazer & Geyer Company or to the copartnership of A. A. Waterman &

Co., composed of I. E. Chapman, W. L. Chapman and A. A. Waterman? A. No, sir.

RDQ197. Did you ever withdraw from the firm of A. A. Waterman & Co.? A. No, sir.

RDQ198. Did you ever sign any withdrawal, or assignment of your rights in the firm of A. A. Waterman & Co., to anybody? A. No, sir.

RDQ199. And the assignment that you refer to is simply an assignment of your profits in the concern of A. A. Waterman & Co., which you made in 1901? A. All the profits in excess of ten per cent of the amount invested.

RDQ200. That is, in excess of $500; that is the only assignment you ever made? A. Yes. 2360

RDQ201. In the beginning where did this $500 that you contributed for the partnership and the $500 that Mr. Geyer contributed for the partnership come from? A. My memory is that both the five hundreds were put in and were transferred from the Frazer & Geyer Company.

RDQ202. How many salesmen did you have on the road when Mr. Waterman was selling from one-fourth to one-fifth of the goods or output of the Frazer & Geyer Company? A. I think it was seven.

RDQ203. Did he sell any amount in excess of other salesmen? A. He sold more than some others but not more than all of them.

RDQ204. Some salesmen sold as much as he? A. Some salesmen sold as much as he did, yes. 2361

RDQ205. Now about end joint pens. Did you manufacture end joint pens? A. Yes.

RDQ206. Can you recall what percentage of your output were end joint pens? A. No, I could not.

RDQ207. Was it a large percentage? A. They were, until the time we began manufacturing the self-filling pens.

RDQ208. When did you begin to manufacture the self-filling pen? A. About a year after; in 1902, I think, after we had moved to Thames Street.

RDQ209. Is it not a fact that all the time you were in this business you were making numerically more end joint pens than self-filling pens? A. No, sir.

RDQ210. Colonel Bacon has asked you about the profits that were made after A. A. Waterman came into the concern. What dividends did you pay prior to the time that Mr. Waterman came into the concern? A. I could not answer the question.

RDQ211. Did he increase the business materially? A. The business was increased very materially after he came with us, yes.

RDQ212. Did he bring much business with him? A. No, sir, he did not.

RDQ213. How much total business did you do for a year after he came with you? A. Approximately $25,000.

RDQ214. That was your gross business? A. Gross business.

2363

RDQ215. Did you have any personal knowledge of any partnership of A. A. Waterman & Company prior to 1901, prior to the one that you formed? A. I simply heard that there was such a partnership.

RDQ216. Didn't you manufacture pens for A. A. Waterman which were marked "A. A. Waterman, maker, Boston"? A. No.

RDQ217. Do you know whether there was any partnership existing at that time? A. I don't remember, no.

RDQ218. Can you recall when that was? A. That was practically for all the year previous, which would be 1900.

RE-CROSS EXAMINATION by Mr. Bacon:

2364

RXQ219. After you started in to make self-filler pens were not the end joint pens that you manufactured of the cheapest grade? A. We made them of all grades; the same grades as we did the self-filling.

RXQ220. Did you make self-filling pens as cheap as the cheapest end joint pens? A. No.

RXQ221. Your cheapest grade were end joint? A. Yes.

RXQ222. And your cheapest grade were numerically very great in number, weren't they; that is, you sold more cheap pens than you did dear ones? A. No, we did not for quite some

time. Our business was largely pens that retail for $2 and up.

RXQ223. Your sales were largely self-filling and middle joint pens? A. Yes.

RXQ224. While your sales of cheap pens were of the end joint pen? A. Yes.

RXQ225. Do you have any recollection of the amount of pens that A. A. Waterman sold as compared with any other one particular salesman? A. Yes.

RXQ226. What was it? A. My recollection is that his largest year was about $25,000.

RXQ227. Your firm of A. A. Waterman & Co. was brought to a close, was it not, by a receivership appointed in supplementary proceedings, in an action wherein you were defendant? A. I don't know anything about that. 2366

RXQ228. You remember that there was such a receiver appointed? A. Yes.

RXQ229. On or about June 7, 1905? A. I do, yes.

RXQ230. The legal effect of the receivership you do not know? A. No.

RXQ231. But you do know that A. A. Waterman & Co. went into liquidation immediately after? A. I know that a receiver was appointed.

RXQ232. Don't you know that it was in liquidation before a receiver was appointed for A. A. Waterman & Co.? A. I don't know anything about that, no, sir. 2367

RXQ233. Don't you know that A. A. Waterman and Mr. Geyer closed it up in liquidation? A. I don't know anything about it, no, sir. They did not consult with me about that.

RXQ234. The $500 capital put in by you and Mr. Geyer, each of you, was charged against you individually on the books of the Frazer & Geyer Company, part of your dividend? A. Charged against us?

RXQ235. Did each of you have a salary? A. Yes.

RXQ236. It was charged against your salary? A. No, it was charged on the books. It had not been paid back.

2368

RXQ237. Didn't you and Mr. Geyer ever make good what you owed to the company? A. Yes, I did.

RXQ238. Then it was paid back, was it? A. Yes. You said charged against my salary. It was not charged against my salary.

RXQ239. Your salary was the only income you had from the company? A. Yes.

RXQ240. Then if your salary was on one side of the account and this $500 on the other side it must have been charged against your salary? A. I did not understand you. We owed the money all right and we paid it back.

2369 By Mr. Raymond:

RDQ241. When was this money paid back? A. I think in 1901.

RDQ242. Some time after the copartnership was formed? A. Yes.

RDQ243. And some time after the Chapmans came into the company? A. Yes.

Deposition closed.

Signature waived.

Adjourned to Saturday, April 29, 1911, at 11 A. M.

2370

Frederick W. Stevens 2371

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

vs.

MODERN PEN COMPANY,
Defendant. 2372

Met pursuant to adjournment at the office of Watson & Raymond, 10 Wall Street, New York, April 29, 1911, at 11 A. M.

Appearances:

Walter B. Raymond, for Plaintiff.
Alexander S. Bacon, for Defendant.

FREDERICK W. STEVENS, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Raymond:

Q1. What is your name, residence and occupation? A. Frederick W. Stevens; residence, Boston; bookkeeper. 2373

Q2. Were you ever connected with Mr. Rhodes Lockwood? A. Yes.

Q3. For how long and in what capacity? A. From the first of December, 1870, to the first of April, 1907; first as bookkeeper and confidential man.

Q4. What happened in 1907 in relation to your employment by Mr. Lockwood? A. The business was sold out.

Q5. And you left the business? A. I resigned my position.

Q6. Do you know Arthur A. Waterman? A. Yes.

2374 *Frederick W. Stevens*

Q7. Will you state when you first knew Arthur A. Waterman and what his connection was with Rhodes Lockwood? A. Mr. Waterman came in to order a sample pen made. This was three months before he had any connection with Mr. Lockwood at all. After he had experimented with these samples for a while he came in and suggested to Mr. Lockwood that he manufacture a line of fountain pens and Mr. Arthur Waterman would sell them. He represented that he had been traveling for L. E. Waterman for a number of years and was acquainted with the trade from Canada to the Mississippi River.

Q8. Did Mr. Waterman and Mr. Lockwood enter into any arrangement; if they did, how do you know it? A. They did
2375 enter into an arrangement; and I know it because I had the papers in my possession. The business was practically under my supervision.

Q9. Was this a written contract that they entered into? A. Yes.

Q10. Do you know where that written contract is today? A. Yes, it is destroyed.

Q11. Will you state how you know that this contract or any other contract between Mr. Lockwood and Mr. Waterman is destroyed? A. When Mr. Paul bought out the Davidson Rubber Company he ordered everything destroyed in the way of books, records and papers up to within three years of his purchase; that is, prior to April 1, 1907. I think we kept the full
2376 three years and three months.

Q12. Who attended to destroying these records? A. I attended personally to the most of them.

Q13. What did you do? A. Put them in a dump cart and put them in the furnace under the boilers.

Q14. Do you remember whether there were any contracts relating to this A. A. Waterman & Co. matter among those papers which were destroyed? A. I recollect distinctly that in cleaning out the safe I had quite a large bundle of them and I asked whether they should be destroyed with the rest and the word was to burn them up.

Q15. Will you state what your relations were with this A. A. Waterman matter; was it under your personal supervision? A. It was under my personal supervision for the last six months. When Mr. Lockwood went to Europe he turned that business over to me with the request that I follow it very closely

Q16. What year was that? A. That was in 1898.

Q17. After 1898 did you keep in close touch with it? A. It was brought right into our office.

Q18. The books of account were kept right in your office? A. The books of account were kept in our office from the start.

Q19. That is, from sometime in 1897? A. From the time A. A. Waterman started. I could not give you the exact date that we gave him the first money. 2378

Q20. And the goods were manufactured by whom? A. The goods were manufactured by the Davidson Rubber Company and carried to an office that Mr. Waterman hired on Bromfield Street and were put together and sold over there.

Q21. Did you have anything to do with the office on Bromfield Street? A. I was supposed to go there three or four times a week and see how things were going there, and I did do it; probably went there five or six times.

Q22. Will you state what the relations were between Rhodes Lockwood and A. A. Waterman in the beginning of this arrangement between them; that is, in 1897? A. Mr. Lockwood agreed to furnish the necessary money and material. Mr. A. A. Waterman was to order the gold pens and put the goods together and he was to go on the road and sell the goods himself. 2379

Q23. Under what name was the concern operating at that time? A. A. A. Waterman Pen Company.

Q24. A. A. Waterman Pen Company? A. Yes.

Q25. Do you remember any suit that was brought against this A. A. Waterman Pen Company? A. Yes, I remember there was an injunction obtained here in New York restraining him from using that name.

Q26. What was the A. A. Waterman Pen Company—a corporation or a partnership? A. Just a name.

2380 *Frederick W. Stevens*

Q27. Who were interested in the concern as partners at that time? A. Mr. Lockwood always claimed that Mr. A. A. Waterman never was a partner, that he had the whole thing. He never gave Mr. Waterman any partnership rights at all.

Q28. Who was the partner with Mr. Waterman, if there was one? A. Nobody except Mr. Lockwood at that time.

Q29. When did Mr. Gibson come in? A. He came in later, after the suit was started.

Q30. Then what name did they give to the firm at that time? A. A. A. Waterman & Co.

Q31. Do you remember how long they continued in that style? A. I should say four or five months, perhaps six months.
2381 I don't remember just exactly.

Q32. Were there any relations between A. A. Waterman & Co. and Rhodes Lockwood or the Davidson Rubber Co.? A. Mr. Lockwood still held that neither had any partnership rights in the business, that it was all his.

Q33. Can you state what the substance of these contracts was, if there was any contract? A. Before Mr. Lockwood went to Europe Mr. A. A. Waterman gave him an assignment of everything, all his stock, materials, good will and everything that he possessed and after Mr. Gibson came in there was another assignment made from A. A. Waterman & Co. similar to the first one, taking in everything.

Q34. Did that include the name of A. A. Waterman & Co.?
2382 A. I consider it did.

Mr. Bacon: All this is objected to on the ground that this matter being in writing it is improper; the loss of the writing has not been specifically accounted for.

Q35. Do you remember whether there was any such assignment made by A. A. Waterman and an assignment made by A. A. Waterman & Co., composed of A. A. Waterman and E. L. Gibson? A. I do.

Q36. Was that assignment one of these papers that was destroyed? A. Yes, both of them.

Q37. You know that these papers were so destroyed? A. Yes.

Q38. Will you state what occurred in the early part of 1899 in reference to the relation between A. A. Waterman & Co. and Rhodes Lockwood or the Davidson Rubber Company? A. On the first day of February or the last day of January we went up to Mr. Waterman's place and took everything in the way of material and what books we desired to take, his stock books, and left him practically nothing but a few cupboards and fixtures, which Mr. Lockwood claimed to have the right to take but he said he would leave them as he said Mr. Waterman assured him that he should continue on in the business and was going to keep the room. 2384

Q39. Will you state what Mr. Lockwood took over in the way of patents at that time? A. Everything that Mr. Waterman had taken out in the way of patents on fountain pens and trade-marks.

Q40. Do you recollect how many patents or trade-marks were taken over? A. There was a trade-mark for the word Standard, a trade-mark for the word "Reliable," a patent on the middle joint Standard pens; a patent on a feed; a patent on a pen pump. Those are all that I recall but I think that there were two or three more.

Mr. Bacon: Objected to as to the assignment of patents; that certified copies thereof are the best evidence and the patents themselves can be obtained from the patent office, or copies. 2385

Q41. Do you remember whether or not a circular was sent out to the trade at the time that Mr. Lockwood took over these things from Mr. Waterman or from A. A. Waterman & Co.? A. I remember sending out circulars, yes.

Q42. I show you a circular dated February 1, 1899 purporting to be signed on a typewriter by Rhodes Lockwood and ask you whether that is the circular that was sent out at about that time? A. I should say that was a copy of it. I do not think that is the original circular.

Q43. You think that is a copy of the circular that was sent out at that time? A. Yes. I know we sent out circulars to that effect.

A circular is shown the witness and he states that they did not have a typewriter at that time.

Q44. Do you know whether or not on or about February 1, 1899, the business connection between A. A. Waterman Co. and Rhodes Lockwood was discontinued? A. It was.

Q45. And that was about the time when Rhodes Lockwood entered into possession of everything that A. A. Waterman & Co. had? A. Yes.

2387 Q46. And among the things taken over were the trademarks "Standard," "Reliable" and "Sterling"? A. Yes.

Q47. What occurred in reference to the formation of the Sterling Pen Company? A. Mr. Lockwood did not care to use the name A. A. Waterman & Co. and asked for suggestions as to a name for the new company. Of course there were a number of names suggested and he finally adopted "Sterling Fountain Pen Company."

Q48. Then the Sterling Fountain Pen Company took ovet these patents? A. They were never transferred. Of course the Sterling Pen Company was not incorporated; it was simply a branch of the Davidson Rubber Company.

Q49. Did Mr. Lockwood at that time take over the name
2388 A. A. Waterman & Co.? A. Yes.

Q50. Did he continue to sell pens under that name? A. Yes.

Q51. What was done with reference to manufacturing pens under that name? A. Until we had new stamps made they were all manufactured and stamped A. A. Waterman & Co.

Q52. For how long did they continue to sell pens marked A. A. Waterman & Co.? A. I should say for six years at least.

Q53. Who received all the accounts of A. A. Waterman & Co. after February 1, 1899? A. From customers?

Q54. From customers? A. The Sterling Fountain Pen Company.

Q55. Who received all the bills receivable? A. The Sterling Fountain Pen Company.

Q56. And all settlements were made with the Sterling Fountain Pen Company for goods and accounts which were outstanding, for A. A. Waterman & Co., composed of Mr. Waterman and Mr. Gibson? A. Yes.

Q57. Do you know what A. A. Waterman did after that time, that is, after February 1, 1899? A. He still kept his office at Bromfield Street and tried to do a small business in fountain pens. He bought pens from the Sterling Pen Company through a third party.

Q58. How were these pens marked? A. A. A. Waterman & Co. 2390

Q59. How did he sell these pens, under what name? A. He took out the mark and marked them "A. A. Waterman maker."

Q60. Now to go back to this question of assignment. Are you positive that this assignment that was made by A. A. Waterman & Company, composed of A. A. Waterman and E. L. Gibson, assigned to Rhodes Lockwood the name A. A. Waterman & Company? A. I consider that they did.

Q61. And after Mr. Lockwood took over the business in February, 1899, he used the name A. A. Waterman & Co.? A. Yes.

Q62. Was there any objection by A. A. Waterman to the use of this name A. A. Waterman & Co.? A. I think Mr. Waterman made some objection but there was nothing ever done about it. 2391

Q63. What happened to Mr. Gibson? A. Mr. Gibson was hired by the Davidson Rubber Company as a salesman.

Q64. And Mr. Gibson went on the road? A. Mr. Gibson went on the road and stayed there until he died.

Q65. What pens did Mr. Gibson sell for the Davidson Rubber Company? A. He sold the A. A. Waterman pens as long as they lasted and after that the Sterling fountain pen.

Q66. Did the Sterling Fountain Pen Company manufacture the pens under these patents that were taken over? A. Yes.

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Q67. Can you recall under what patents they manufactured these pens? A. Under the middle joint.

Q68. The middle joint patent that was taken out by A. A. Waterman. A. Yes.

Q69. Did Mr. Lockwood or the Davidson Rubber Company receive checks made to the order of A. A. Waterman and Co.? A. Yes.

Q70. And what was done with these checks?

Mr. Bacon: Objected to as the checks are the best evidence.

A. Deposited in the bank.

2393 Q71. The checks were received from customers? A. Yes.

Q72. And how were they endorsed? A. With a rubber stamp.

Q73. They were endorsed "A. A. Waterman & Co."? A. Yes, "By W. N. Lockwood, Attorney." W. N. Lockwood, Attorney, signed all the checks too. Mr. Waterman could not sign his own check.

Q74. And that had been the condition previous to February 1, 1899? A. Yes.

Q75. What happened about the orders that were sent to A. A. Waterman & Co. for pens subsequent to February 1, 1899? A. The mail was delivered at Bromfield Street for a while and Mr. Waterman sent down all the checks and held the orders for
2394 a while but finally I went up and had a talk with him and after making some slight concessions he turned everything over.

Mr. Bacon: Objected to as hearsay; Mr. Waterman is the best evidence.

A. (Continued) He turned the orders over to the Sterling Pen Company.

CROSS-EXAMINATION by Mr. Bacon:

XQ76. In what year did you first meet Mr. A. A. Waterman? A. 1896 or 1897.

XQ77. What were your relations then with Mr. Rhodes Lockwood? A. I was bookkeeper and office manager.

XQ78. What was his business? A. Manufacturing rubber goods.

XQ79. Did he manufacture pen points? A. No, sir.

XQ80. What kind of rubber goods did he manufacture? A. Hard and sott rubber, druggists' goods.

XQ81. Did he manufacture pen holders? A. Yes.

XQ82. At that time? A. Yes.

XQ83. For whom did he manufacture? A. Penholders?

XQ84. Yes? A. Anybody that wanted them made. We made a fountain pen which we sold ourselves, but we had a very slight sale for it.

XQ85. What was the name of it? A. Davidson's No. 12.

XQ86. Did Mr. Lockwood do business under his own name? 2396
A. He did business under the name of Davidson Rubber Company.

XQ87. Was that a corporation? A. Not at that time.

XQ88. When was it incorporated? A. I should say in 1903 or 1904.

XQ89. Who owned it in the beginning? A. Hamilton D. and Rhodes Lockwood.

XQ90. Brothers? A. Yes.

XQ91. Was the Sterling Fountain Pen Company a corporation? A. No, sir.

XQ92. Who owned it? A. Rhodes Lockwood.

XQ93. Did his brother have any interest? A. His brother 2397
was dead.

XQ94. When did he die? A. 1875.

XQ95. After 1875 and up to 1903 was Rhodes Lockwood the sole owner of the Sterling Fountain Pen Company? A. No.

XQ96. Who was with him? A. The Sterling Fountain Pen Company was not in existence during those times.

XQ97. When was it first in existence? A. In 1899.

XQ98. Who was the owner of the Sterling Fountain Pen Company? A. Rhodes Lockwood.

XQ99. Sole owner? A. Yes.

2398 *Frederick W. Stevens*

XQ100. Under what name had Mr. Rhodes Lockwood made fountain pens before 1899? A. Davidson Rubber Company.

XQ101. Who owned the rubber company at that time? A. Rhodes Lockwood and P. C. Lockwood.

XQ102. That is another brother? A. Yes.

XQ103. How long had P. C. been in the firm? A. From 1875 to 1895.

XQ104. When the first brother died the other brother came in; is that it? A. Yes.

XQ105. Then when you first met Mr. A. A. Waterman the Lockwood brothers were doing business under the name of the Davidson Rubber Company, manufacturing rubber goods,
2399 including pen holders; is that it? A. No.

XQ106. What were they doing? A. Mr. Rhodes Lockwood bought his brother out in 1891.

XQ107. From 1895 to 1899 was he the sole owner? A. Yes.

XQ108. Under what name was Mr. Rhodes Lockwood doing business from 1895 to 1899? A. The Davidson Rubber Company.

XQ109. And that was the only name under which he was doing business? A. Yes.

XQ110. He never did business with Mr. A. A. Waterman under the name of the Sterling Fountain Pen Company? A. No.

2400 XQ111. That was organized after Mr. Waterman left him? A. Yes.

XQ112. When did you say you first met A. A. Waterman? A. In 1896 or 1897.

XQ113. Did you have charge of the office or the factory? A. The office.

XQ114. That had nothing to do with the factory? A. Not at that time.

XQ115. In the beginning A. A. Waterman bought rubber holders of you? A. In the beginning he bought simply feeds.

XQ116. How long did he buy feeds? A. I should say three months.

XQ117. In what year would that be? A. 1896 or 1897.

XQ118. After that what did he buy? A. Complete pens—complete hard rubber parts.

XQ119. For how long did he buy of Mr. Lockwood the complete hard rubber parts? A. It might have been for a month or six weeks. Mind you, these were only samples.

XQ120. What happened after a month or six weeks? A. He made arrangements with Mr. Lockwood whereby Mr. Lockwood was to furnish material and capital and Mr. Waterman was to sell the goods.

XQ121. Mr. Waterman was sales agent for the manufacturer; was that it? A. Salesman.

2402

XQ122. Salesman? A. Yes.

XQ123. How early was that? A. I should think that was early in 1897.

XQ124. When was the A. A. Waterman Pen Company organized? A. I should say in the fall of 1897.

XQ125. Was that a corporation? A. No, sir.

XQ126. Who were the partners? A. A. A. Waterman and E. L. Gibson.

XQ127. They were the only partners? A. Mr. Lockwood never gave them any partnership rights. Mr. Lockwood really was the whole thing.

XQ128. Mr. Lockwood never claimed to be a partner in Lockwood & Gibson? A. Mr. Lockwood claimed that the business was all his; that A. A. Waterman and Gibson had no partnership rights.

2403

XQ129. Were they not partners between themselves? A. Yes.

XQ130. And as between Gibson and Waterman they were partners? A. Yes.

XQ131. And Lockwood did not claim to be a partner in that matter, did he? A. No, sir.

XQ132. Is it not a fact that Mr. Waterman and Mr. Gibson doing business under the name of A. A. Waterman Pen Company, were selling agent for pens marked A. A. Waterman

& Co. or marked Waterman Pen Company? A. They were marked A. A. Waterman & Co.

XQ133. How early were they so marked? A. When the new copartnership was formed.

XQ134. Waterman and Gibson? A. Yes.

XQ135. When did Mr. Rhodes Lockwood die? A. In 1905.

XQ136. You said in your direct-examination that Mr. Gibson came in after that injunction suit was started? A. Yes.

XQ137. Do you mean that? A. Yes.

XQ138. Don't you know that that injunction suit was started against both Gibson and Waterman? A. No, sir; that in-

2405 junction suit was started against A. A. Waterman alone; I understand it so.

XQ139. Your recollection of that is just as good as it is of anything else? A. I don't think that the papers had been made out for the A. A. Waterman & Co. when that suit was brought.

XQ140. Is it not a fact that A. A. Waterman and Gibson were already doing business as the A. A. Waterman Pen Company when that suit was begun? A. I don't think so.

XQ141. You think that L. E. Waterman first sued A. A. Waterman? A. I do.

XQ142. Alone? A. Yes.

XQ143. And that he afterwards brought in Gibson? A. Yes.

XQ144. Do you know how that could be done?

2406 Mr. Raymond: Objected to.

A. I don't see why.

XQ145. Don't you know that is impossible? A. I don't see why. The first suit was brought against A. A. Waterman as I understood.

XQ146. Were there two suits brought? A. No, but when the injunction was brought out they stopped marking their pens A. A. Waterman Pen Company.

XQ147. You stated that Mr. Gibson came in after this suit was brought. Can you tell me how under our practice that could be done?

Mr. Raymond: Objected to as the witness is not an attorney; he is only stating his recollection.

XQ148. Mr. Lockwood was not made a party to that suit as a member of the partnership of A. A. Waterman & Co.? A. No.

XQ149. Or of the Waterman Pen Company? A. No.

XQ150. And Mr. Lockwood never claimed to be a partner with A. A. Waterman? A. No, sir; A. A. Waterman assigned everything to Mr. Lockwood in the beginning before he started business.

XQ151. Was it by written assignment? A. Yes.

XQ152. Did you see it? A. I did. 2408

XQ153. Did you see it signed? A. I did.

XQ154. When? A. I could not give you the date but just before Mr. Lockwood sailed for Europe.

XQ155. What year? A. 1897.

XQ156. Where? A. In 19 Milk Street, Mr. Lockwood's office.

XQ157. Was this assignment made before the firm of Waterman and Gibson was formed? A. Yes, that was A. A. Waterman's assignment.

XQ158. That is, Mr. A. A. Waterman made an assignment before Mr. Gibson came in? A. Yes.

XQ159. The Gibson and Waterman partnership was terminated on February 1, 1899, was it not? A. Yes. 2409

XQ160. You have seen these circulars? A. Those were issued by Mr. Waterman.

XQ161. These circulars, already in evidence, issued by Mr. Waterman, dated respectively March 1, 1899, and April 20, 1899, have you not? A. Yes.

XQ162. These are the original circulars? A. Mr. Waterman issued these circulars. I have no recollection about those at all.

XQ163. Did you see them at the time they were issued? A. I don't remember seeing them until they were handed to me today.

XQ164. You will notice that it says in the circular, "On February 1, 1899, the partnership previously existing between

E. L. Gibson and myself doing business as A. A. Waterman & Co., was dissolved by mutual consent." Do you know that to be a fact? A. Yes.

XQ165. And that partnership consisted of Mr. A. A. Waterman and Mr. Gibson only? A. Yes.

XQ166. The circular further states: "Mr. Gibson had a position with the Sterling Fountain Pen Company, then starting in business, having acquired certain rights from the business of A. A. Waterman & Co.; while I continued as sole maker of fountain pens bearing my name and guarantee;" was that true? A. Yes.

2411 XQ167. Then Mr. Gibson went with the Sterling people? A. Yes.

XQ168. With Mr. Lockwood? A. Yes.

XQ169. And Mr. Waterman continued by himself? A. Yes.

XQ170. And had no relations after that with Mr. Lockwood at all? A. He bought some goods.

XQ171. That is all? A. That is all.

XQ172. And Mr. A. A. Waterman continued as sole maker of fountain pens bearing his name and guarantee? A. Yes.

XQ173. Then the statements in this circular are true? A. So far as I know.

XQ174. Then after February 1, 1899, Mr. Lockwood never had anything to do with Mr. A. A. Waterman except to sell him some goods? A. That is all and those pens were not marked
2412 A. A. Waterman & Co.

XQ175. How were they marked? A. A. A. Waterman maker.

XQ176. You do not claim that the Sterling people made any pens and marked them A. A. Waterman or A. A. Waterman & Co. after February 1, 1899? A. I do.

XQ177. How do you reconcile that with the statement in the circular that you have already sworn to be true, as follows, "While I continued as sole maker of fountain pens bearing my name and guarantee"? A. Those are marked A. A. Waterman maker. We marked ours A. A. Waterman & Co.

XQ178. How long did you do that? A. We had pens marked A. A. Waterman & Co. that probably were not sold for five or six years.

XQ179. Is it not a fact that you did not make any new pens; you simply took over what stock there was? A. We cleaned up all the pens in process and marked them A A. Waterman & Co.

XQ180. On February 1, 1899? A. Yes.

XQ181. And after that you did not make any new pens and so mark them? A. We may have; I could not tell that.

XQ182. You are not willing to swear that you ever made a new pen after February 1, 1899, and marked it A. A. Waterman & Co.? A. I told you that all the pens that were in process were made up and marked A. A. Waterman & Co. 2414

XQ183. How many would that be? A. There may be twenty-five; there may be fifty gross.

XQ184. But it is a fact that after February 1, 1899, you discontinued the manufacture of new pens marked A. A. Waterman & Co. and thereafter marked them Sterling, did you not? A. I finished up what stock there was in process and marked them A. A. Waterman & Co.

XQ185. And that is all? A. Yes.

XQ186. And sold them out? A. Yes.

XQ187. Mr. Lockwood never claimed to be the successor of the firm of Waterman & Gibson did he? A. We issued circulars in which we stated that the Sterling Fountain Pen Company were successors to A. A. Waterman & Co.—succeeding to 2415 the business of A. A. Waterman & Co.

XQ188. Are you sure of that? A. Yes.

XQ189. I read from what purports to be a circular of Rhodes Lockwood dated February 1, 1899, as follows: "The business connection existing between A. A. Waterman and the undersigned has been this day discontinued." Is that right? A. Yes.

XQ190. What was that "connection"; was it a partner or salesman? A. I suppose, as you said a while ago, that A. A. Waterman was practically a sales agent.

XQ191. He had assigned everything that he had to Mr. Lockwood but you do not claim that the partnership was dissolved on

that day between Mr. Lockwood and these people? A. Mr. Lockwood never was a partner of that concern.

XQ192. The circular also says, "I am the sole owner of the trade-marks Standard, Reliable and Sterling for fountain pens etc. and as such have made over to the Sterling Fountain Pen Company the exclusive right to manufacture the same;" is that right? A. Yes.

XQ193. But he never made over to the Sterling Pen Company the right to manufacture pens and mark them A. A. Waterman & Co.? A. The Sterling Pen Company was his own business. It would not be necessary to advertise that all over the world.

2417 XQ194. (Last question repeated)? A. It was not necessary.

XQ195. But the circular says that he has made over to the Sterling Fountain Pen Company the exclusive right to manufacture pens under the name of Sterling. Was it not as much necessary in the one case as in the other? A. I don't see why, because the whole thing was his own business.

XQ196. Is it not a fact that in settling up the relations between the firm of A. A. Waterman & Co. and Mr. Rhodes Lockwood, that Mr. Lockwood took over, on that settlement, the accounts of A. A. Waterman & Co. then due? A. The accounts of A. A. Waterman & Co. were assigned to Mr. Lockwood monthly, all the time that he was in business.

XQ197. Each month? A. Yes.

2418 XQ198. That was in payment for the goods that he furnished to A. A. Waterman & Co.? A. No.

XQ199. Wasn't it? Why were they assigned monthly? A. So that Mr. Lockwood could have his money.

XQ200. Was it not to get his pay for something? A. To get his pay in part, yes.

XQ201. Did A. A. Waterman & Co. assign their accounts to Mr. Lockwood for nothing? A. A. A. Waterman & Co. assigned their accounts to Mr. Lockwood monthly at the suggestion of our lawyer and Mr. Waterman did not object.

XQ202. What was that in payment of—money advanced? A. Certainly.

XQ203. And goods furnished? A. Yes.

XQ204. Then is it not a fact that A. A. Waterman & Co. got their goods from Mr. Lockwood and to pay for them assigned over the accounts every month? A. Yes, but the accounts were not enough to pay the bills.

XQ205. Is it a fact that the accounts were assigned over to pay the bills in part? A. Yes.

XQ206. Then is it not true that A. A. Waterman & Co. being indebted to Mr. Rhodes Lockwood for goods advanced, turned over their accounts to him every month in part payment? A. Yes.

XQ207. And that was the only relation that existed between Mr. Lockwood and A. A. Waterman & Co.? A. When A. A. 2420
Waterman & Gibson formed their partnership they assigned everything to Mr. Lockwood, to take the place of the assignment that A. A. Waterman made.

XQ208. And was not that to cover advances for goods and to secure further advances? A. That is what it was done for.

XQ209. Then from the very beginning is it not a fact that Mr. Waterman made these assignments of accounts to Mr. Lockwood for the purpose of securing him for advances? A. In part.

XQ210. In part- A. Yes.

XQ211. And that was the only relationship existing between them? A. I don't understand that.

XQ212. Was there any other relationship except that of 2421
debtor and creditor? A. No, sir.

XQ213. And when Waterman & Gibson dissolved partnership on February 1, 1899, Mr. Gibson went with Mr. Lockwood? A. Yes.

XQ214. And Mr. Waterman did not? A. No.

XQ215. And Mr. Waterman kept his own name and Mr. Gibson continued with the Sterling people? A. Mr. Waterman was already under an injunction from the New York Court not to use his own name.

XQ216. You are certain of that, are you? A. Yes.

XQ217. Just as certain as of anything that you have sworn to? A. On a fountain pen.

2422 *Frederick W. Stevens*

XQ218. On a fountain pen? A. Yes.

XQ219. You are sure he could not use the name of A. A. Waterman & Co.? A. No, sir; A. A. Waterman.

XQ220. Are you sure that under this injunction he could not use the name of A. A. Waterman? A. On a fountain pen.

XQ221. Are you sure of that? A. Yes.

XQ222. Your recollection is just as good about that as it is about the contents of these assignments? A. The assignments were right in my possession all the time.

XQ223. And you knew about this injunction? A. From what I heard. I was not present at the court when the in-
2423 junction was issued.

XQ224. Had you ever seen a copy? A. I think I did.

XQ225. Don't you know that that injunction permitted Mr. Waterman to use the name A. A. Waterman or A. A. Waterman & Co.? A. That injunction as I understand permitted him to use the name A. A. Waterman & Co.

XQ226. And nothing else? A. Yes.

XQ227. Nevertheless, on or about February 1, 1899, according to that circular, he manufactured only pens marked, "A. A. Waterman, maker, Boston"? A. That is not A. A. Waterman, is it; that is "A. A. Waterman, maker."

XQ228. Then you think he had the right to use the words, "A. A. Waterman, maker, Boston," but did not have the right to use the name A. A. Waterman alone? A. I am not sure that
2424 he put "A. A. Waterman, maker" on the pen itself.

XQ229. I show you this circular and ask you if you are prepared to swear that he did not immediately after February 1, 1899, sell pens marked "A. A. Waterman, maker, Boston"? A. I think he did.

XQ230. Then these assignments that you say were burned up in 1907, were these monthly assignments? A. Everything was burned up, the monthly assignments and the original assignments.

XQ231. What were these original assignments? A. The original assignments assigned everything to Rhodes Lockwood, all of the right, title and interest in the business and all the

accounts and good will and everything, permitting him to carry on the business in case they did not carry out their part of the program.

XQ232. And this was before the organization of the firm of Waterman & Gibson, was it? A. There was one made out then; there was another one made out afterwards.

XQ233. On what date? A. I could not tell you the date.

XQ234. Who signed it? A. As I remember it, it was signed A. A. Waterman & Co., A. A. Waterman and E. L. Gibson.

XQ235. And yet you cannot give the date? A. No.

XQ236. Can you give us a statement of how it read? A. Similar to the other; assigning everything, all of their right and 2426
good will.

XQ237. Give us your recollection of how it read? A. It assigned everything to Rhodes Lockwood, all their right, title and interest and good will and accounts receivable and gave him authority to take over the goods at a certain date, providing they had not carried out their agreement.

XQ238. Was this before the injunction or after? A. I should say that last one was after the injunction. The first one was before the injunction.

XQ239. Are you certain? A. I am certain the first one was before the injunction.

XQ240. You are not certain that the last one was before it too? A. I could not give you the date of that.

XQ241. Are you willing to swear that that assignment was 2427
not merely for security for advances by Mr. Lockwood? A. No, sir.

XQ242. It may have been for security only? A. It was to protect Mr. Lockwood.

XQ243. Was this so-called assignment, the date of which you cannot remember, to secure Mr. Lockwood for goods and money advanced? A. It was to prevent Mr. A. A. Waterman and Mr. Gibson from turning receipts in any other direction than to Mr. Rhodes Lockwood.

XQ244. And they were turned to him to pay him in part for goods advanced by him? A. Yes.

2428 *Frederick W. Stevens*

XQ245. And that was its only object? A. Yes.

XQ246. You are not prepared to swear that that so-called assignment was not in the nature of a security, to secure advances? A. No, sir.

XQ247. Did Mr. Lockwood advance the A. A. Waterman Pen Company any money, or only goods? A. Both.

XQ248. On February 1, 1899, had they paid him up in full? A. No.

XQ249. How much did they owe? A. About $10,000.

XQ250. How long had he been in advancing this sum? A. Two years; no, about a year and a half.

2429 XQ251. What did he take over in payment of that $10,000? A. He took over what material Mr. Waterman had at the Bromfield Street office.

XQ252. Then Mr. Lockwood did the manufacturing? A. After that.

XQ253. Before that, and Waterman & Co. did the selling? A. There are two parts to manufacturing fountain pens Mr. Lockwood manufactured the hard rubber holders complete and Mr. Waterman bought the gold pens and fitted the holders so that really both of them were doing manufacturing business.

XQ254. What Mr. Lockwood took over was the stock of completed pens? A. He took everything there was there, gold pens, completed pens, hard rubber holders.

2430 XQ255. Do you know whether it paid him for the $10,000 or not? A. I know it did not.

XQ256. When Waterman & Company dissolved on February 1, 1899, the good will of the name A. A. Waterman or A. A. Waterman & Co. remained in Mr. A. A. Waterman didn't it? A. No, sir.

XQ257. Did he not continue to use it? A. We considered that the assignment that Gibson and Waterman had made turned the good will over to Mr. Lockwood.

XQ258. Did those assignments specifically assign his name, A. A. Waterman, or A. A. Waterman & Co.? A. The good will of the business.

XQ259. But they said nothing about the name? A. I think they did.

XQ260. You are not sure of that? A. No.

XQ261. Then while you are not prepared to swear that there was ever any assignment of the trade name of A. A. Waterman or A. A. Waterman & Co., you are prepared to swear that on and after February 1, 1899, Mr. Waterman continued to use his own name in the manufacture and sale of fountain pens while Mr. Lockwood did not? A. Mr. Lockwood continued to use that name for five or six years.

XQ262. Only in disposing of the old stock? A. That is all. 2432

XQ263. He did not manufacture any new stock? A. He manufactured all the stock that was in process.

XQ264. That was half made? A. That was new stock.

XQ265. What would you call "in process of manufacture"? A. Hard rubber in the rough.

XQ266. When he made it in the rough and made a new pen holder didn't he put Sterling on it? A. No, because he changed the style of pen, for the Sterling Pen Company.

XQ267. He did not have any gold pens bearing the name of A. A. Waterman & Co. into which he put new rubber holders? A. We held nearly all the gold pens that Mr. Waterman bought in our safe in the office.

XQ268. Separate from the holders? A. Yes.

XQ269. How many of them were there? A. I should think 2433 there was $1,000 worth.

XQ270. How many pens would that be? A. The pens would average 50 cents apiece.

XQ271. That would be 2,000 pens? A. Yes.

XQ272. Then you made up 2,000 holders to correspond with those pens? A. We put some of those pens into holders bearing no name at all.

XQ273. Then the new holders that you manufactured bearing the name A. A. Waterman & Co. would be far less than the 2,000? A. I could not tell you about that. I had no connection with the factory at that time.

XQ274. Then you don't know anything about it? A. I know there was stock in process but I could not tell you how many.

XQ275. What do you mean by stock in process? A. Hard rubber manufactured ready to turn up into fountain pens.

XQ276. But you do not put the stamp of the pen on the holder until it is all completed? A. No.

XQ277. Then you could put on Sterling as well as Waterman? A. Yes.

XQ278. And is it not a fact that on all the new holders that you manufactured after the first of February, 1899, you put on the name Sterling? A. No, we changed the style of the Sterling fountain pen.

2435 XQ279. What name did you put on? A. We put A. A. Waterman & Co. on part of them.

XQ280. Why? A. Because they were A. A. Waterman & Company's pens.

By Mr. Raymond:

Q281. That is, their style? A. The style of the pen. If you make a piece of hard rubber in the rough you have got to turn it up to the shape that it was intended for in the first place. You cannot turn it up into a new pattern.

By Mr. Bacon:

XQ282. You knew nothing about the factory end did you?

2436 A. We were in telephonic communication all the time.

XQ283. You never had anything to do with the manufacture of the rubber goods? A. No.

XQ284. How do you know they could not take the rubber and turn it into any kind of barrel they pleased? A. I am enough of a mechanic to know that.

XQ285. Your new style of pen was an end joint pen? A. Both kinds.

XQ286. Both? A. Both, yes.

XQ287. What do you mean by both kinds? A. The end joint and middle joint.

XQ288. Couldn't you take the material that A. A. Waterman & Co. had and make them up into either end joint or middle joint pens? A. That would depend upon whether they would turn up to the same pattern.

XQ289. You never did any turning? A. No.

XQ290. Your office was not in the factory at all was it? A. No.

RE-DIRECT EXAMINATION by Mr. Raymond:

RDQ291. You testified in your cross-examination that these advances were not paid in February, 1899. Is that the reason 2438
that Mr. Lockwood entered into possession of everything? A. That is the reason that he took over the business, because he found they were losing money.

RDQ292. He not only took over what he could get hold of in the way of physical assets but he also took over the good will of the business? A. He took everything that he could have.

RDQ293. And he continued the business under that name, A. A. Waterman & Co., until these goods that were in process of manufacture were all exhausted? A. He did.

RDQ294. Do you know why he did not continue the business after that under the name of A. A. Waterman & Co.? A. Because he thought that the business under A. A. Waterman & Co. might have the effect to—I don't know how to express it; 2439
the idea is a person might buy an A. A. Waterman pen thinking he had got an L. E. Waterman pen.

RDQ295. At that time what were the relations between Rhodes Lockwood and the L. E. Waterman Company? A. Perfectly friendly.

RDQ296. Did this injunction suit brought against A. A. Waterman have anything to do with the determination to abandon that name? A. The first suit?

RDQ297. Yes? A. I think it did.

RDQ298. Mr. Lockwood did not want any more lawsuits? A. He did not want any more lawsuits.

RDQ299. That is the reason why the name Sterling Fountain Pen Company was chosen? A. Yes.

RDQ300. Who paid the debts of Waterman & Gibson? A. Mr. Lockwood.

RDQ301. All the debts of Waterman & Gibson other than the debt to Mr. Lockwood himself, were paid by Mr. Lockwood? A. Mr. Lockwood paid every dollar that they owed.

RDQ302. These assignments that you have spoken of, did they provide for monthly turning over of the accounts of A. A. Waterman & Co.? A. The original assignments?

RDQ303. Yes? A. No, sir; that came up later.

2441 RDQ304. The original assignment provided for the assignment of everything to Rhodes Lockwood? A. Yes. These monthly assignments were made at the suggestion of our lawyer.

RDQ305. And these monthly assignments were also among these papers which were destroyed, as you have testified? A. Yes.

RE-CROSS EXAMINATION by Mr. Bacon:

RXQ306. On February 1, 1899, was there any assignment made? A. At the time we took the goods?

RXQ307. Yes? A. No.

RXQ308. How long before that had there been any assignment made? A. At the time of the last assignment, of the ac-
2442 counts receivable, made on January 1st.

RXQ309. And that assignment was merely an assignment of accounts? A. That was an assignment of accounts. The assignment previous to that was made by Waterman & Gibson at the time they formed their partnership.

RXQ310. At the very beginning of their partnership? A. Yes.

RXQ311. That was what you call the first or second assignment? A. The A. A. Waterman & Co. was the second assignment.

RXQ312. And the second assignment was when A. A. Waterman and Gibson formed their partnership originally, was it not? A. Yes.

RXQ313. Then you do fix a date for that second assignment as when the new firm of Waterman & Gibson was formed? A. That is what I said before.

RXQ314. And the first assignment was when Mr. A. A. Waterman first began as an individual to buy goods of Lockwood? A. Yes, that is after Lockwood had furnished him money.

RXQ315. And the second assignment was when the firm of Waterman & Gibson was formed? A. Yes.

2444

RXQ316. And all assignments after that were mere assignments of accounts? A. Yes.

RXQ317. Were there any regular assignments of these patents ever given? A. They were assigned on the application.

RXQ318. To whom? A. Rhodes Lockwood.

RXQ319. And were they issued in his name? A. Yes.

RXQ320. Are you sure of that? A. Yes.

RXQ321. What would be the dates of those assignments? A. Mr. Waterman took out those patents, I think, most of them, in 1897. I think there was one patent that Mr. Waterman took out that was assigned afterwards.

RXQ322. You have said that on February 1, 1899, Mr. Lockwood took over the good will. He did not do it under any written assignment? A. He did it under authority from Mr. Waterman's lawyer.

2445

RXQ323. Taken over verbally? A. Mr. Waterman had a lawyer there and we had a lawyer there at that time.

RXQ324. Did he assign this good will verbally on February 1, 1899? A. Verbally, so far as anything in addition to what he had already assigned.

RXQ325. And is it not a fact that the assignments merely permitted him to sell what goods they had on hand already in process of manufacture, under the name of A. A. Waterman & Co.? A. I think that assignment would have permitted him to carry on the business under that name if he had seen fit.

2446 *Frederick W. Stevens*

RXQ326. You do not know definitely? A. I am not positive on law points.

RXQ327. And you do not remember the phraseology of this verbal assignment? A. Except that it assigned everything there was to him.

RXQ328. But the name was not mentioned? A. What do you mean—when we took the goods?

RXQ329. On the first of February, 1899? A. Certainly, it was mentioned.

RXQ330. What was said about it? A. Mr. Waterman's lawyer said we had a perfect right to take the goods and use them and sell them and use the name.

2447 RXQ331. And that is all that he did say? A. That is all that I recollect.

RXQ332. It only related to the goods on hand? A. It related to all the goods that we held.

RXQ333. That you then held? A. Yes.

RXQ334. And nothing else? A. We had 2,000 gold pens down in the safe in our office.

RXQ335. And he authorized you to sell those although they bore the name of Waterman? A. Yes.

RXQ336. And that is all there was to it? A. At that verbal talk, yes.

RXQ337. And you are not prepared to say that any of those preceding assignments went any further than that verbal talk,

2448 are you? A. Those preceding assignments assigned everything that it is possible for a man to assign. If a man can assign his name, it assigned his name.

RXQ338. You don't remember the wording of those assignments? A. No.

RXQ339. You don't know that they mentioned the name of A. A. Waterman & Co.? A. Certainly they did.

RXQ340. Mentioned the trade name? A. Certainly they did; A. A. Waterman and E. L. Gibson doing business under the firm name of A. A. Waterman & Co.

RXQ341. And they assigned certain goods to Mr. Lockwood; was that it? A. Assigned everything.

RXQ342. In the body of the assignment where they assigned certain goods did they also say that he sold to Mr. Lockwood his right to make goods under his own name? A. I think the wording was that Mr. Lockwood had the right to take over and continue the business. I think that is the wording in the assignment.

RXQ343. Are you sure of that? A. No.

By Mr. Raymond:

RDQ344. Were you ever an inventor of a fountain pen? A. I invented one with Mr. A. A. Waterman.

By Mr. Bacon: 2450

RXQ345. Didn't you have a long lawsuit with L. E. Waterman Company? A. Yes.

RXQ346. What time? A. It lasted several years; I could not tell you. I think it started soon after the Sterling Pen Company was formed.

RXQ347. And continued for several years? A. Yes.

RXQ348. And it related to some infringement of their patents? A. Some infringement on the Waterman patents, of the L. E. Waterman patents. That had nothing to do with the A. A. Waterman case.

RXQ349. You say Mr. Lockwood paid the debts of A. A. Waterman & Co. Had he not guaranteed them in the beginning? A. No, Mr. Lockwood never guaranteed anything. I 2451
presume that A. A. Waterman represented that Mr. Lockwood was back of his firm, because he had no credit of his own.

RXQ350. If A. A. Waterman had no credit of his own, how could he buy this $1,000 worth of gold pens? A. I presume that he represented that Mr. Lockwood was advancing the money.

RXQ351. You don't know whether he did or not? A. I don't know. I know there were no guaranteed bills.

RXQ352. How could you know what Mr. Lockwood had guaranteed? A. Because he was one of the kind that would not do a thing of that kind without speaking of it.

RXQ353. And that is the only way you know? A. Yes.

2452 *Frederick W. Stevens*

RXQ354. You won out in your suit with the L. E. Waterman Company? A. Yes.

It is admitted that a patent for middle joint pen, No. 619,702, February 14, 1899, application filed May 26, 1897, by Arthur A. Waterman, was assigned before the issuance, to Rhodes Lockwood.

It is also admitted that a patent for fountain pen No. 633,538, application filed May 3, 1899, by A. A. Waterman and F. W. Stevens, issued September 19th, 1899, was assigned before issuance to Rhodes Lockwood.

2453 It is also admitted that A. A. Waterman took out patent No. 638,779 for a feed device, application filed August 16th, 1899, issued December 12, 1899.

It is also admitted that the A. A. Waterman Pen Company took out a trad-mark, No. 31442, registered March 29th, 1898, for a device which contained the words "A. A. Waterman Standard Fountain Pen."

By Mr. Raymond:

RDQ355. Were you the F. W. Stevens mentioned as a co-inventor with Mr. Waterman of a pump pen? A. Yes.

RDQ356. And were these patents assigned by Mr. Waterman and also by yourself to Mr. Lockwood pursuant to these assignments which you have testified to? A. Yes.

2454 RDQ357. And this trade-mark just spoken of is one of the trade-marks which was assigned to Mr. Lockwood pursuant to these assignments? A. Yes.

By Mr. Bacon:

RXQ358. These assignments, of those two patents and that trade-mark were made to repay the debt that Mr. Waterman owed Mr. Lockwood? A. In a measure, in part payment.

RXQ359. When was the name A. A. Waterman & Co., first used on a fountain pen? A. After the copartnership between Waterman & Gibson. I could not tell you the date.

RXQ360. And from that time until this, fountain pens have been manufactured and sold openly in the market bearing the

imprint A. A. Waterman or A. A. Waterman & Co., have they not? A. I did not know it until yesterday. I saw one yesterday.

RXQ361. Don't you know that they have been very largely sold in Boston throughout all these years? A. No, sir.

Mr. Raymond: Objected to as improper re-cross examination and I give notice that as to these matters the defendant makes the witness his own.

RXQ362. Have you not seen them advertised widely? A. No, sir.

RXQ363. What is your present business? A. I am not in a position at the present. 2456

RXQ364. You were with Lockwood up to 1907? A. Yes.

RXQ365. Manufacturing pens? A. Yes.

RXQ366. And kept in touch with the manufacture of different kinds of pens? A. In a measure. Of course I was in the office.

RXQ367. Do you mean to say that although you were manufacturing fountain pens in these years from say 1899 until 1907, you never knew until yesterday that pens were being manufactured and sold under the name of A. A. Waterman & Co.? A. I have never seen the name marked on a fountain pen until yesterday. I know one concern in Boston that represented itself to be agent for A. A. Waterman's Modern pen but I have never been inside the store. 2457

RXQ368. How long have you known of that concern? A. I should say for five or six years.

RXQ369. You knew then that they were selling A. A. Waterman & Co. pens? A. A. A. Watermans Modern pens.

RXQ370. And didn't you know before this that they were for sale on the market? A. While the Colonial Pen Company was in existence they were selling A. A. Watermans Modern Pens. After they went out of business I supposed the pen was gone.

RXQ371. Didn't you know that Frazer & Geyer Company were manufacturing them and that they were sold by A. A. Waterman & Co. as selling agents? A. I did not.

2458 *Frederick W. Stevens*

RXQ372. And yet you were in the fountain pen business? A. I was in the rubber business.

RXQ373. Manufacturing holders? A. The large proportion of the Davidson Rubber business was in soft rubber goods. I had charge of the office. The fountain pen business was kept separate.

RXQ374. And you had nothing to do with it? A. I had the oversight of the books, but I had a bookkeeper working on those books.

RXQ375. Then you personally were not interested in the manufacture of fountain pen holders?

2459 A. Only as being connected with the Davidson Rubber Company.

Deposition closed.

Signature waived.

Adjourned to Monday, May 1, 1911, at 11 A. M.

2460

Plaintiff's E

No. 35,048.

PROPRIETOR
ATTORNEYS

TRADE-MARK.

No. 35,048.

Registered Sept. 18, 1900.

L. E. WATERMAN COMPANY.

FOUNTAIN PENS.

(Application filed July 28, 1900.)

IDEAL

...ES:

...PROPRIETOR

UNITED STATES PATENT OFFICE.

L. E. WATERMAN COMPANY, OF NEW YORK, N. Y.

TRADE-MARK FOR FOUNTAIN-PENS.

STATEMENT and DECLARATION of Trade-Mark No. 35,048, registered September 18, 1900.

Application filed July 28, 1900.

STATEMENT.

To all whom it may concern:

Be it known that the L. E. WATERMAN COMPANY, a corporation duly organized under the laws of the State of New York, and located in the city of New York, county of New York, in said State, and doing business at Nos. 155 and 157 Broadway, in said city, has adopted for its use a Trade-Mark for Fountain-Pens, of which the following is a full, clear, and exact specification.

The trade-mark consists of the word "Ideal." This word has generally been arranged as shown in the accompanying facsimile, in which it is represented in plain block letters; but the style of letters may be changed and a different style of letters be used without altering the character of the trade-mark, the essential feature of which is the word "IDEAL."

This trade-mark has been used continuously in the business of said corporation and by its predecessors in business since the 1st day of July, 1883.

The class of merchandise to which this trade-mark is appropriated is stationery miscellany, and the particular description of goods comprised in said class upon which the said trade-mark is used is fountain-pens.

The trade-mark is usually displayed by being stamped into the barrel of the fountain-pen and on the gold pen used in the same, or by being printed in suitable colors on the labels applied to the boxes containing said fountain-pens, or by being branded, stenciled, or painted on the cases in which said fountain-pens are shipped, or by being placed in suitable colors on the show-cards, bill-heads, letter-paper, and circulars advertising said pens.

Signed this 26th day of July, 1900.

L. E. WATERMAN COMPANY.
L. E. WATERMAN,
President.

Witnesses:
PAUL GOEPEL,
M. H. WURTZEL.

DECLARATION.

State of New York, county of New York, ss:

LEWIS E. WATERMAN being duly sworn, deposes and says that he is the president of the corporation the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that said corporation has at this time a right to the use of said corporation in commerce between the United States and foreign nations, and particularly with England; that the description and facsimile presented for record truly represent the trade-mark sought to be registered.

LEWIS E. WATERMAN.

TRADE-MARK.

49,715. REGISTERED FEB. 13, 1906.

L. E. WATERMAN COMPANY.

FOUNTAIN PENS.

APPLICATION FILED MAY 5, 1905.

IDEAL

UNITED STATES PATENT OFFICE.

L. E. WATERMAN COMPANY, OF NEW YORK, N. Y.

TRADE-MARK FOR FOUNTAIN-PENS.

No. 49,715. Statement and Declaration. Registered Feb. 13, 1906.

Application filed May 5, 1905. Serial No. 4,349.

STATEMENT.

To all whom it may concern.

Be it known that the L. E. WATERMAN COMPANY, a corporation duly organized under the laws of the State of New York, and located in the city of New York, county of New York, in said State, and doing business at No. 173 Broadway, in said city of New York, has adopted for its use a trade-mark, of which the following is a description.

The trade-mark consists of the word "IDEAL."

The trade-mark has been continuously used in the business of said corporation and by its predecessors in business since the 1st day of July, 1883.

The class of merchandise to which this trade-mark is appropriated is stationery miscellany, and the particular description of goods comprised in said class upon which the said trade-mark is used is fountain-pens.

The trade-mark is usually displayed by being stamped into the barrel of the fountain-pen or on the gold pen used in the same, or by being printed in suitable colors on the labels applied to the boxes containing said fountain-pens, or by being branded, stenciled, or painted on the cases in which said fountain-pens are shipped.

L. E. WATERMAN COMPANY,
By FRANK D. WATERMAN,
President.

DECLARATION.

State of New York, county of New York, ss:

FRANK D. WATERMAN, being duly sworn, deposes and says, that he is the president of the L. E. WATERMAN COMPANY, a corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark either in the identical form, or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States and between the United States and foreign nations and particularly with England, France, Germany, Austria, Italy, Mexico, Cuba, Argentine Republic and Japan; and that the description, drawing and facsimiles presented truly represent the trade-mark sought to be registered.

FRANK D. WATERMAN.

Subscribed and sworn to before me, a notary public, this 29th day of April, 1905.

[L. S.] W. M. BONHAG,
Notary Public, (No. 121,) N. Y. Co.

TRADE-MARK.

No. 35,849. Registered Feb. 5, 1901.

L. E. WATERMAN COMPANY.

FOUNTAIN PENS.

(Application filed Jan. 2, 1901.)

UNITED STATES PATENT OFFICE.

L. E. WATERMAN COMPANY, OF NEW YORK, N. Y.

TRADE-MARK FOR FOUNTAIN-PENS.

STATEMENT and DECLARATION of Trade-Mark No. 35,849, registered February 5, 1901.

Application filed January 2, 1901.

STATEMENT.

To all whom it may concern:

Be it known that the L. E. WATERMAN COMPANY, a corporation duly organized under the laws of the State of New York, and located in the city of New York, county of New York, in said State, and doing business at No. 155 Broadway, in said city, has adopted for its use a Trade-Mark for Fountain-Pens, of which the following is a full, clear, and exact specification.

The trade-mark consists of the words "Waterman's Ideal Fountain Pen N. Y.," which words have generally been arranged as shown in the accompanying facsimile, in which they are represented in plain block letters in a horizontal line. The style of letters and the arrangement of the words may be changed, however, without altering the character of the trade-mark, the essential feature of which is the words "WATERMAN'S IDEAL."

This trade-mark has been continuously used in the business of said corporation and by its predecessors in business since the 1st day of July, 1883.

The class of merchandise to which this trade-mark is appropriated is stationery miscellany, and the particular description of goods comprised in said class upon which the said trade-mark is used is fountain-pens.

The trade-mark is usually displayed by being stamped into the barrel of the fountain-pen and on the gold pen used in the same, or by being printed in suitable colors on the labels applied to the boxes containing said fountain-pens, or by being branded, stenciled, or painted on the cases in which said fountain-pens are shipped, or by being placed in suitable colors on the show-cards, bill-heads, letter-paper, and circulars advertising said pens.

Signed this 22d day of November, 1900.

L. E. WATERMAN COMPANY
By F. D. WATERMAN,
Secy.

Witnesses:
PAUL GOEPEL,
JOSEPH H. NILES.

DECLARATION.

State of New York, county of New York, ss:

FRANK D. WATERMAN being duly sworn, deposes and says that he is the secretary of the corporation the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that said corporation has at this time a right to the use of the trade-mark therein described; that no other person, firm or corporation, has the right to such use, either in the identical form, or in any such near resemblance thereto as might be calculated to deceive; that it is used by said corporation in commerce between the United States and foreign nations, and particularly with Germany; that the description and facsimile presented for record truly represent the trade-mark sought to be registered.

FRANK D. WATERMAN.

Sworn to and subscribed before me this 22d day of November, 1900.

[L. S.] PAUL GOEPEL,
Notary Public, N. Y. County.

TRADE-MARK.

No. 49,478. REGISTERED FEB. 6, 1906.

L. E. WATERMAN COMPANY.

FOUNTAIN PENS.

APPLICATION FILED MAY 5, 1905.

WATERMAN'S IDEAL FOUNTAIN PEN N.Y.

UNITED STATES PATENT OFFICE.

L. E. WATERMAN COMPANY, OF NEW YORK, N. Y.

TRADE-MARK FOR FOUNTAIN-PENS.

No. 49,478. Statement and Declaration. Registered Feb. 6, 1906.

Application filed May 5, 1905. Serial No. 4,350.

STATEMENT.

To all whom it may concern:

Be it known that the L. E. WATERMAN COMPANY, a corporation duly organized under the laws of the State of New York, and located in the city of New York, county of New York, in said State, and doing business at No. 173 Broadway, in said city of New York, has adopted for its use a trade-mark, of which the following is a description.

The trade-mark consists of the words "WATERMAN'S IDEAL FOUNTAIN PEN, N. Y."

The trade-mark has been continuously used in the business of said corporation and by its predecessors in business since the 1st day of July, 1883.

The class of merchandise to which this trade-mark is appropriated is stationery miscellany, and the particular description of goods comprised in said class upon which the said trade-mark is used is fountain-pens.

The trade-mark is usually displayed by being stamped into the barrel of the fountain-pen or on the gold pen used in the same, or by being printed in suitable colors on the labels applied to the boxes containing said fountain-pens, or by being branded, stenciled, or painted on the cases in which said fountain-pens are shipped.

L. E. WATERMAN COMPANY,
By FRANK D. WATERMAN,
President.

DECLARATION.

State of New York, county of New York, ss:

FRANK D. WATERMAN, being duly sworn, deposes and says that he is the president of the L. E. WATERMAN COMPANY, a corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark either in the identical form, or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States and between the United States and foreign nations and particularly with England, France, Germany, Austria, Italy, Mexico, Cuba, Argentine Republic and Japan; and that the description, drawing and facsimiles presented, truly represent the trade-mark sought to be registered.

FRANK D. WATERMAN.

Subscribed and sworn to before me, a notary public, this 29th day of April, 1905.

[L. S.] W. M. BONHAG,
Notary Public, (No. 121,) N. Y. Co.

TRADE-MARK.

No. 59,703. REGISTERED JAN. 15, 1907.

L. E. WATERMAN COMPANY.

FOUNTAIN PENS, FEEDS, CAPS, AND BARRELS THEREFOR.

APPLICATION FILED AUG. 2, 1906.

WATERMAN'S

UNITED STATES PATENT OFFICE.

L. E. WATERMAN COMPANY, OF NEW YORK, N. Y.

TRADE-MARK FOR FOUNTAIN-PENS, FEEDS, CAPS, AND BARRELS THEREFOR.

No. 59,703. Statement and Declaration. Registered Jan. 15, 1907.

Application filed August 2, 1906. Serial No. 21,300.

STATEMENT.

To all whom it may concern:

Be it known that the L. E. WATERMAN COMPANY, a corporation duly organized under the laws of the State of New York, and located in the city of New York, county of New York, in said State, and doing business at No. 173 Broadway, in said city of New York, has adopted for its use the trade-mark shown in the accompanying drawing.

The trade-mark has been continuously used in our business since the 1st day of July, 1883.

The class of merchandise to which the trade-mark is appropriated is Class 70, Stationery not otherwise classified, and the particular description of goods comprised in said class upon which said trade-mark is used is fountain-pens, fountain-pen feeds, fountain-pen caps, and fountain-pen barrels.

The trade-mark is usually displayed on the packages containing the goods by placing thereupon a printed label on which the same is shown or branding, stenciling, painting, stamping, or imprinting the same on the packages containing the goods or upon the goods themselves.

L. E. WATERMAN COMPANY,
By F. D. WATERMAN,
President.

DECLARATION.

State of New York, county of New York, ss:

FRANK D. WATERMAN, being duly sworn, deposes and says that he is the president of the L. E. WATERMAN COMPANY, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said L. E. WATERMAN COMPANY to be the owner of the mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said mark is used by said L. E. WATERMAN COMPANY in commerce among the several States of the United States and between the United States and foreign nations, or Indian tribes, and particularly with England, France and Germany; that the drawing presented truly represents the mark sought to be registered; that the specimens show the mark as actually used upon the goods; and that the mark has been in actual use as a trade-mark of the applicant and applicant's predecessors from whom title was derived for more than ten years next preceding the passage of the act of February 20th, 1905, and that, to the best of his knowledge and belief, such use has been exclusive.

FRANK D. WATERMAN.

Subscribed and sworn to before me this 9th day of October, 1906.

[L. S.] STOCKBRIDGE BACCHUS,
Notary Public, Kings County.
Certificate filed in New York County.

Plaintiff's Exhibit 9.

2521

IMPORTANT NOTICE

After our stock of Modern Fountain Pens, at present manufactured, is disposed of we will drop the name "A. A. Waterman & Co." from the Modern line, and these pens will be imprinted as follows:

MIDDLE JOINT HOLDERS

"Middle Joint Modern
Modern Pen Co.—New York.
Pat'd Dec. 12, 1899."

AUTOMATIC SELF-FILLING HOLDERS

"Automatic Self-Filling Modern.
Modern Pen Co.—New York.
Pat'd Dec. 12, '99, and Nov. 17, '03."

ALL MODERN GOLD PENS

"Modern—New York" and the number of the pen.

We will also drop the Numbers 20 and 22—list prices $2.00—from the Modern line when the present manufactured stock is sold, and thereafter the lowest priced Moderns will list at $2.50.

2522

If you desire the "A. A. Waterman & Co." imprint on the Moderns or wish a stock of these lower priced models before the supply is exhausted, you should place your orders at once for immediate or future delivery.

MODERN PEN CO.

April 1, 1908.

2523

2524 **Plaintiff's Exhibit 18, Decree in Saadi Case.**

At a Stated Term of the Supreme Court of the District of Columbia, sitting in Equity and held in the Court House of the District of Columbia, on the 5th day of December, 1910.

Present: Hon. Wendell P. Stafford, Justice.

L. E. WATERMAN COMPANY, Complainant, against JOHN SAADI, Defendant.	Filed Dec. 5th, 1910. J. R. Young, Clerk. No. 28,987.

2525

This cause came on to be finally heard at this, the November Term of the said Court, upon the pleadings and proofs, and was argued by counsel for the respective parties, and the Court being advised in the premises, and upon consideration, and after due proceedings had, it is adjudged, ordered and decreed as follows:

1. That now you, the said John Saadi, and John Saadi doing business under the name and style of The Egyptian Diamond Jewelry Company, the defendant above named, and your attorneys, servants, employees, agents, clerks, salesmen and all persons taking or holding under, from or through you, are hereby
2526 strictly enjoined and restrained perpetually from

(a) Infringing the complainant's trade-mark "Waterman's Ideal Fountain Pen, N. Y.," or infringing the complainant's trade-mark "Ideal," or infringing the complainant's trade-mark the representation of a globe, and from manufacturing or selling fountain pens (other than fountain pens of complainant's manufacture) having the said trade-marks, or either of them, or any counterfeit, simulation or colorable imitation thereof, on such fountain pens, whether on the holder or on the gold pen or on labels, boxes, signs, letter heads, bill heads, circulars or adver-

tisements accompanying or used in connection with the making or selling of such fountain pens, or in any manner whatsoever.

(b) Using in connection with the business of making or selling fountain pens (other than fountain pens of complainant's manufacture), on such fountain pens, whether on the holder or on the gold pen, or on the labels, boxes, signs, letter heads, bill heads, circulars or advertisements or in any manner whatsoever the word "Waterman," "Waterman's" or "Watermans" alone; or the word "Waterman," "Waterman's" or "Watermans" whether the same be or be not coupled with the initials "A. A." or with the initial "A" or whether or not the same be or be not used in collocation with the word "Pen" or "Fountain Pen," or 2528 other descriptive word or words, unless accompanied by words which conspicuously, clearly and unmistakably distinguish such fountain pens from those of complainant's manufacture.

2. And it is further adjudged, ordered and decreed that a writ of injunction issue perpetually enjoining and restraining the above named defendant John Saadi and John Saadi doing business under the name and style of The Egyptian Diamond Jewelry Company, his attorneys, servants, employees, agents, clerks, salesmen and all persons taking or holding under, from or through them, all as aforesaid.

3. That heretofore, to wit, as early as the year eighteen hundred eighty-three complainant's predecessor in business was en- 2529 gaged in the manufacture and sale of fountain pens in the City of New York, and in said year, in order to distinguish and identify his fountain pens from those of all other producers he adopted as trade-marks for his fountain pens the word "Ideal," and the words "Waterman's Ideal Fountain Pen, N. Y.," and since said date complainant and its predecessors in business used and continued to use continuously said trade-marks for their fountain pens to denote and designate and identify their fountain pens from those of all other manufacturers; that in the year eighteen hundred and ninety-six the complainant adopted as its trade-mark for fountain pens the representation of a globe which

2530 *Plaintiff's Exhibit 18*

it imprinted or stamped on its fountain pens and on the boxes in which its fountain pens are distributed and sold, and since said last mentioned date the complainant has continuously used said trade-mark to designate, indicate and identify fountain pens of its manufacture from those of all other manufacturers; that said trade-marks had become, many years prior to the beginning of this action, and have ever since continued to be the trade names by which complainant's fountain pens are generally and widely known; that heretofore and many years prior to the beginning of this action and ever since said trade-marks and trade names indicated and signified origin and indicated and signified
2531 and identified complainant's fountain pens from those of all other manufacturers; that the defendant John Saadi has violated and infringed the rights of the complainant by advertising, representing, selling and dealing in fountain pens (not of complainant's manufacture) bearing the names and marks "Royal Ideal Pen," "A. A. Waterman & Co.," which names and marks are an imitation and simulation and infringement of complainant's said trade-marks and trade-names; that the defendant, John Saadi, has violated and infringed the rights of the complainant by using the name "A. A. Waterman & Co.," and "A. A. Waterman," in connection with the advertising, selling and dealing in fountain pens not of complainant's manufacture; that the defendant, John Saddi, has violated and infringed the rights of the complainant by advertising, representing, selling and dealing in foun-
2532 tain pens (not of complainant's manufacture) marked and stamped with a device in imitation and simulation of complainant's said trade-mark the representation of a globe; that said names, marks and devices used by the defendant, as aforesaid, caused confusion in the trade, were intended to deceive and did deceive the public and cause the defendant's goods to be passed off and purchased as and for fountain pens of complainant's manufacture.

4. And it is further adjudged, ordered and decreed that the complainant is entitled to have and recover the damages which it has suffered and sustained by reason of said infringement upon

Plaintiff's Exhibit 18 2533

its rights by the defendant, as aforesaid, and by reason of the advertisement, representation or sales by the defendant of fountain pens (not of complainant's manufacture) in connection or conjunction with the names "A. A. Waterman & Co.," or "A. A. Waterman," or marked or stamped in imitation, or simulation, or infringement of complainant's said trade-marks or trade names, and to enable the Court to ascertain the damages to which the complainant is entitled, it is ordered that this cause be and the same is hereby referred to the Court Auditor, who is hereby directed to take and state an account of the damages which the complainant has suffered and sustained by reason of said defendant's acts, as aforesaid, in using "A. A. Waterman & Co." 2534
or "A. A. Waterman," or in advertising, representing, offering for sale, selling or dealing in fountain pens (not of complainant's manufacture) marked or stamped with any infringement, counterfeit, imitation or simulation of any or either of complainant's said trade-marks or trade names, and said Auditor is directed to make and state an account of said damages from the proceedings and proofs now in the cause and such other proof as may be laid before him.

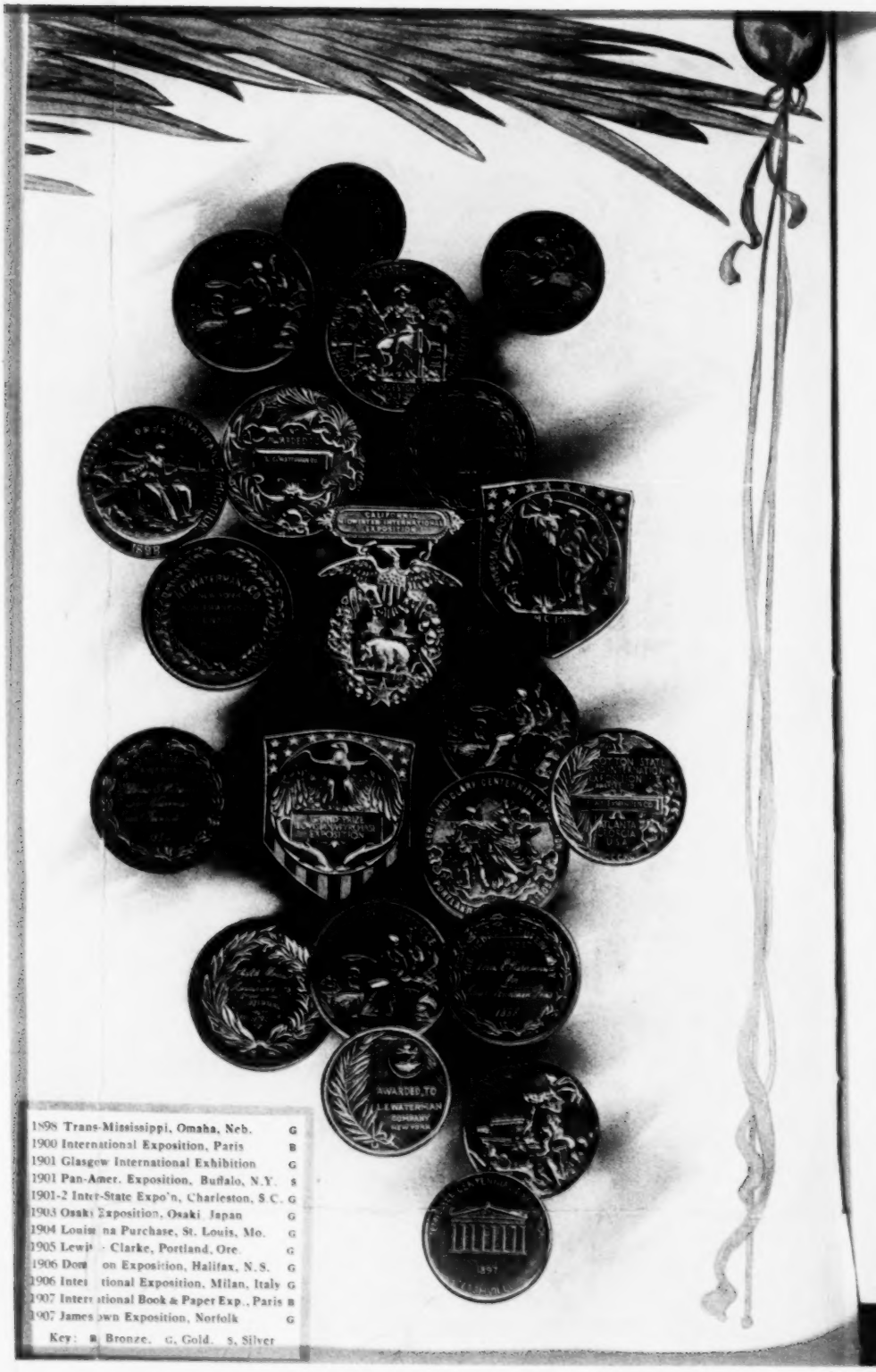
5. And it is further adjudged, ordered and decreed that the said defendant, John Saadi, pay all the costs herein to be taxed by the Clerk and that execution herein issue in favor of the complainant and against the defendant for the collection of said costs in the same manner as at law. 2535

WENDELL P. STAFFORD,
Justice.

A true copy:
Test: J. R. Long, Clerk.
by F. H. Smith, Asst. Clerk.
(Seal)

1883	Mechanics Institute, N.Y., Excellence	B
1884	Mechanics Institute, N.Y., Superiority	B
1885	Mechanics Institute, N.Y., Special	S
1886	Mechanics Institute N.Y., Superiority	B
1887	Mechanics Institute, N.Y., Superiority	B
1888	Mechanics Institute, N.Y., Superiority	B
1889	Mechanics Institute, N.Y., Excellence	B
1889	Exposition Universelle, Paris, Highest	B
1893	World's Col'bian Exposition, Chicago	B
1894	California Mid-Winter, San Francisco	G
1895	Cotton States Int'rn'tion'l, Atlanta, Ga.	G
1897	Tennessee Centennial, Nashville	G

Key: B, Bronze. G, Gold. S, Silver



1898 Trans-Mississippi, Omaha, Neb.	G
1900 International Exposition, Paris	B
1901 Glasgow International Exhibition	G
1901 Pan-Amer. Exposition, Buffalo, N.Y.	S
1901-2 Inter-State Expo'n, Charleston, S.C.	G
1903 Osaki Exposition, Osaki, Japan	G
1904 Louisiana Purchase, St. Louis, Mo.	G
1905 Lewis & Clarke, Portland, Ore.	G
1906 Dominion Exposition, Halifax, N.S.	G
1906 International Exposition, Milan, Italy	G
1907 International Book & Paper Exp., Paris	B
1907 Jamestown Exposition, Norfolk	G

Key: B, Bronze. G, Gold. S, Silver

Plaintiff's Exhibit 23.

BOOKSELLER AND STATIONER

If it is a

Waterman's Lincoln

it is all right

and has a reputation gained by giving perfect satisfaction.

In the manufacture of the

A. A. Waterman & Co.'s Pen

and has a reputation gained by giving perfect satisfaction.

In the manufacture of the

A. A. Waterman & Co.'s Pen

quality is assured, using nothing but the finest Beni Bolivian Para Rubber from Bolivia. This is the finest grade gathered in any part of the world.

The Waterman Pen Point

is made from 14 carat gold, alloyed with silver and copper; is acid proof and non-corrosive; tipped with iridium, mined in the Ural Mountains of Russia, and passes through seventy careful and delicate operations before reaching the market.

The Waterman Pen costs no more at first, and less in the end.

Canadian Agents:

Warwick Bros. & Rutter, Limited

Importing and Manufacturing Stationers

TORONTO

Plaintiff's Exhibit 24.

BOOKSELLER AND STATIONER

WHY

The New Lincoln Fountain Pen

made by

A. A. Waterman & Co.

is the most satisfactory pen for the Canadian Trade

1st **It is absolutely guaranteed by a Canadian House who do not depend on Fountain Pen business only.**

2nd **It is thoroughly high-grade in every particular.**

A. A. Waterman & Co.

is the most satisfactory pen for the Canadian Trade

1st It is absolutely guaranteed by a Canadian House who do not depend on Fountain Pen business only.

2nd It is thoroughly high-grade in every particular.

3rd It is by far the best value made.

4th We have all parts in stock and look after all repairs in Toronto.

5th A few pens may be enclosed with other goods or with any parcel from Toronto, as required.

No. 103—All styles. Retail price, $1.50

No. 503—All styles, regular $4.00 size. Retail price, $2.50

Gold mounted patterns in all styles and sizes

If you do not now carry the New Lincoln, order a sample and compare the value

---

Warwick Bros. & Rutter, Limited

Distributors for Canada **TORONTO**

Plaintiff's Exhibit 29.

Photograph of Carey's Window.

Plaintiff's Exhibit 31. 2551

Port Hope, Canada,
October 13th, 1910.

The L. E. Waterman Fountain Pen Co.,
Montreal, Que.

Gentlemen:

Under separate cover, I am sending you one of your American make self-filling Fountain Pens. This Pen seems to be clogged up. I would be obliged if you would clean it and return it to me.

I would also like to know how I can clean it. There seems to be no end to come off to get at the inside. 2552

Yours very truly,
H. C. WOTHERSPOON.

Dict. H. C. W/R.

"Dunain," Port Hope, Ont., Canada,
7th Nov., 1910.

L. E. Waterman Co., Ltd.,
Montreal, P. Q.

Dear Sirs:

Your favor of the 18th ult. came duly to hand and the pen referred to a few days later. The letter has inadvertantly remained unanswered. 2553

I did not purchase the pen myself and cannot therefore tell you if it was sold as one of your firms make, but I thought there was only ONE WATERMAN.

I have one of your pens which has been in constant use for about ten years and is as good now as it did the day I got it.

I enclose postage for the amount you had to use returning my pen.

Thanking you for your courtesy, I remain,
Yours truly,
H. C. WOTHERSPOON.

2554 **Plaintiff's Exhibit 32.**

Letterhead of

L. S. ARNOLD.

Melita, Man. Aug. 29, 1910.

The L. E. Waterman Co.,
Montreal, Que.

Sirs:

Enclosed is a Waterman pen—also note from the owner of pen explaining the difficulty.

2555 Mr. Duncan is leaving Melita on Sept. 10 so that pen will have to be back before that date.

Yours truly,

L. S. ARNOLD.

Note referred to above.

Pen has been a good one for a short time, but when I want to write fast it does not let down the ink. If I write slow it is not too bad, but as I am a fast writer it does not do the work to suit.

JAMES DUNCAN.

2556 Must have it returned to Melita before Sept. 8th as I am going away.

J. D.

Plaintiff's Exhibit 33. 2557

Letterhead of

THE CAVENDISH LUMBER COMPANY

Lakefield, Ont.

Lakefield, Jan. 12th/11.

The L. E. Waterman Co.,
Montreal, Que.

Dear Sirs:

I am forwarding under separate cover by concurrent post two pens of your manufacture which I would thank you to kindly 2558
fix. On the one pen you will notice it requires a new cap. On the other I would ask you to kindly substitute with a new hard fine pointed nib.

Kindly advise amount of the charges for the alterations and I will forward you Post Office order for the amount.

Yours truly,
A. M. CHALMERS.

Plaintiff's Exhibit 34.

Hastings, Sept. 20-10 2559

L. E. Waterman
136 St James St
Montreal Que.

Dear Sir:

We are today forwarding you by mail (Reg) two fountain pens to be repaired. Will you kindly repair these as soon as possible and advise us when you receive them.

We are

Yours truly,
GIBSON & HUYCK
"G"

2560 *Plaintiff's Exhibit 34*

Hastings, Nov. 11-10

L. E. Waterman Co. Ltd.
Montreal, Que.

Gentlemen:

You have charged us $1.00 for repairing and setting pen for McGuire. This was sold to him under guarantee, and he did not use it many times with satisfaction, consequently, he refuses to pay for repairs. We will be pleased to hear from you in regard to this.

Yours truly,
2561 GIBSON & HUYCK
G

Hastings Nov 24-10

L. E. Waterman & Son,
Montreal, Que.

Gentlemen

Re. pen for Mr. McGuire.

He bought pen in Belleville, supposing that he was getting one of your make. This is how it was returned for repairs under
2562 that understanding. Thanking you for crediting us with over charge.

We are

Yours truly,
GIBSON & HUYCK
G

Plaintiff's Exhibit 35. 2563

POSTAL CARD

Louisburg, N. S., Jany. 6th, 1911.

Please send me your catalogue of "Waterman's Fountain Pens?

Is there any difference in the L. E. and A. A. Waterman Co.?

Yours truly,
REV. JOHN MACKINNON
Louisburg, N. S.

2564

Plaintiff's Exhibit 36.

Felix Cormier, L. L. B. C. C. S.
Notary Public.

Wickham Ouest, Que 29 October 1907.

L. E. Waterman Co. of Canada,
Montreal, Q.

Sir:

Herewith fountain pen: to replace gold pen, exchange it for another, strong, reliable, point neither fine nor too coarse. This was defective from the first and never much used; slides on paper without writing, ink bubbling in tube to prevent flow of ink, comes from H. Birks, I believe. Why is name Waterman (A. A.) on these pens? which is your best pen for business men? 2565

Yours,
F. CORMIER.

2566 **Plaintiff's Exhibit 37.**

Hotel Hassard Terlauney St Toronto
April 25th 1910

The Messrs L. E. Waterman Co. Ltd.
136 St James St
Montreal

Gentlemen.

When in Montreal last week, I called at your office, to ask your advice, re leakage in my Fountain Pen, & was astonished to learn that the Pen was not of your manufacture. This Pen was presented to me by Mr. W. C. Bouden (now Supt. for
2567 Prudential Insurance Co. at Calgary) on his leaving the London District, and was bought with eleven other Pens and presented at the Tecumseh Hotel London last July. On examining the box I found it was one of your boxes, with your name & address printed on the top and Mr. Bouden's compliments written on the bottom, but the Pen instead of being an L. E. Waterman's Ideal, was made by A. A. Waterman of New York & is called the Lincoln, I don't know how you a/c for this but am convinced that Mr. Bouden presented it in good faith as the Waterman Pen represented on the box. I was so positive that the Box was one of yours that I have sent it to your office to confirm my statement & shall be glad to know what you have to say in the matter, if someone is trading on your name then
2568 I am glad if I can be of any assistance to unravel what appears to me to be a fraud on the public generally.

I am sure if you wrote to Mr. Bouden at Calgary he will tell you whether he knew at the time that he was presenting a different pen to that represented & any assistance I can give you, will be glad to do.

Believe me

Yours Very Faithfully
R. J. NEWTON

Late Asst. Supt. Prudential Insurance Co.
at London, Ont.

Plaintiff's Exhibit 39. 2569

POSTAL CARD

Neudorf Sash, Feb. 21st 1911

The Waterman Fountain Pen Co.
Montreal, Que.

Dear Sirs.

The other day we exchanged one of your pens which we are enclosing. Kindly send us a No. 12 and charge us the difference. Send one with medium point.

Sincerely yours
THE NEUDORF DRUG & BOOK CO. 2570
per H. P.

POSTAL CARD

Neudorf Sash Mch 6/11

Dear Sirs:

Re Folio 9640

The pen I returned you was bought from me & was returned 8 days afterwards as being not satisfactory. I exchanged this pen and gave my customer the fine point. This $1.48 is a loss 2571
for me.—I understood you were to exchange any pen free of charge?

I am selling many fountain pens but I never had an experience like this!

NEUDORF DRUG—BOOK CO.

2572 **Plaintiff's Exhibit 41.**

Hospital for Insane,
London, Ont., Dec. 28/09.

Messrs. L. E. Waterman Co.,
136 St. James St.,
Montreal, Que.

Dear Sirs:

A short time ago I had one of your pens presented to me, but each time I have used it, or rather tried to use it, I could get no results. The pen was new when I received it, and since having same it has had no hard usage, simply because there was
2573 little satisfaction in trying to work with such an article.

I am mailing it under separate cover and would be greatly obliged if you could inform me as to the foundation of the trouble, also what the extra cost would be for a pen whose point was a grade finer.

I remain,

Yours truly,
WILSON D. SMYTH.

Plaintiff's Exhibit 42.

2574 Levis College September 15th 09

L. E. Waterman Co. of Canada Limited
136 St James Street
Montreal, Canada.

Sir.

I have sent you the 7th of September my fountain pen because it did not suit me perfectly. The package was registered, and I had included in the letter giving the explanations about it 10 cts for the registration at the return.

I have not yet received an answer after eight days. I find that my correspondence has not received a prompt and careful attention.

Plaintiff's Exhibit 42 2575

Hoping an answer by the return of the mail and my fountain also if possible.

I remain truly yours
REVEREND EDMOND CASON
Levis College
Notre-Dame of Levis
P. Q.

Levis College Sept. 27th/09

L. E. Waterman Company, Limited 2576
136 St. James St.,
Montreal.

Sir.

I have received with pleasure your letter of the 15th, and I am very obliged to you for your explanations.

The pen A. A. Waterman that I have sent to you was given me as a gift the 24th of April, 1909. The person who has given it me has bought the pen to the firm "Searsley, Limited" Montreal. She has asked a "Waterman's Ideal Fountain Pen" and believed to receive a genuine Waterman's Ideal Fountain Pen because it was in one of your boxes containing all your explanations about the Waterman's Ideal Fountain Pen. I am very sure of it— 2577

Now I will not write to Searsley & Co. Lim. of Montreal because I think it would be useless. However I advise you of the case with pleasure, and if you could do something for me in that case I would be very obliged to you, because I would desire to have a genuine Waterman's Ideal Fountain Pen. The pen was paid $4.50

I remain truly yours
REVEREND EDMOND CASON
Levis College
Notre-Dame Levis,
P. Q.

2578 **Plaintiff's Exhibit 43.**

Letter head of M. R. & S. A. Campbell.

Winnipeg, Canada, Jan. 9th, 09.

Messrs. E. L. Waterman Co.
Montreal.

Dear Sirs:

On Dec. 17th we sent a parcel with two pens in it but addressed it to A. Waterman, Montreal. If you have not already received it kindly enquire for it and let us have it as soon as possible and oblige.

2579 Yours very truly,
W. R. & S. A. CAMPBELL.

Dict/WRC.

L. E. Waterman

Gentlemen:

We found the two fountain pens mentioned in M. M. Campbell's letter and we return them to you to be repaired.

Yours truly,
GRANGER FRERES.

2580

POST CARD.

Winnipeg, Mar. 6th, 1909.

E. L. Waterman & Co.

Gentlemen:

Have you received the box of fountain pens yet, which we addressed to A. Waterman Co., Montreal. The Post Office people told us that they were delivered to Granger Bros., Mon-

Plaintiff's Exhibit 44 2581

treal. We asked the aforesaid firm to hand them over to you. Would you kindly let us know if you have received them yet. As the owners are getting a little anxious. Awaiting your reply, we remain,

Yours truly,
W. R. & S. A. CAMPBELL.

Repair Voucher of

L. E. WATERMAN COMPANY, Limited, 2582

136 St. James St., Montreal.

April 26, 1909.

Name — W. R. & S. A. Campbell.
Address — Winnipeg, Mon.

Plaintiff's Exhibit 44.

EXCHANGE SLIP.

Name — Mr. A. E. Bennett, 2583
Address — 243 St. Elizabeth.

Note Attached read as follows:

Please exchange this pen for a stub point.
GRANGER FRERES Ltd.

2584 **Plaintiff's Exhibit 44-a.**

ENVELOPE.

(Post Office Stamp)
Fort William Ont
Sept 9
7 30 A. M.
1909

(2 cancelled Stamps)

To Waterman Fountain Pen Co.
Montreal, Que.

ENVELOPE.

2585 (Post Office Stamp)
Cedar Springs
Aug 11
09
Ont.

(1 cancelled stamp)

To Waterman Fountain Pen Co.
Montreal, Queb.

ENVELOPE.

(From)
Dr. A. P. Chown
185 Princess St.,
Kingston, Ont.

2586

(1 cancelled stamp)
(Post Office Stamp)
Kingston, Ont
Sep 22
10 P M
1909

To Waterman Fountain Pen Co.
Montreal, Que.

Plaintiff's Exhibit 44-a 2587

ENVELOPE.

(From)
S. J. Watson
Druggist
Blairmore
Alta

(1 cancelled stamp)
(Post Office Stamp)
M. Hat & Nel.
R. P. O.
Nov. 15
09
B. C.

To Waterman Fountain Pen Co.
Montreal.

2588

ENVELOPE.

G. S. Mason,
Jeweler and Watchmaker
17 Hastings St., E.
Vancouver, B. C.

(1 cancelled stamp)
(Post Office Stamp)
Vancouver, B. C.
Sep 14
3 - P M
1909

The Waterman Fountain Pen Co.
Montreal, Can.

2589

2590 *Plaintiff's Exhibit 44-a*

ENVELOPE.

Return in 10 days to
The E. Eaton Co. Limited,
Importers & Manufacturers
Toronto, Canada

(1 cancelled stamp)
(Post Office Stamp)
Toronto, Ont.
July 23
10 A M
1909

Watermans Ideal Pen Co.,
Montreal, Que.

2591 ENVELOPE.

Grand Central Hotel
T. Donley, Prop.
St. Thomas, Ont.
Turpenny & Curran

(1 cancelled stamp)
(Post Office Stamp)
St. Thomas, Ont.
Sept 28
11 A M
1909

Waterman Fountain Pen Co
Montreal, Que.

2592

Plaintiff's Exhibit 44-a 2593

ENVELOPE.

(1 cancelled stamp)
(Post Office Stamp)
Winchester
Nov 22
1909
Ont.

Wm. Bow
Winchester, Ont.

The Waterman Company
Fountain Pen Mfrs
Montreal Que.

2594

ENVELOPE.

Return to
Eastern Townships Bank,
Bromptonville,
within eight days, if not called for.

(1 cancelled stamp)
(Post Office stamp)

WATERMAN Fountain Pen Co.
Montreal, Que.

ENVELOPE.

(Post Office Stamp)
Renerew
P M
Aug 21
09
Ont.

(1 cancelled stamp) 2595

Waterman Fountain Pen Co.
Montreal, Que.

2596 *Plaintiff's Exhibit 45*

ENVELOPE.

(Post Office Stamp)
Vancouver, B. C.
Sept 6
9 - A M.
1910

(2 cancelled stamps)

To the Waterman Pen Company
Quebec Canada.

ENVELOPE.

2597 Wm. Woods,
Brompton, Ont.

(2 cancelled stamps)

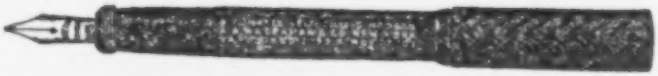
Waterman Pen Co.,
Montreal, Que.

Plaintiff's Exhibit 45.

2598

Waterman's Safety

Fountain Pens



Automatic Self-filling

BARNES & CO., LTD.

84 Prince William Street.

Plaintiff's Exhibit 46. 2599

No. B-7071.

Post Office, Montreal, 29th April, 1909.

Gentlemen:

With further reference to your communication of the 24th instant, regarding mail matter addressed to your clients, L. E. Waterman & Co., Ltd., I beg to say that all correspondence addressed to that firm will be, as in the past, duly delivered to them. Regarding correspondence addressed to A. A. Waterman & Co., however, we had taken the question up with Messrs. Granger Freres, Stationers, and they have submitted to us an authorization from the firm of A. A. Waterman & Co., New York, 2600
appointing them as their sole agent for the Modern Fountain Pens. In view of this fact anything which may reach this office addressed to A. A. Waterman & Co., (to which the firm you represent, of course, can have no claim whatever, as their initials are quite different) will be delivered to Granger Freres.

In view of the dispute regarding the matter any correspondence which may reach here not bearing the initials of the firm, but simply addressed Waterman & Co., will be returned to the senders for better direction, unless such correspondence bears the street address, or unless L. E. Waterman & Co. and Messrs. Granger Freres come to an amicable settlement, and furnish us with a statement signed by each as to whom such correspondence is to be delivered. 2601

Yours very truly,

N. S. HAMON
Postmaster.

Messrs. Davidson & Wainwright,
Advocates,
London & Lancashire Chambers,
Montreal.

2602 **Plaintiff's Exhibit 47.**

Sept. 4/06. Lawtey, Fla.

Messrs. L. E. Waterman & Co.,

Dear Sirs:

Last March I bought a self-filling pen at your place. It is the same size as my old one which I used about five years and it is still good. I gave it to a friend when I bought this. I could write all day with one filling. The new one is the same size, but it lasted only an hour when I first had it, and now it will not last half an hour, I bought it just as I was coming down here and thought I would keep it until I returned, but as I do
2603 not now expect to return at present, am sending it to you. If it will not hold as much as the old pen the same size when it is all right, would like a larger size and will send whatever is due you. I need a pen that will last all day like the old one for I frequently go away and take it with me, and I do not want to have to take an ink bottle for a day's trip. The pen itself just suits me and I would like another just like it. I am left handed, and some pens I cannot use. This is perfectly smooth. I am using an ordinary pen to write this.

Kindly return as soon as possible.

Yours truly,
MABEL GIFFORD.

2604

Lawtey, Fla., Sep. 19/06.

L. E. Waterman Co.,

Dear Sir:

The pen I sent you and which was bought for a genuine Waterman of the latest improved self-filling Waterman, and which you sent to the New York office has been returned to me with the enclosed note. I feel that there is a mistake somewhere. It seems incredible that you are selling imitation pens for the genuine, with a guaranty accompanying them. The fact

Plaintiff's Exhibit 47 2605

that you sent the pen to the N. Y. office indicates that it is one of their pens, yet they deny it, as the enclosed copy of letter to me will show you.

I have sent them a copy of guaranty and told them that the pen was sold to me for a genuine Waterman, latest improved self-filler. I think possibly some new clerk handled the business. Anyway it seems I have not the latest Waterman self-filler, so there was also a mistake at your office.

Respectfully yours,

M. GIFFORD.

2606

Lawtey, Fla. Apr. 19/06.

Mr. W. I. Ferris, Secy.
L. E. Waterman Co.,

Dear Sir:

Am much surprised to learn that your Boston office is selling poor imitations Waterman pens for genuine Waterman. Am more surprised that you permit this to be done.

There is also a guaranty accompanying pen. As you consider it no business of yours that they are carrying on affair in this manner. I am sending to them again to tell them what you say about it and to remind them of the guaranty. It says in the guaranty "if any dealer fails to respect their guaranty we request that the facts be reported." I cannot think the Boston office would send to you a pen that did not belong to you. It is an A. A. Waterman pen sold for a genuine Waterman and the latest improved make. Their sending it to you indicates that it is one of your pens. We have not learned in Boston that the Watermans pens selling at No. 8 School St. are frauds, but as I have it from head quarters that this the fact, will let Boston know it, if I get no clearer explanation from them. I feel that there is some misunderstanding and think may be some clerk made a mistake about it at your office, so I direct

2607

2608 *Plaintiff's Exhibit 47*

this to the Secretary hoping to get more satisfactory information.

If what you write is actually true I shall certainly want a new pen from you, and I hope you will get after your Boston office. If they are so unreliable it is bad for your business.

Respectfully yours,

M. GIFFORD.

GUARANTY.

2609 "We guarantee fully any pen bearing our name. This guaranty to be made good by the dealer through whom the pen is obtained, as against actual defects or faults in construction only, no matter when they become evident. If any dealer fails to respect this guaranty we request that the facts be reported."

A. A. WATERMAN & CO.

POSTAL CARD.

Lawtey, Fla. Oct. 1/06.

2610 Thank you much for your communication. Think you have solved the problem. Will try again. Regrets for trouble.

Yours truly,

M. GIFFORD.

Plaintiff's Exhibit 48. 2611

Letterhead of D. S. Phlegar.

Norfolk, Va. December 22, 1909.

Waterman Pen Co.,
Broadway,
New York City.

Gentlemen:

I am sending you under separate cover by this mail a small barrel fountain pen (short nib).

Will you please equip this holder with

A No 2 point, *medium length nib*, hard to touch, with points that will glide over paper *smoothly*. 2612

Kindly return this to me by December 29th, if possible, together with your bill for same, and oblige,

Very truly yours,
D. S. PHLEGAR.

Letterhead of D. S. Phlegar.

Norfolk, Va. January 8th, 1910.

2613

L. E. Waterman Company,
173 Broadway,
New York,

Gentlemen:

Accept my thanks for your favor of the 7th in reference to pen sent you December 22nd.

I was very much surprised some days ago to get a statement of costs from the Modern Pen Company, which seems to me a branch of A. A. Waterman, for repairs to this pen.

Plaintiff's Exhibit 49

My dealings with you in the past have always been very pleasant and satisfactory, and I am sorry that the pen was not delivered to you as it was my intention it should be.

I have not yet received the pen from the Modern Pen Company, and therefore do not know whether it is satisfactory or not. In sending the pen I directed it to "Waterman Pen Company, Broadway, New York.

Very truly yours,

D. S. PHLEGAR.

Plaintiff's Exhibit 49.

Letterhead of Henry Hall.

Sept. 29, 1909.

L. E. Waterman Co.

Dear Sirs:

Replying to yours of 28th—

By an unintended mistake in preparing my catalogue the name Ideal was used in connection with the A. A. Waterman Modern Pen. If you have my catalogue you will find that a cut of the Modern Pen is shown the name *Modern* appearing on the barrel of the Pen. I never had or sold your Ideal Pen. Have changed the name on catalogue and it will not appear when new ones are printed.

Yours, &c.,

HENRY HALL.

The cut referred to above is here reproduced.

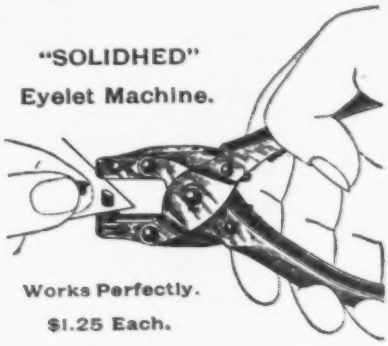
Plaintiff's Exhibit 49

FOUNTAIN PENS.

Waterman's Ideal self-filling fountain pen, the best made..... $2.50
Middle Joint Modern Pen 2.00
(Fully guaranteed to be satisfactory.)

Wirt, Parker, and other popular makes at from $1.00 to $5.00, according to finish.

"SOLIDHED" Eyelet Machine.



Works Perfectly.
$1.25 Each.

Box of 250 eyelets for same, 15 cents.

Triumph Eyelet Fastener and Punch.

Price, With 1 oz. Box of Eyelets, $2.50 Each.

EYELETS PER BOX OF 225:
B, Short, 10c. | JN, Medium, 15c. CZ, Long, 25c.

The Triumph Eyelet Fastener and Punch is a marvel of simplicity and usefulness. It combines great strength with perfect accuracy, and is free from flat or round springs that can in any way break or get out of order; although several ounces less in weight than other punches, its tensile strength is greater, and there is not sufficient power in the hand of a man to bend or break the handles. Papers, card-board, thin sheet brass, or any other soft sheet metals can be punched without danger of breaking the tool. Every punch sold is guaranteed perfect.

Plaintiff's Exhibit 50.

Letterhead of Brentano's.

CEB-KM

October 19, 1906.

Messrs. A. Waterman & Co.,
173 Broadway, City.

Dear Sirs:

We take pleasure in enclosing you a circular which you printed for us last year for distribution. We would suggest that you print us another lot for this season, say about 5000 which we will distribute to our customers.

When ready, kindly address package to Chas. E. Butler. Please deliver same before November 15th.

With kindest regards, we are,

Yours respectfully,
BRENTANO'S.

Plaintiff's Exhibit 51.

Letterhead of The Nashville Times.

Nashville, Tenn. Oct. 27, '07.

L. E. Waterman Co.,
173 Broadway, N. Y.

Dear Sirs:

Last Christmas I received as a present a fountain pen marked "Automatic, Self-filling, Modern. A. A. Waterman Co., New York." The pen has never given satisfaction and dealers here do not know how to manipulate it. Would like to know if A. A. Waterman and L. E. Waterman are the same, and if so, would be pleased to receive directions for *filling* the pen, as the printed directions that came with it contained nothing of the sort. Please mail me booklet of pen information and oblige.

Yours, etc.,
J. F. HARDING,
520 Broadway.

Plaintiff's Exhibit 52. 2623

Sodus, N. Y., Feb. 11, 1911.

Mess. L. E. Waterman & Co.,
New York City.

Gentlemen:

I am mailing you under separate cover and by registered mail today one of your fountain pens purchased through Scranton Wetmore & Co., Rochester, N. Y. a couple of years ago. The pen does not fill as it should. Please repair it and put it in good shape and return to me. Please also see that it feeds freely as it has never done so. Advise me amount of charges and I will remit promptly. 2624

Yours truly,
W. H. FOLEY.

Letterhead of The Aspegren & Gaylord Co.

Sodus, N. Y. March 2, 1911.

L. E. Waterman & Co.,
New York City, N. Y.

Gentlemen:

I am in receipt of yours of the 28th, also the fountain pen, and 2625
on looking at the pen I find that I was in error in the matter. I purchased the pen as a Waterman but I did not know until now that there are two Watermans manufacturing fountain pens. The pen is one of A. A. Waterman & Co's pens.

I am very sorry for the trouble I have caused you in the matter and hereby enclose twenty cents (.20) in stamps to cover your expense in the matter.

Very truly yours,
W. H. FOLEY.

2626 *Plaintiff's Exhibit 53*

WRAPPER.

From W. H. Foley
Sodus, N. Y.
Registered mail

L. E. Waterman & Co.
173 Broadway,
New York.

Reg. No. 351 (Stamped)
New York Regy
2627 2-12-1911

Plaintiff's Exhibit 53.

Letterhead of Broadalbin Drug Co.

Broadalbin, N. Y. Dec. 31st, 1910.

Mess. L. E. Waterman Co

Gentlemen:

2628 We are sending you by mail today one of your Fountain pens which we sold and same has been returned to us as it leaks badly. Will you kindly send us another of same kind, and oblige,

BROADALBIN DRUG CO.
Successors to
Bradford & Dickinson
and Finch & Lee.

Plaintiff's Exhibit 53 2629

Letterhead of Broadalbin Drug Co.

Broadalbin, N. Y. Jan. 6th, 1911.

Messrs. L. E. Waterman Co.

Gentlemen:

Replying to your favor of Jan. 5/11, would say, that the Pen in box marked "Florence Walsh" is the one sent by us. We sent you the pen in good faith thinking it was of your manufacture. We bought the pens of O. L. Pulman Co., a stationer in Albany thinking they were your goods. We bought a cabinet filled with an assortment of pens but we find on looking that 2630
the cabinet is marked A. A. Waterman Co. New York, some one is evidently taking advantage of the prestage enjoyed by your goods. Kindly return us the pen, and oblige,

BROADALBIN DRUG CO.
Successors to
Bradford & Dickinson
and Finch & Lee.

WRAPPER.

(Cancelled stamp) 2631

(From Broadalbin Drug Co.)
Broadalbin, N. Y.

A. A. Waterman & Co.,
173 Broadway,
New York City.

2632 **Plaintiff's Exhibit 55.**

Letterhead of Maurice Strelitz.

Milwaukee - 1-11-11

L. E. Waterman Co.,
New York.

Gentlemen:

I am sending you under separate cover, one of your pens, which is broken. Kindly fix this for me and return as soon as possible.

Yours truly,
2633 EDW. C. BOWIE,
c/o Maurice Strelitz.

WRAPPER.

Two cancelled stamps.

(Stamped)
Milwaukee
Jan.
9 P M
Wis.

2634 L. E. Waterman Co.
173 Broadway,
New York, N. Y.

If not delivered in 5 days return to
MAURICE STRELITZ
4th Floor Majestic Bldg. Milwaukee.

Plaintiff's Exhibit 56. 2635

Letterhead of
The Henry Delatush Company.

Jersey City, N. J., January 16th, 1911.

L. E. Waterman & Co.,
173 Broadway, N. Y. City.

Gentlemen:

On December 30th, I went into the jewelry store of G. D. Davidson, and asked them to sell me an L. E. Waterman fountain pen.

They gave me a pen for which I paid $5.00. On reaching the 2636
office and filling the same, I discovered that it was an A. A. Waterman pen.

Therefore I returned the same for exchange by messenger with a request that they give me a genuine L. E. Waterman pen.

They then gave me the pen I am sending you herewith with a cap that evidently does not belong to the pen, and as you can see is liable to spoil the pen point.

Under the circumstances, I do not care to have any further dealings with Davidson, and should greatly appreciate your furnishing me with another pen in exchange.

Should there be any difference in price, I shall be perfectly willing to settle for the same.

Enclose herewith check for the purchase of the pen, from 2637
Davidson.

Yours very truly,
HENRY DELATUSH.

2638 **Plaintiff's Exhibit 58.**

Letterhead of
W. H. York.

Quartz, Ga. Jan. 28, 1910.

L. E. Waterman & Co.,
New York City.

Gentlemen:

I am enclosing you a fountain pen of your make which is somewhat worse for wear. I want to exchange this pen for a pen of your make, late model. Please quote me exchange price,
2639 between this and one of your pens of later make. Quote me price between two or three models.

Very truly yours,

W. H. YORK.

Plaintiff's Exhibit 59.

Letterhead of
Waterman's Ideal Fountain Pen.

New York, July 27th, 1910.

2640 Mr. D. D. Ewing,
412 Millandon St.,
New Orleans, La.

Dear Sir:

We beg to acknowledge the receipt of your favor of July 19th also the fountain pen submitted which upon examining, we are surprised to note is not of our manufacture but imprinted "A. A. Waterman & Company, New York."

Upon examining the above we find we can place the same in working condition at an expense of 25¢. Return postage and registration will be 14¢ additional.

Plaintiff's Exhibit 59 2641

We beg to inquire if you purchased this fountain pen thinking the same to be a genuine Waterman's Ideal Fountain pen, if so, kindly give us the name and address of the dealer from whom purchased which information will be greatly appreciated.

Kindly advise us if the above attention will be satisfactory and in order to avoid our having to open accounts on our books for these small items, it is customary to request the courtesy of remittance in advance for the same and we trust you will favor us in this way when replying.

Yours very truly,

E. R. (Signed) L. E. WATERMAN CO.

2642

ANSWER.

Gentlemen:

I don't know the name and address of the dealer that it came from but thought I had a "Waterman" and was surprised when the bill came from the friend that got it for $1.55. He also expressed surprise at the price. We did not know that there were other Waterman pens than yours on the market.

Money order is attached.

Resp.

8/12/10. D. D. EWING. 2643

2644 **Plaintiff's Exhibit 60.**

Letterhead of
J. C. Mimms

Mexia, Texas 3-8-10

L. E. Waterman Co.,
New York.

Gentlemen:

Some time ago (Feb 15) I was in your Broadway store inspecting your pens, and the sales-lady said you would exchange, or take in part payment an old one—Now I have had one of
2645 your large sized pens for about five years and don't suppose I have written a dozen letters with it, as it never did write well, so I herewith return it as part payment on your Plain, Chased and Mottled pen No. 12 ($2.50) on page 11 of Catalog—I enclose page with marked pen. Let me know difference and I'll remit.

Sincerely

J. C. MIMMS

Letterhead of
J. C. Mimms,

2646 Mexia, Texas 3-17-10

Mr. L. E. Waterman
New York City.

Dear Sir:

In replying to yours of 14th inst. will say I did not purchase the pen. It was a present from a friend, and he thought it a Waterman, and so did I. Don't know from whom he bought it.

Enclosed find money order for $1.95 for which please send me pen as per your offer.

No. 12 Waterman's Ideal Fountain Pen.

Yours very truly,

J. C. MIMMS.

Plaintiff's Exhibit 60 2647

ENVELOPE

J. C. Mimms
Pastor M. E. Church, South
Mexia, Texas.

L. E. Waterman Co.,
173 Broadway,
New York City.

(Post-Office Stamp)
Mexia, Tex.
Mar 17
4 PM

2648

WRAPPER

From
J. C. Mimms
Pastor M. E. Church, South
Mexia, Texas

L. E. Waterman Co.
Broadway & Cortland St.,
New York City.

(Post-Office Stamp)
Mexia, Tex.

2649

2650 **Plaintiff's Exhibit 61.**

Madisonville-Ky.
1/5-10.

L. E. Waterman Co.

Sirs:

Am sending today to you by mail my fountain pen. Was told by a reliable party that if I would send it to you that you would repair same and return to me. Please send me the bill that you charge—and I will remit at once. Have been using pen about 2 yrs and one cold morning it would not work so I broke it. Thanking you in advance, I remain

2651 Very Respy.

MRS. T. J. STEELE
Madisonville
Ky.

Box 4.

POSTAL CARD.

Madisonville-Ky-
Feb. 14th 10.

Sirs:

2652 Examine my pen carefully and if it isn't a Waterman, just return it to me with the 2cts stamp you have left that was sent you in letter. Sorry to trouble you but am sure it is your make.

Very Respy—

MRS. T. J. STEELE.

Plaintiff's Exhibit 62. 2653

Pearce, Virginia, Feb. 1, 1911.

Waterman Fountain Pen Co.,
New York City.

Gentlemen:

Under separate cover I have mailed a fountain pen of your make which I purchased recently from one of your agents in Washington—(Walfords 9th & Ave N W) and there is something wrong with it.

Kindly repair and send bill of the cost as soon as possible.

Very truly yours,
WALTER W. BURDETTE 2654

Plaintiff's Exhibit 63.

From A. T. Hoyt,
Moravia, N. Y.

Enclosed find one of your pens that is out of order Please put in good order and return by mail.

Plaintiff's Exhibit 64. 2655

Letterhead of
Victor Allen Warren

Massena, New York, March 25 1910

L. E. Waterman Co.,
New York City.

Dear Sirs:

About two years ago I bought one of your pens and after using it a month it failed to work.

2656 *Plaintiff's Exhibit 64*

I think there is some slight dearrangement of parts that causes this and write to ask you where to send it in for repairs.

I think it is up to you to see that your pens give better satisfaction than this one did me because I put it away in disgust a month after I bought it and no doubt you will be glad to do so when given the opportunity.

Yours respectfully,
V. A. WARREN

P. S. I bought this pen while traveling in California.

2657

ENVELOPE

Victor Allen Warren
Massena, New York

L. E. Waterman Co.,
173 Broadway,
New York City.

(Post-Office Stamp)
Massena, N. Y.
Mar 25
2 PM

2658

Letter-head of
Victor Allen Warren,

Massena, New York, April 12th 1910.

L. E. Waterman & Co.,
173 Broadway, New York.

Dear Sirs:

Your favor of the 7th inst. received.

I assure you that I have never expressed anything derogatory of my pen except, perhaps, to my wife and I regret to learn

Plaintiff's Exhibit 65 2659

that there are other firms selling "Waterman" pens of inferior make on the strength of your reputation as I supposed I was buying one of your pens and my experience with it would not justify your claims for them. However, I now see my error.

I enclose you herewith 25cts in stamps for the repairs required and beg to thank you for your interest. You doubtless will infer that I shall be more careful in my next purchase.

Please repair pen and return at your earliest convenience.

Yours respectfully,

V. A. WARREN.

Enc.

2660

REPAIR VOUCHER.

Victor Allen Warren,
Massena, N. Y.

Received 3/31/10
Returned 4/5/10

Plaintiff's Exhibit 65.

Private Mailing Card of L. E. Waterman Co.
Phelps, N. Y.

2661

I now have a small stock of your Lincoln brand of Pen.

F. H. WISEWELL.

(Post-Office Stamp)
Phelps
Nov 16
4 P M
1909

2662 **Plaintiff's Exhibit 66.**

Letterhead of
Autocar Sales Co.

New York
Nov. 24th, 09.

Waterman Fountain Pen Co.
173 Broadway.

Gentlemen:

Enclosed find Pen that broke. Will you please repair same if bill will not be too much. I do not want to put much into it as
2663 it seems to be kind of rotten.

Very truly yours
CURTIS G. LEE.

ENVELOPE

Curtis G. Lee
Autocar Sales Co.
Broadway and Eightieth Street
New York

F. D. Waterman
2664 173 Broadway
N. Y. City

(Post-Office Stamp)
New York, N. Y. Sta. W.
Nov 24
8 PM
Waterman Fountain Pens.

Plaintiff's Exhibit 66 2665

Letterhead of
Autocar Sales Co.

New York,
December 2nd, 09.

Waterman Ideal Fountain Pen
173 Broadway.

Gentlemen:

Your favor of the 1st received. I purchased the pen as one of your manufacture & paid $4.00 for the same. It is also marked with your trade mark. I certainly do not wish for any more of the same goods at your price so kindly return the broken pen so I can have the pleasure of throwing it away. 2666

Very Truly Yours

C. G. LEE

ENVELOPE

C. G. Lee
Autocar Sales Co.
Broadway and Eightieth Street
New York

Waterman Ideal Fountain Pen 2667
173 Broadway
City

Repair Dept.

(Post-Office Stamp)
New York, N. Y. Sta. W.
Dec. 2
10-PM
1909

2668 **Plaintiff's Exhibit 67.**

#8112 Frankstown Ave.,
Pittsburgh, Pa., Oct. 26, 1909.

Waterman Fountain Pen Co.,
New York, N. Y.

Gentlemen:

I am sending you, under separate cover, fountain pen purchased a short time ago in this City and since using same, it is a little out of order, kindly examine it and see where the trouble lies.

Yours very truly,

2669 JWS/I. JOHN C. INNES.

Letterhead of John C. Innes

#8112 Frankstown Ave., Pittsburg, Pa.
November 26, 1909.

Messrs. L. E. Waterman Company,
#173 Broadway,
New York.

Gentlemen:

2670 Your favor of October 30th received.

The fountain pen which I submitted to you for repairs I purchased believing it to be an L. E. Waterman pen and since receiving your letter stating that it was not of your manufacture, I took the matter up with the dealer in this city, who promised to make the matter right with me, either by giving me a new pen or refunding the money. You will, therefore, kindly return the pen to my address.

Enclosed please find twelve cents in postage to cover postage and registration.

Thanking you for any inconvenience that I may have caused you in this matter, I remain,

Yours very truly,
JOHN C. INNES.

Plaintiff's Exhibit 68. 2671

Letterhead of Geo. W. Hull.

Lancaster, Pa. Oct. 16, 1909.

Mess. L. E. Watterman Company

Gentlemen:

We send you this day one of your pens for repair or a new one as it has never been satisfactory. If necessary put in new Pen and send bill to me.

Yours Truly
GEO. W. HULL

Pen by Mail. 2672

Plaintiff's Exhibit 69.

Letterhead of

JAY G. SHUMWAY,

Schuylkill Haven, Pa.
Jan. 17/10.

A. A. Waterman & Co.,
Broadway & Cortlandt Sts.,
New York. 2673

Gentlemen:

Send to you this mail under separate cover one of your pens purchased 2 years ago. Pen leaks or sweats. Pen Point scratches. Paid Wanamaker Phia. $1.25 about one year ago to repoint pen & stop leak or sweat but within a month after receiving pen again it was as bad as ever. Kindly examine pen, see if it can be put in order & advise me, also state cost.

Very truly yours
JAY G. SHUMWAY.

2674 **Plaintiff's Exhibit 70.**

Letterhead of

G. M. FINCIK CO.,

Latrobe, Penna., Sept. 8th, 1910.

L. E. Waterman Co.,
New York.

Gentlemen:

Sending you by separate cover one of your make Faunten Pen it is from the first day I wos not satisfactory. It is not
2675 strong and not Pointed good. I head one of you make I got tru Prudentiol Insurance Co. when I wos Agent. It wos first Clas. Now I like you to have this fix as falow

Put on one Gold Band on ather eand and put in good pen heavi good strong point extra good. Change the new style Filing it is no good nat naugf Ing get in if you can change this one would you change holl Barel then put the pen in same shape as you have made for Prudentiol Insurance Co.

I hope that you take tnis maier and have the pen fix good. So I would be satisfy with it. Let me here from you ot once what you can do with it. If you can nating to do with this then change for ather but good one as I can use nating but good faun-
2676 ten pen you do have good . . had one before and I lost it.

Yours truly,

G. M. FINCIK CO.

Plaintiff's Exhibit 71. 2677

Letter head of

COMMERCIAL UNION ASSURANCE COMPANY,
LIMITED.

Casselman, Ont. Agency 3rd March, 1910.

L. E. Waterman Company,
New York.

Gentlemen:

I enclose herein a pen holder for repairs and would like it done as soon as convenient. I have had trouble with this holder since I got it. I have had several of your pen outfits that gave satisfaction, but this one. 2678

If there is any charge for repairs let me know and I will remit.

Yours very truly,
R. W. F. LENDRUM.

Casselman, Ont. 19th Mar 1910

R. W. F. Lendrum,
Conveyancer, &c.,
Casselman, Ont.

L. E. Waterman Co., 2679
New York.

Gentlemen:

I mailed you by registered post my Ideal fountain pen holder for repairs on the 3rd inst and have not heard from you since.

Please let me know cause of delay.

Yours truly,
R. W. F. LENDRUM.

2680 *Plaintiff's Exhibit 72*

ENVELOPE

R. W. F. LENDRUM,
Conveyancer &c.
Casselman, Ont.

L. E. Waterman Co.
Manufacturers of Fountain Pens
Broadway, New York City,
U. S. A.

2681 **Plaintiff's Exhibit 72.**

Des Moines, Iowa,
Jan. 28, 1911.

L. E. Waterman Co.,
173 Broadway, New York, N. Y.

Dear Sirs:

Yours of the 25th at hand. The name of the dealers who referred you to me is, McCurnin Drug Co., Corner 6th and Mulberry of this City. The pen is stamped thus

A. A. WATERMAN & CO. NEW YORK
2682 MIDDLE JOINT MODERN PEN
PATENTED—DEC. 12—1899.

and the number I sent you was stamped on the pen point. The pen was given me by my father, who is a dealer in fountain pens in a small town of western Iowa, Little Sioux.

Is the L. E. Waterman and the A. A. Waterman different companies?

I believe this is all that I could tell you concerning my pen.

My father's address would be T. J. Lanyon, Little Sioux, Iowa.

Yours truly,
TERESA LANYON.

Plaintiff's Exhibit 73. 2683

Ann Arbor, Mich. 1/30/10.

L. E. Waterman Co.,
173 Broadway, New York.

Dear Sirs:

I am sending by todays mail one of your Fountain Pens. I think you can put it in shape so it will be a pleasure to use it again. In fact it never did feed perfect. Kindly examine and oblige.

Yours truly,
O. J. BURKLEY,
539 5th Ave. So. 2684
Ann Arbor, Mich.

Feby. 7, 1910.

L. E. Waterman Co.,
New York, N. Y.

Dear Sirs:

When I received your letter the first time I ever knew there was more than one Waterman Fountain Pen. At that I am not sure whether I am dealing with the "Original" or an "Imitation." Nevertheless I am inclosing Postage Stamp to cover the amount 2685
you ask. Kindly adjust the pen as best you can and return to address given below. Thanking you in advance for the accomodation, I am,

Yours truly,
O. J. BURKLEY.

P. S. Address pen to
Ruth Burkley,
539 5th Ave. So.
Ann Arbor, Mich.

2686 *Plaintiff's Exhibit 74*

ENVELOPE.

(Stamped)
East Tawas,
Feb. 7
7 P. M.
1910.
Mich.

The L. E. Waterman Company,
173 Broadway,
New York,
2687 N. Y.

Plaintiff's Exhibit 74.

CRESCENT SCHOOL DISTRICT, No. 110

Saskatchewan.

Dec. 8th, Sask., 1910.

Messrs. L. E. Waterman Co.,

Gentlemen:

2688 I have been waiting sometime for one of your advertisements in order to get your New York address. Fortunately have just caught sight of it on the cover page of the Independent Magazine Dec. 1st.

I have one of your Fountain Pens marked Self-filling Pat. Dec. 12, 1899. I think the rubber tube must be perished. I cannot get it to take up and retain the ink. The number stamped on the pen I think is (7). Can you send me by mail a new tube with instructions how to be filled or refer me to the address of one of your Canadian offices so that I could get what was needed from there. Please state cost and I will remit.

Yours respectfully,
H. F. PARTRIDGE,
Box 89 Saltcoats,
Sask.

Plaintiff's Exhibit 75 2689

ENVELOPE.

If not called for in ten days return to
W. H. Partridge
Secy.-Treas.
Crescent School District No. 110.
Saltcoates Sask.
Box 89

(Stamped)
Saltcoats
AM
Dec. 9
10
Sask.

L. E. Waterman Co.,
173 Broadway,
New York. 2690

Plaintiff's Exhibit 75.

North Dakota, Oct. 13, 1909.

L. E. Waterman Co.,
New York.

Dear Sirs:

I send you under a separate cover, to day, one fountain pen of your make, the Diamond point on one side of the pen fell out, can't use it. A Jeweler who is an Agent for your Pens tried to get the Pen out, and put in a new one, but could not move it. Enclosed find P. O. Money order for 40 cents for which please put in a new pen, or repair the old one so I can use it and oblige. Mail it to me to *Leeds, North Dakota, Gen. Dely.* and oblige. 2691

Yours truly
J. O. HULBERG.

Find enclosed Stamps
for Return of Pen.

2692 **Plaintiff's Exhibit 76.**

Bigstone, S. Dak.

Bigstone City, S. Dak.
Nov. 3, 1909.

L. E. Waterman Co.,
173 Broadway, N. Y.

Dear Sirs:

Under separate cover I am sending you one of your fountain pens which I wish repaired. The pen is bent. Send me the bill.

Yours truly,

2693 RALPH S. GOLD.

Big Stone, S. D., Nov. 11-09.

Big Stone, S. D. Nov. 11-09.

L. E. Waterman Co.,
173 Broadway, New York.

Gentlemen:

Your favor of Nov. 9th at hand. I enclose dft for $1.17 for a new gold pen. I understand the pen will be guaranteed when it is returned to me.

2694

Yours truly,
RALPH S. GOLD.

Plaintiff's Exhibit 77. 2695

Letterhead of

J. E. HEISLER,

Centerville, S. D.

Jan. 10, 1910,

Waterman Pen Co.,
New York, N. Y.

Gentlemen:

I am sending you under separate cover 1 pen for repair or rather wish to have a new pen put in the holder. 2696

Please Repair and Return.

Yours truly,

J. E. HEISLER.

Letterhead of

J. E. HEISLER,

Centerville, S. D.

Jan. 31, 1910.

2697

Waterman Pen Co.,
New York, N. Y.

Gentlemen:

Yours of recent date at hand regarding pen sent you for repair and I think you will find that the pen is your make that is why I sent it to you for repair. Inclosed find $1.00 to cover same. Please repair and return at once and oblige. (No money enclosed. E. M. H. 2/5/10.)

Yours truly,

J. E. HEISLER.

2698 *Plaintiff's Exhibit 78*

ENVELOPE.

Return in five days to
J. E. HEISLER
Pharmacist
Centerville, S. D.

(Stamped)
Centerville
Feb. 3
2 P. M.
1910
S. D.

2699

L. E. Waterman Co.,
New York, N. Y.

173 Broadway

Plaintiff's Exhibit 78.

Letterhead of

NEBRASKA TELEPHONE COMPANY.

Omaha, Neb., November 22, 1909.

2700

L. E. Waterman Co.,
173 Broadway, New York, N. Y.

Gentlemen:

Enclosed please find one of your pens which refuses to work. Kindly repair same and send me a bill and I will be glad to send you check.

Yours truly,
E. B. SCANNELL.

Plaintiff's Exhibit 79. 2701

Mt. Vernon, Wash.
Nov. 2-09.

Mr. L. E. Waterman,
New York.

Dear Sir:

I am sending you under separate cover a fountain pen which needs a new pen. I have the cap here have sent a cap with the pen which came from a cheaper pen.

I do not know what it will cost to have this pen put in so please let me know as soon as possible and I will send you a M. O. to cover cost.

As I wish to use this pen on fine work I want the pen which will make the lightest line put in. This pen with which I am writing this is your (Ideal #12 fine). 2702

Let me hear from you soon,

Yours truly,
H. H. ALLEN,
Mt. Vernon, Wn.,
Route No. 2.

Mt. Vernon, Wash., Jan., 1910.

L. E. Waterman Co.
New York, N. Y. 2703

Gentlemen:

I am in receipt of your letter of the of Dec. in which you refer to a fountain pen which I sent you some time ago.

At the time that I sent the pen to you I was under the impression that it was one of your manufacture, but if as you say, it is not I do not think that I care about it being repaired, and under the circumstances you may keep the gold pen for your trouble in the matter.

I am sorry that I was away from home and so was unable to answer your letter and thus relieve your mind of this matter.

2710 **Plaintiff's Exhibit 82.**

Letterhead of

GULICK TAILORING CO.

Champaign, Ills., Sept. 24, 1909.

Waterman Fountain Pen Company,
New York City.

Gentlemen:

We are enclosing one of your fountain pens which has the platinum off one of the points. Please repair same and return
2711 to us at once with bill.

Very truly yours,
GULICK TAILORING CO.,
A. P. G.

We have not sent the top to this pen as we are using it on another while you are repairing this one but will use it on this one when returned to us.

2712

Plaintiff's Exhibit 83. 2713

Letterhead of

FRED TILLSON,

Ishpeming, Mich., April 11th, 1910.

Messrs. L. E. Waterman Co.,
New York City, N. Y.

Gentlemen:

I consider it of business importance that I unsolicited inform you about a Fountain Pen deal which took place in my store some time ago. 2714

A travelling man called stating he represented the Waterman Company and I understanding it was the well known Waterman Ideal Fountain pen placed an order for one dozen Self Filling Pens. He never told me it was not Waterman's Ideal Pen but when I received the bill I observed the name A. A. Waterman.

I am now convinced that I was misled in this transaction and call it in plain words to obtain business under false pretenses.

It is against my business and moral principle to offer such goods to my customers, and make them believe I am selling them the well known and advertised Waterman Ideal Fountain Pen. Therefore, I will acting in my full right without delay return the pens to A. A. Waterman Company and take pleasure in placing an order with the L. E. Waterman Company for your famous Ideal Fountain Pens, the pen I thought I first was getting. 2715

Yours very truly,

F. P. TILLSON.

2716 **Plaintiff's Exhibit 84.**

Letterhead of

G. L. MANDAVILLE

Titusville, Florida, Apr. 25-10.

L. E. Waterman Co.,
New York City, N. Y.

Gentlemen:

Replying to yours of the 21st inst. regarding the "A. A. Waterman & Co. Fountain Pen," I wish to say that it was really my fault—purely an oversight—since the pen was *not* bought for an "Ideal," but seeing the name *"Waterman"* caused me to
2717 think 'twas a branch of your firm.

Regretting to have caused you to inquire concerning this, and wishing you to understand that I alone am to blame.

I beg you to remain,

Yours very truly,
G. L. MANDAVILLE,
Titusville, Florida.

Per—E. L. Wilson.

Plaintiff's Exhibit 85.

Letterhead of

2718 WILL S. COGBURN

Fort Worth, Texas, 2/11/10.

L. E. Waterman Co.
New York.

Dear Sirs:

I send you today under separate cover (1 Waterman Ideal Fountain Pen). Please have a new point put in and adjust the flow of ink.

Will remit the price on receipt of your letter.

Yours truly,
WILL S. COGBURN.

Box 1144.

Plaintiff's Exhibit 86. 2719

Letterhead of

JAS. H. McGREW.

Shelbyville, Tenn., Nov. 19, 1909.

L. E. Waterman Co.,
173 Broadway, New York.

Gentlemen:

I am sending you by registered mail pen sold to W. F. Bryant which I wish to have repaired and put in good condition and returned to me as soon as you can, and on receipt of your bill I will remit you the amount. 2720

Very respectfully,
JAS. H. McGREW.

Letterhead of

JAS. H. McGREW

Shelbyville, Tenn., Nov. 29, 1909.

L. E. Waterman Co.,
173 Broadway, New York.

Gentlemen:

Your letter of Nov. 27th enclosing bill of Nov. 26th for repairing Pen sent you has been received. I enclose you the amount 32¢ in postage stamps, and thank you for your prompt attention to my small want. 2721

I regret that I am not in position to give you an order for the Holidays as I already have in stock the A. A. Waterman, and the Akin-Lambert line. I have been informed that you all are one in the same, but only doing business under different names. When I am in the market for Fountain Pens I will consider your offer with pleasure.

Very respectfully,
JAS. H. McGREW.

2722 **Plaintiff's Exhibit 87.**

POSTAL CARD.

1507—30th St.,
Wash., D. C.

Dear Sir:

One of your pens (a "Lincoln") was given to me in the Autumn sometime and I have never been able to write with it. If I send it on will you fix it up for me? Your adds. say "Selection may be exchanged until satisfactory." I don't know when it was purchased.

Yours truly,
2723 MAY B. NEALL.

Plaintiff's Exhibit 88.

Letterhead of

S. P. TOWNSEND & CO.

Orange, N. J., Dec. 6th, 1910.

Messrs L. E. Waterman Co.,
2724 #173 Broadway, N. Y. City.

Gentlemen:

I send you herein three of your Waterman Pens and would like you to go over them and see if they are worth putting in order. If so, advise me cost of same. I think they should have new pens, but you will know just what is necessary.

Very truly yours,
GEORGE BURGESS.

Mark reply for writer—

Plaintiff's Exhibit 88 2725

Letterhead of

S. P. TOWNSEND & CO.

Orange, N. J., Dec. 8/10.

Messrs. L. E. Waterman Co.,
New York City.

Gentlemen:

Thank you for your courteous letter of the 8th.

The pens sent you on the 6th belong to one of our men here and I sent them to you thinking they were your pens. 2726

Our man is not sure where he bought them but is under the impression that one was bought at the corner of Market and Mulberry Streets, Newark, N. J. (stationery store), while the other he picked up in New York some place.

It is the writer's opinion however that he has seen these Waterman Lincoln pens on sale right here in Orange and if it is not your pen, will look it up and report to you.

Discard the two old Lincoln pens (throw them away if you like) and repair the Ideal pen as per your letter.

The party to whom the pen belongs (our foreman) is away today and on his return Monday will have him remit you the $1.54 as per your letter.

If you do not receive it drop the writer a postal when the pen is finished and will see that remittance is sent you at once. 2727

Very truly yours,

NA. GEORGE BURGESS.

My wife gave me one of your pens Christmas, 1906, and it has been in use every day since and if I could not get another one I would not sell this one to you or anyone else for half of New York.

2728 **Plaintiff's Exhibit 89.**

New Braunfels, Texas.
January 19th 1911

L. E. Waterman Company,
173 Broadway, N. Y.

Dear Sirs:

Per even mail I am sending you my Fountain Pen for repair, re-filling device out of order. This pen was bought by me from the San Antonio Drug Co. with a guarantee.

Pleased to have the pen back as soon as ready, I am

Yours truly,

2729 FELIX KLAPPENBACH.

WRAPPER.

Felix Klappenbach
New Braunfels, Tex.

L. E. Waterman Co.
173 Broadway, New York, N. Y.

(2 cancelled stamps)

2730

Plaintiff's Exhibit 90. 2731

Letterhead of

LOUIS F. DOW COMPANY,

Saint Paul, January 31, 1911.

L. E. Waterman Company,
173 Broadway,
New York City, New York.

Gentlemen:

We are mailing you under separate cover by registered mail one of your fountain pens. Kindly repair as per marked on envelope and return at your earliest convenience and oblige, 2732

Very truly yours,
LOUIS F. DOW CO.,
per A. J. DORN, JR.

Plaintiff's Exhibit 91.

Letterhead of

CHAS. MENGES

Wichita Kans. 1/21-11 2733

L. E. Waterman Co.,
New York,
173 Broadway.

Under separate Cover I am sending you Fountain Pen which leaks, and after it is carried in the pocket and not while writing, kindly repair same if possible and return.

Very truly yours,
CHAS. MENGES,
Wichita, Kans.

2734 *Plaintiff's Exhibit 91*

WRAPPER.

From Chas. Menges
Wichita Kans.

L. E. Waterman Co.,
173 Broadway
New York.

Letterhead of

2735 CHAS. MENGES

Wichita Kans. 2/3-11

L. E. Waterman Co.
New York N. Y.

Gentlemen:

Your letter of the 28th, as well as the Pen received, and in reply to your letter will say that all though the amount is small as to cost of Pen never the less, if you say that it isent your make of Pen, it was bought as a Waterman Pen, at the Docum Drug Co our City where they where on display with a Big sign (the Waterman Fountain Pen) I don't believe that the Drug Co itself
2736 where selling the Pens, but had only rented space to the party, this was in the month of Sept last.

The Box I sent you the pen in was the one I got from a Local dealer that also handles your Goods and to whom I had taken the Pen for repairs, as I had broken it, and naturally supposed that they had sent it to you for repairs, I have written to a friend of mine who purchased one of the Pens at the same time and who very likely still has the Box which we got them in, and if he has will send it to you, and if it will be of any service to you, you are welcome to use it.

Very truly yours,
CHAS. MENGES,
Wichita, Kans.

Plaintiff's Exhibit 92. 2737

Galatia, K's.
Jan 16—

L. E. Waterman Co.,
New York.

Dear Sirs:

Rec'd yours of Jan 11 stating it was useless to repair pen with gold Bands. Very well if not return same.

But in reguard to other pen, the box I sent it in was a box I got a different pen in which I now have, having lost the Box this pen came in I just sent it in that Box. The pen I sent you was an A. A. Waterman pen No. 40 self filling.

2738

I supposed the Waterman pen was all same Co. having many different kinds.

Repair the one if you can and if not kindly send same to me and I will send it in to wholesale House from which it was purchased and see that they make it good.

Yours Resp.
DR. H. R. BRYAN
Galatia K's.
Barton Co.

Plaintiff's Exhibit 93.

MIDDLEBURGH, PA., POST OFFICE 2739

J. N. Brosius, P. M.

Jan. 6, 1911.

Waterman Fountain Pen Co.,
New York, N. Y.

Gentlemen:

I send you by this mail fountain pen for repairs.

If a new pen is required it should be one of the same kind the holder has now—stiff point.

Send bill and I will remit.

Respectfully,
J. N. BROSIUS.

2740 *Plaintiff's Exhibit 93*

MIDDLEBURG, PA., POST OFFICE

J. N. BROSIUS, P. M.

Jan. 18, 1911.

L. E. Waterman Co.,
New York, N. Y.

Gentlemen:

Reply to your of 17" inst. will say that the pen was repaired and returned to me by the Modern Pen Co., No. 22 Thames St.,
2741 New York, N. Y., athough package was addressed "Waterman Fountain Pen Co., New York, N. Y."

The job is a satisfactory one.

Respectfully,

J. N. BROSIUS.

MIDDLEBURG, PA., POST OFFICE,

J. N. BROSIUS, P. M.

Jan. 21, 1911.

2742 L. E. Waterman Co.,
New York, N. Y.

Gentlemen:

Replying to yours of 20" inst. will say that the pen in question is a "Waterman Ideal."

I did not know your exact address and addressed the package containing the pen to "Waterman Fountain Pen Co." which may account for delivery to the Modern Pen Co. I was anxious to have the pen repaired by the maker, and the package was intended for your firm.

Respectfully,

J. N. BROSIUS.

Plaintiff's Exhibit 94. 2743

Letterhead of C. H. Williams.

Lewistown, Montana, 12/30/10.

Waterman Pen Co.
New York City.

Gentlemen:

We are sending you under separate cover one of your pens to have point changed.

We wish to have point similar to pen enclosed as sample.

Please charge to us.

Respectfully, 2744
C. H. WILLIAMS.
A. R.

Letterhead of Modern Pen Company

Sole Selling Agent for A. A. Waterman & Co.

New York, January 6th 1911

Mr. C. H. Williams,
Lewistown, Mont. 2745

Dear Sir:

By today's mail we received an Ideal self-filling fountain pen, but there were no instructions enclosed as to what you wanted us to do with it. Please advise us at your early convenience.

Yours truly,
THE MODERN PEN COMPANY
By E. T. K.

2746 *Plaintiff's Exhibit 94*

Letterhead of C. H. Williams

Lewistown, Montana, 1/16/11.

L. E. Waterman,
173 B'way,
New York.

Gentlemen:

Your letter of 11th inst. to hand about pen that we mail you. I addresed package and letter the same but not knowing street address the pen went to Modern Pen Co. as you can see by
2747 enclosed letter.

We would much prefer to have you fix pen if you can obtain same from them.

I did not know that there were two Waterman in fountain pen business.

If you do not fix pen I enclose postage for return of letter from Modern people.

Hoping to hear from you soon, We remain,

C. H.WILLIAMS
A. R.

2748 ENVELOPE.

After 10 days return to
C. H. Williams,
Lewistown, Mont.

(Stamped) Lewistown
Jan 17
12 - M
1911
Mont.

L. E. Waterman,
173 Broadway
New York City.

Plaintiff's Exhibit 95 2749

Letterhead of Modern Pen Company

Sole Selling Agent for A. A. Waterman & Co.

New York, January 23, 1911.

The L. E. Waterman Co.,
173 Broadway, City.

Gentlemen:

Your letter of the 21st instant in regard to a pen received by us from C. H. Williams, Lewistown, Montana, received, and as per your request, we hand you the pen herewith. 2750

We wrote Mr. Williams for instructions as to this, but presume he wrote to you instead of to us in regard to it.

Yours truly,
THE MODERN PEN COMPANY.
Hobart W. Geyer,
Treasurer.

Plaintiff's Exhibit 95.

F. Morrow,
Walder, Texas. 2751

Walder, Texas. 2/27/1911.

Messrs. L. E. Waterman Co.
New York,

Gentlemen:

You will find enclosed one of your pens with something wrong with filler and would be glad to have repaired.

Would like to have a pen a little coarser and not so stiff put in place of one in pen. Don't know what your charges are for this work but will send by return mail if you will send bill.

Repair as soon as possible and return and oblige.

F. MORROW.

2752 *Plaintiff's Exhibit 96*

WRAPPER.

From
Box 48,
Walder, Texas.

L. E. Waterman Co.
173 Broadway,
New York, N. Y.

(three cancelled stamps)

2753

Plaintiff's Exhibit 96.

Edwards, Miss. Dec. 22, 1910.

Waterman Fountain Pen Co.
New York,

Dear Sirs:

I am sending you under separate cover 1 fountain pen which leaks and will ask you to kindly repair same. I purchased this pen about two years ago from Geo. M. Book & Co., Tullahoma and as it is one of your best pens I can't understand why it should leak.

2754 Kindly repair same as soon as possible and if there is any charges kindly notify me and I will remit for same.

Yours truly,
J. P. WILLIAMSON.

P. S. The point is a little bent and will ask you to straighten same.

Plaintiff's Exhibit 97. 2755

Syracuse, N. Y. Apr. 18, 1910.

Waterman & Co.,
N. Y.

Gentlemen:

I send you today by mail 2 of your pens for repair. Please put them in first class condition and as soon as you receive them send me the bill and will send check for the same so you will receive it by the time you have them repaired.

Yours very truly,
L. L. SPENCER.

2756

I think a good deal of them and hope you will fix them in good shape.

Syracuse, N. Y., April 25th, 1910.

L. E. Waterman Company,
173 Broadway,
New York, N. Y.

Messrs:

I am in receipt of your favor of the 21st. in answer to my letter of the 18th relative to repairing two fountain pens sent you on the 18th. Please repair the Waterman's Ideal by re-pointing the gold pen and replacing the broken cap. Also repair the gold pen in the other holder, which is not of your manufacture. The repairs to be made as per your suggestions in your letter above referred to. I had supposed that both pens sent you were of your manufacture. I am unable to give you the name and address of the dealer from whom they were purchased. Enclosed herewith you will find my check for $1.25 in payment of the repairs. 2757

Yours respectfully,
L. L. SPENCER.

622 Park Avenue.

2758 **Plaintiff's Exhibit 98.**

Detroit, Apr. 18, 1910.

Waterman Fountain Pen Co.

Gentlemen:

I am sending you in separate package one fountain pen that I purchased in the City of Milwaukee and it does not write good and I have not had a chance to get to Milwaukee since I got it, I send it to you for repairs. I paid $3.50 for the pen. Will you please repair same and send to me at following ad.

C. N. HARTMAN, First Officer,
Str. John T. Hutchinson,
2759 Marine P. O.
Detroit, Mich.

Very truly yours,
C. A. H.

Houghton, Mich. April 27, 1910.

Waterman Fountain Pen Co.
New York.

Gentlemen:

Your letter rec'd and noted. In reply will say I do not re-
2760 member the concern I bought the pen of but I thought I was buying one of your pens seeing the name on the pen. However, I enclose you $1.20 and you can put on new pen and mail *not registered* to same address as before. Please mail at once.

Very truly yours,
C. A. HARTMAN
S. S. John T. Hutchinson,
Marine P. O.
Detroit, Mich.

Plaintiff's Exhibit 99. 2761

Letterhead of John M. Roberts & Son Company

435-437 Market Street,

Pittsburgh, Pa. June 17th, 1910.

L. E. Waterman Company,
173 Broadway,
New York,

Dear Sirs:

Your letter of June 7th at hand. Drawing sent you is the exact size of the sign we wished made. It was to be used on a panel on a counter in the most conspicuous part of our store, 2762 therefore no ordinary sign would suit as the counter is occupied only by your pen case. It is all real mahogony with marble trimmings and would cost possibly $150.00. This counter we had made to match the pen case you so kindly sent us when we first installed your line. In a prominent store like ours we could not use anything but the very best that money could buy, therefore the only question is whether you would get enough benefit of the same in the way of advertising your pens to justify your expense. The 5 foot model pen you speak of would not be suitable for our place at all and as regards to the words Ideal in the Waterman pen that can be added in some way to the design that we sent you if you so desire, but 95% of the people in our city buying your pens speak of them as Watermans Fountain pens. 2763 We would also like to have a couple of cuts of your Fountain pen a narrow one so we can use in both single and double column adds. We do not wish a large cut as we wish to use your pen add in connection with other advertising and not to make a separate advertisement of it. If you have a printed copy of some of the cuts you have kindly sent it to us and we can pick out just the kind of an add that we wish.

Yours,

JOHN M. ROBERTS & SON CO.

Dict. J. M. R.

2764 **Plaintiff's Exhibit 99-a.**

Letterhead of McGee Brothers Company

Jackson, Mich. Jan. 29 1904.

L. E. Waterman Company,
173 Broadway,
New York, N. Y.

Gentlemen:

I am sending you today, under separate cover, one "modern" A. A. Waterman, fountain pen, which was purchased as being one of your pens, in the following way:

Several days before Christmas the women employees of our factory, bought from G. G. Case, a Jeweler of this city, three
2765 Waterman Ideal Fountain Pens, one for a present to each member of the firm. Several days ago the Vice President brought his pen to me and asked what ailed it. He said he had tried to use it several times, but every time it acted so badly that he was inclined to think *Waterman* pens were no good. I looked the pen over and saw that it was a pen made by A. A. Waterman, and asked to see the box in which it came. The box has your name on the inside, and I am sending the pen back to you in that box. Thinking that perhaps the girls may have been imposed upon, I took occasion to look at the pens which were given the President and Secretary, and found that they were both your pens, and that they came in your boxes. I then approached the girl who bought the pens, and asked her what she asked the jeweler for. She said the rest of the girls had instructed her
2766 to purchase the Waterman Ideal Fountain Pens, as they understood them to be the best made. I did not tell her that one of the pens was a fraud, fearing to hurt the feelings of the balance of the girls, but there is no doubt that Mr. Case cheated her, passing off an inferior pen for one of yours.

Therefore, I ask that you make this matter good, but would request that you will not let the matter come to the ears of our factory girls, as it might seem to them that the recipient of their present was not pleased with it. You will appreciate the position, I have no doubt. The Vice President can afford to buy a fountain pen if he wants one, but after his experience with what he thought a *Waterman*, he does not want one.

Let me hear from you at your convenience.

Yours truly
STEWART D. HAUK

Plaintiff's Exhibit 126.

2767

Subpoena in due form to Witness Lutzer.

Plaintiff's Exhibit 127.

SUPREME COURT,

NEW YORK COUNTY.

HOBART W. GEYER and WILLIAM G. FRAZER,
Plaintiffs,

2768

vs.

ARTHUR A. WATERMAN and GRATZ NATHAN,
as Receiver of William G. Frazer,
Defendants.

State of New York,
County of New York, } ss.:

William G. Frazer and Hobart W. Geyer, being severally duly sworn, depose and say, and each for himself says, that they are members of the firm of A. A. Waterman & Co., composed of plaintiffs and defendant Arthur A. Waterman; that they have read the complaint herein, and the same is in all respects true, 2769
except as to the statements therein made on information and belief, and as to those statements they believe it to be true.

And deponents further say that they are stockholders and officers of the Frazer & Geyer Company, a corporation organized and doing business under the laws of the State of New York and engaged in the manufacture of fountain pens, and which corporation is intimately associated with the firm of A. A. Waterman & Co.; that said corporation has a contract with A. A. Waterman & Co., under which it manufactures all the fountain pens sold by A. A. Waterman & Co., and largely controls the business of said copartnership.

2770 *Plaintiff's Exhibit 127*

That for some time last past the corporation of Frazer & Geyer Company has been in financial difficulties and recently an attempt has been made to re-organize such corporation, and which has not as yet been successful.

That these plaintiffs are minority stockholders in said corporation and have expressed a willingness to reorganize said company on the lines and plans of the majority stockholders, and have signed an agreement so to do; that notwithstanding such fact an attempt is now being made by the majority interests in said Frazer & Geyer Company to acquire by unfair means, as these deponents believe, the interests of deponents in
2771 said Frazer & Geyer Company, with the purpose among others of controlling said firm of A. A. Waterman & Co., that in order to acquire such interests said parties have caused several litigations to be instituted against these deponents and against A. A. Waterman & Co., and among other things have obtained a judgment against the plaintiff William G. Frazer.

And deponents further say, that they are informed and believe, from conversations had with the defendant Arthur A. Waterman, and with the majority interests in said Frazer & Geyer Company, and from his conduct in the premises, that said defendant Arthur A. Waterman is doing all he can to aid and abet and help said majority interests in the said Frazer & Geyer Company, to acquire by fair means, or unfair means, the
2772 control of A. A. Waterman & Co., with some ulterior purpose in view, and what that purpose is deponents do not know, but believe it to be for the financial advantage of said defendant Arthur A. Waterman.

And deponents further say that annexed hereto is a copy of a letter received from Alexander S. Bacon, the attorney for the majority interests in said Frazer & Geyer Company, which shows on its face the arbitrary stand of said controlling interest, and the attempt made to acquire the stock of these plaintiffs therein on terms which they deem unjust, unfair and inequitable.

And deponents further say that as a part of the scheme to carry out the threats made under said letter, by implication, at least, their partner, said defendant Arthur A. Waterman, has

arbitrarily and without right, usurped the management of said firm of A. A. Waterman & Co. contrary to the express terms of the agreement; has stopped the mail and diverted it from the usual channels to himself, and has threatened to liquidate said firm.

And deponents further say that they believe said Waterman to be a man of no financial responsibility and unable to respond to them in damages, and that the effect of his diverting the mail from the business of A. A. Waterman & Co. would be, in their judgment, destructive of such business, which consists of the sale of fountain pens through salesmen and through orders received by mail; that very little of the business of said firm is done directly, the amount thereof not exceeding in sales in the New York office two per cent of the whole business, and the result of defendant Arthur A. Waterman usurping the management of the business, and diverting the mail from its usual channel is to practically destroy it. 2774

And deponents further say that unless some remedy is afforded by injunction or receivership so that the business may be continued, and orders filled as received from time to time, the delay and interference with customers in their orders to supply the trade will be such as to jeopardize the whole future of said business, if not to wholly destroy it.

And deponents further say that the reason why an order to show cause is desired herein rather than the usual notice, is that immediate protection is necessary to fully secure said business from the interference of defendant Arthur A. Waterman, and to continue it as a business, and that even the delay necessary for the usual notice would cause loss therein. 2775

That no other application has been made to any court or judge for the order sought herein.

And deponents further say that through their attorneys they have requested the defendant Gratz Nathan as the Receiver in supplementary proceedings of the plaintiff William G. Frazer herein, to joint with plaintiffs herein, and that on such request being made, said receiver expressed a hesitation to join with the plaintiffs, unless after first conferring with the attorney for

2776 *Plaintiff's Exhibit 127*

the judgment creditor, and after such conference applying for leave of the court.

And deponents further say that they were duly authorized by order of the City Court of the City of New York, duly entered on the 14th day of June, 1905, to bring this action against defendant Gratz Nathan as Receiver in supplementary proceedings of the plaintiff William G. Frazer and who as such Receiver has, or may claim to have some interest in the co-partnership assets of said A. A. Waterman & Co., as Receiver of said William G. Frazer.

HOBART W. GEYER
WM. G. FRAZER

2777 Sworn to before me this
14th day of June, 1905.
C. A. D. Utench,
Notary Public,
New York Co.

2778

Plaintiff's Exhibit 128. 2779

SUPREME COURT,

NEW YORK COUNTY.

HOBART W. GEYER and WILLIAM G. FRAZER,
Plaintiffs,

vs.

ARTHUR A. WATERMAN and GRATZ NATHAN,
as Receiver in Supplementary Proceedings
of William G. Frazer,
Defendants. 2780

The plaintiffs herein, by Straley & Hasbrouch, their attorneys, respectfully show to this Court:

1. That the plaintiffs herein and the defendant Arthur A. Waterman entered into certain articles of copartnership under date of January 9, 1901, a copy of which articles of co-partnership is hereto annexed marked Schedule A.

2. That said articles of co-partnership were modified by endorsement thereon under date of December 12th, 1901, a copy of which modification is hereto annexed marked Schedule B.

3. That said copartnership has continued up to the present 2781
time, except as modified by certain articles of agreement between the parties thereto annexed marked Schedule C.

4. That under and pursuant to the terms of said articles of copartnership it was expressly provided, as by reference thereto will more fully appear, that these plaintiffs jointly should have the entire control of the business, except that the defendant Arthur A. Waterman should have authority in the following matters, viz; the styles and quality of all goods made on which the name of A. A. Waterman & Co. should appear, list and net prices and terms to the trade, and further in that by said modi-

2782 *Plaintiff's Exhibit 128*

fication of December 12, 1901, it was provided that said defendant should continue to travel and act as salesman as theretofore, which he had been in the habit of doing, the parties to have equal authority in all prices and terms of sale, and the plaintiff William G. Frazer to have the general management of the business.

5. Plaintiffs further show that notwithstanding said provisions in the contract as to the management of said business on the tenth day of June, 1905, said defendant Arthur A. Waterman took possession of the mail of said firm, and as plaintiffs are informed and believe, without right or authority di-
2783 rected the Postmaster of the City of New York, to send all further mail to a different address, and threatened to proceed to liquidate the firm of A. A. Waterman & Co. and served, or caused to be served upon these plaintiffs, a notice, a copy of which is hereto annexed marked Schedule D.

6. Plaintiffs further show that the acts and conduct of said defendant Arthur A. Waterman in the premises are wholly inconsistent with the articles of co-partnership existing between plaintiffs and said defendant, arbitrary, and without right or authority, and that it will be impossible to continue said business with said defendant as a partner therein and for which reason a dissolution thereof is imperative.

2784 7. And plaintiffs further show that for some weeks last past they and the defendant Arthur A. Waterman have had numerous conferences, in which said defendant has fully been apprised of an attempt being made by parties interested in the Frazer & Geyer Company, intimately connected in business with said A. A. Waterman & Co., to acquire its control, and through the control thereof a controlling interest in the firm of A. A. Waterman & Co., and that these plaintiffs are informed and believe, that said defendant Arthur A. Waterman is acting with and on behalf of said parties, inconsistent with his relations as partners with these plaintiffs, and for the purpose of jeopardizing the interests of said firm of A. A. Waterman & Co. to the end

that it may be acquired by other parties, and that the acts and conduct on said defendants' part are such, coupled with the aforesaid threats, that the business cannot be continued successfully.

8. And plaintiffs further show that the business of A. A. Waterman & Co. consists largely in the sale of fountain pens through the distribution thereof over a large territory of the United States, as well as in foreign countries, and the business very largely consists of mail orders received through salesmen on the road, and which business could not exist but for the use of the mails for such purpose.

2786

9. That on the tenth day of June, 1905, said defendant Arthur A. Waterman arbitrarily, and without right and authority, took the mail of said A. A. Waterman & Co. from its place of business, and notified the Postmaster of the City of New York to deliver such mail elsewhere, and where neither of these plaintiffs is aware of; that such mail usually contains checks, as well as orders, and the result of the conduct of said defendant in that respect is to tie up the business and practically stop it, and that unless he is restrained from interfering with such mail and said business by the order of the Court, it must wholly cease.

10. And plaintiffs further show that the defendant Arthur A. Waterman is without pecuniary responsibility, and these plaintiffs would be without remedy for relief at law in the premises because of his inability to respond in damages.

2787

11. And plaintiffs further show that the defendant Gratz Nathan is receiver in supplementary proceedings of the plaintiff William G. Frazer, appointed by order of Hon. Edward F. O'Dwyer, one of the judges of the City Court of the City of New York, dated June 7, 1905, and entered in the office of the Clerk of the County of New York on the seventh day of June, 1905, and that before suit was brought said receiver was requested to join with plaintiffs in this action but was not com-

2788 *Plaintiff's Exhibit 128*

plied with said request and for which reason he is made defendant herein.

12. That plaintiffs were duly authorized by order of the City Court of the City of New York duly entered on the 14th day of June, 1905, to bring this action against defendant Gratz Nathan as receiver in Supplementary Proceedings of the plaintiff William G. Frazer, and who as such receiver has, or may claim to have, some interest in the co-partnership assets of said A. A. Waterman & Co. as receiver of said William G. Frazer.

Wherefore, plaintiffs demand the judgment of this Court:

2789 First: That said copartnership of A. A. Waterman & Co. be dissolved.

Second: That a receiver with the usual powers in such cases given, should be appointed.

Third: That the defendant Arthur A. Waterman herein be restrained temporarily as well as permanently from in any way interfering with the partnership assets or business of A. A. Waterman & Co., except in so far as expressly authorized so to do by the articles of co-partnership between plaintiffs and defendant Arthur A. Waterman.

Fourth: That the defendant Arthur A. Waterman be directed to restore to plaintiffs any and all mail orders or letters
2790 received and diverted by him.

Fifth: That an accounting be had of the interests of the several parties in the partnership assets of A. A. Waterman & Co. and that plaintiffs have their costs of the suit.

STRALEY & HASBROUCH,
Attorneys for Plaintiffs,
257 Broadway,
New York City,
Borough of Manhattan.

Plaintiff's Exhibit 129 2791

State of New York,
County of New York, } ss.:

Hobart W. Geyer, being duly sworn, deposes and says, that he is one of the plaintiffs above named; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HOBART W. GEYER.

Sworn to before me this
14th day of June, 1905.
C. A. D. Utench,
Notary Public,
New York Co. 2792

Plaintiff's Exhibit 129.

SUPREME COURT,

NEW YORK COUNTY.

HOBART W. GEYER and WILLIAM G. FRAZER,
Plaintiffs, 2793

vs.

ARTHUR A. WATERMAN and GRATZ NATHAN,
as Receiver, etc.,
Defendants.

County of New York, ss.:

Hobart W. Geyer, being duly sworn, says, that he is one of the plaintiffs in the above entitled action, and listened to the argument of the motion for a receiver on Monday, June 19, 1905, and

2794 *Plaintiff's Exhibit 129*

then understood for the first time that his name was being used in a way that he did not understand.

Deponent is anxious that the affairs of the late firm of A. A. Waterman & Co. should be closed up with the least possible expense, and he verily belives that that can be done by Mr. Waterman and deponent without expense to the firm and without interference from the court.

Deponent is now advised and verily believes that the fact that Mr. Frazer's property is now in the hands of a receiver in supplementary proceedings prevents him from having anything to do with the liquidation of the firm, because his interest has been assigned (by act of law) to the receiver.

2795 Deponent verily believes that the conduct of Mr. Waterman is attempting to hasten the liquidation of the firm was in good faith and in good judgment, and deponent is perfectly willing to unite with his partner Mr. Waterman, in liquidating the affairs of the firm, without expense, and thereby saving the most possible to the creditors and the partners, if anything should be left.

Deponent wishes to withdraw as far as he possibly can from this litigation, and joins with the defendants in asking that the motion for a receiver be denied.

HOBART W. GEYER.

Sworn to before me this
21st day of June, 1905.
2796 V. M. Turner,
Notary Public,
New York County.

Endorsement: Filed July 11, 1905.

Plaintiff's Exhibit 130.

2797

At a Special Term of the Supreme Court, Part I, held at the County Court House, in the County of New York, on the tenth day of July, 1905.

Present, Hon. Leonard A. Giegerich, Justice.

HOBART W. GEYER and WILLIAM G. FRAZER,
Plaintiffs,

vs.

ARTHUR A. WATERMAN and GRATZ NATHAN,
as Receiver,
Defendants.

2798

A motion having come regularly on to be heard on the order to show cause herein dated June 14, 1905, why a receiver should not be appointed with the usual powers, of the assets of the firm of A. A. Waterman & Co. and why defendant Arthur A. Waterman should not be restrained temporarily pending this action from in any way interfering with the copartnership assets and business of A. A. Waterman & Co., it is on the summons and complaint herein, the joint affidavit of Hobart W. Geyer and William G. Frazer verified the fourteenth day of June, 1905, read in support of said motion, the affidavit of defendant Arthur A. Waterman verified the nineteenth day of June, 1905, and the affidavit of Isaac E. Chapman an intervening creditor, verified the twentieth day of June, 1905, and the affidavit of Hobart W. Geyer, verified June 21st, 1905, read in opposition to said motion, and the affidavit of William G. Frazer verified the twenty-second day of June, 1905, in reply, read in favor of said motion, and after hearing Louis B. Hasbrouch, of counsel for plaintiffs, in support of said motion, and Alexander S. Bacon, Esq., of counsel for intervening creditors, William E. Weaver, Esq., of counsel for defendant Arthur A. Waterman, in opposition thereto, the defendant Gratz Nathan as Receiver appearing and supporting said motion, and

2799

2800 *Plaintiff's Exhibit 130*

on motion of Straley & Hasbrouch, attorneys for plaintiffs, 126 Chambers Street,

Ordered, that Alexander D. Henderson be, and he hereby is, appointed receiver, *pendente lite,* of the co-partnership property, assets and effects of every kind and nature of the firm of A. A. Waterman & Co., which firm heretofore consisted of the plaintiffs in this action, and the defendant Arthur A. Waterman, upon his executing and filing with the Clerk of this Court a bond in the usual form prescribed by law, in the sum of five thousand dollars, with sufficient sureties to be approved by this Court, and when he shall have so qualified the receiver is directed to forthwith take possession of the said co-partnership
2801 property which bond shall be issued on the application of any party if the value of property received or about to be received warrants such issue, and it is further

Ordered, that the plaintiffs and the defendants do assign, transfer and deliver to said receiver on oath under the direction of Henry Kroff, Esq. (120 Bway), Counsellor at law of this court, hereby appointed Referee for that purpose, all said property, real and personal, things in action, equitable interests and other effects belonging to said co-partnership of A. A. Waterman & Co., and that they in like manner deliver to said receiver all bills, insurance, contracts, books of account and other evidences relating thereto, and under the direction of said referee the said parties execute and deliver to said receiver a gen-
2802 eral assignment of said property and effects, and it is further

Ordered that said parties appear before said referee as they shall be summoned or required to do from time to time and produce such books, papers and accounts, and to submit to such examination as said referee shall direct in relation to any matter which may be lawfully required to be disclosed, and it is further

Ordered, that the parties hereto be, and hereby are enjoined and restrained from interfering with said receiver, excepting, however, that either or any of them may be allowed upon being requested by the said receiver so to do, to assist in the winding up of said business, but only in accordance with such

specific directions as they may receive from said receiver, and in all other respects they and each of them are restrained from intermedling with or interfering with the assets or affairs of said co-partnership or this receivership, and from making any other disposition of the copartnership assets by sale, transfer or otherwise, except as herein expressly directed, and it is further

Ordered, that said receiver deposit in the Union Trust Company any sums in cash coming to his hands as such receiver, there to abide the event of this action, and not to be withdrawn without the further order of this Court, and it is further

Ordered, that application may be made at the foot of this order by any of the parties to this action for further instructions or provisions in relation to said receivership. 2804

Enter,

L. A. G.,
J. S. C.

Endorsement: Notice of Settlement, admission of service.

2806 **Plaintiff's Exhibit 131.**

SUPREME COURT OF THE STATE OF NEW YORK,

NEW YORK COUNTY.

FRAZER & GEYER COMPANY,
Plaintiff,

vs.

WILLIAM G. FRAZER, HOBART W. GEYER and ARTHUR A. WATERMAN,
Defendants.

2807 The above entitled action having come up in its regular order for trial, and an inquest having been taken and Mr. Justice Samuel Greenbaum having made and filed his Findings of Fact and Conclusions of Law:

Now upon said Findings and on motion of Alexander S. Bacon, Esq., attorney for plaintiff, it is

Ordered and decreed that the plaintiff Frazer & Geyer Company, have judgment against the defendants, William G. Frazer, Hobart W. Geyer and Arthur A. Waterman, in the sum of $12,133.40 with $13.94 to date & $151.22 costs as taxed, making a total of $12338.50 and that the plaintiff have execution therefor.

2808 Dated, New York City, June 4, 1908.

PETER J. DOOLING,
Clerk.

(Endorsement): Supreme Court, New York County. Frazer & Geyer Co. plff. vs. Wm. G. Frazer, *et al.*, defts. Orig. Judgment. Alexander S. Bacon, attorney for Plf., 37 Liberty Street, Borough of Manhattan, New York City. Filed June 4, 1908.

Plaintiff's Exhibit 132. 2809

SUPREME COURT OF THE STATE OF NEW YORK,

NEW YORK COUNTY.

Estate WILLIAM E. CHAPMAN Inc.,
Plaintiff,

vs.

FRAZER & GEYER COMPANY, WILLIAM G. FRAZER, HOBART W. GEYER and ARTHUR A. WATERMAN,
Defendants. 2810

This cause having duly come on for trial before the Honorable Peter A. Hendrick, one of the Justices of the Supreme Court of the State of New York and a jury at Trial Term, Part XIV of this Court at the County Court House in the County of New York, on the 15th day of June, 1908, and plaintiff appearing by Alexander S. Bacon, Esq., the defendant Arthur A. Waterman by William E. Weaver, Esq., and the defendant William G. Frazer by Arthur O. Townsend, Esq., and the case having been duly tried on the 15th and 16th days of June, 1908, and the jury having duly rendered its verdict in favor of the plaintiff, in the sum of $12,453 and the costs having been duly adjusted at the sum of $201.42, now on motion of Alexander S. Bacon, Esq., attorney for the plaintiff, it is 2811

Ordered and Adjudged that the plaintiff Estate William E. Chapman, Inc., recover of the defendants Arthur A. Waterman, William G. Frazer and Hobart W. Geyer, the sum of $12,453 the amount of the verdict aforesaid, together with the sum of $201.42 the costs taxed as aforesaid making a total of the sum of $12,654.42 and that plaintiff have execution therefor against the defendants Arthur A. Waterman, Hobart W. Geyer and William G. Frazer and each of them.

Judgment signed and entered this 26th day of June, 1908.

PETER J. DOOLING,
Clerk.

2812 *Plaintiff's Exhibit 133*

(Endorsement): Supreme Court, New York County. Est. Wm. E. Chapman, Inc., Plff. vs. Frazer & Geyer Co. *et al.*, Defts. Orig. Judgment Roll. Alexander S. Bacon, Attorney for plaintiff, 37 Liberty Street, Borough of Manhattan, New York City. Filed June 26, 1908.

Plaintiff's Exhibit 133.

WHEREAS the firm of A. A. Waterman & Co. in liquidation is now indebted to the Frazer & Geyer Company with sum of about $53,234.95 and is desirous of liquidating that indebtedness; and

2813 WHEREAS A. A. Waterman & Co. have the following assets of a fair and agreed valuation, viz.:

Merchandise—finished pens, parts, &c., &c., in their office, factory or elsewhere, or in the hands of salesmen	$17,000.
Accounts receivable	17,474.62
(Accounts payable not exceeding $2300):	
Furniture & fixtures in offices	1000.
Machinery	185.78
Show cases at different parts in the United States & Canada	6,000.
Disbursements for patents which have hitherto been	
2814 assigned to the Frazer & Geyer Company	3,306.22
Cash in safe and bank	307.06
Total	45,285.68

And whereas it is desirable that the firm of A. A. Waterman & Co. should liquidate its affairs as soon as possible and pay off all its creditors.

(1) Now therefore in consideration of one dollar to us in hand paid, the receipt whereof is hereby acknowledged and other good and sufficient consideration herein expressed the said firm of A. A. Waterman & Co. in liquidation hereby sells, assigns,

transfers and sets over unto the Frazer & Geyer Company all its right, title and interest in and to all of its assets of every name and nature whatsoever and especially as above set forth.

(2) In consideration of said transfer of assets the Frazer & Geyer Company hereby covenants and agrees to pay off all the creditors (except itself) of said A. A. Waterman & Co. the amount due to said creditors being hereby agreed not to exceed $2500 and to credit on the account of said A. A. Waterman & Co. the remaining sum of $42,785.68 hereby reducing the indebtedness of said A. A. Waterman & Co. to said Frazer & Geyer Company to $10,449.27.

IN WITNESS WHEREOF the Frazer & Geyer Company has caused these presents to be signed by its President and its corporate seal to be hereto affixed, and the said firm of A. A. Waterman & Co. in liquidation has hereunto set its hand and seal this 24th day of June, 1905, at the City of New York. 2816

A. A. WATERMAN,
HOBART W. GEYER,
for A. A. Waterman & Co., (in liquidation).

Plaintiff's Exhibit 134.

NEW YORK SUPREME COURT. 2817

ISAAC E. CHAPMAN, vs. FRAZER & GEYER COMPANY.	Execution issued June 10, 1905, for $20,-163.90. Alexander S. Bacon, Plaintiff's Attorney.

Sold by Joseph P. Day, Auctioneer, on June 16th, 1905, at No. 22 Thames St.

By order of Mitchell L. Erlanger, Sheriff.

FRANK J. BURNES,
Deputy.

Sale No. 219.

2818 *Plaintiff's Exhibit 135*

Lot. 1. All the right, title and interest of the Frazer & Geyer Co. which it had on the 10th day of June, 1905, or at anytime thereafter of, in and to the lease of the premises No. 22 Thames St., now occupied by them, also, Machinery and Material for manufacturing fountain pens, fixtures, patents, accounts & bills receivable and all other personal property of the Frazer & Geyer Co.

Sold for		$4900.00
To		
T. T. Quackenbush,		
17 Battery Pl.		
Auctioneer Bill		
2819 Sheriff Bill	$249.40	
Poundage	147.50	
Posting Notice	5.00	
Keepers Fee	21.00	422.90
Made on Execution		$4477.10

O. K.
Alex S. Bacon.

Plaintiff's Exhibit 135.

2820 OFFICE OF THE MODERN PEN CO.,

22 Thames St., New York.

June 21, 1905.

Mr. Wm. G. Frazer,
Brooklyn, N. Y.

Dear Sir:

The long delay in the work of the Reorganization Committee was occasioned partly on account of the tardiness of some of

the stockholders in sending their written consent to make up the necessary two-thirds, but more particularly on account of the position taken by the partners of Mr. Waterman.

In consequence of the insolvency of Mr. Frazer, the old firm of A. A. Waterman & Co. has been dissolved, and a new co-partnership with A. A. Waterman has been formed in the interest of those who have their money invested.

Upon advice of our counsel, Col. Alex. S. Bacon, the original plan of reorganization was abandoned, and actions at law were brought in which all the assets of the Frazer & Geyer Company have been sold under execution.

A new corporation, the Modern Pen Company, with a capital of $150,000, all one kind of stock, has been organized under the laws of West Virginia. 2822

The control of the new Company will be in new hands. This will overcome the objections of some who did not approve of the original reorganization plan. The Board of Directors of the new Corporation will be:

Benj. F. Jayne, Isaac E. Chapman, George T. Hay, Francis A. Wilson, William L. Chapman, A. A. Waterman, A. W. Smith.

This Modern Pen Company will acquire the manufacturing plant of the Frazer & Geyer corporation; and all stockholders in the Frazer & Geyer Co. may subscribe for stock in the new corporation upon the following terms. The Modern Pen Company will for one share of Frazer & Geyer Co. stock (whether 1st preferred, 2nd preferred, or common) and $20.00, issue one share of new stock and this contemplates that the proposed contribution of $15.00 per share be increased to $20.00 because some of the stockholders apparently will not participate in the exchange, but the participating stockholders will receive greater benefit on account of the smaller capital outstanding. The Modern Pen Co. reserves the right to withdraw this offer if remittance is not received by June 26th, 1905. 2823

You are requested to send check to the order of the Modern Pen Co., c/o I. E. Chapman, 17 Battery Place, New York City, to cover the number of shares you own, or as many thereof as you wish to subscribe for. Upon receipt of your check and certifi-

2824 *Plaintiff's Exhibit 136*

cates of Frazer & Geyer Co. stock, a certificate of new stock will be issued to you for the number of shares subscribed for. (The new shares will be full paid and non-assessable, par value $100.00.)

It is requested that checks for subscription be sent immediately, and not later than the 26th instant, so the business will not be obliged to suffer.

ISAAC E. CHAPMAN,
WM. L. CHAPMAN,
A. A. WATERMAN,
BENJ. F. JAYNE,
2825 GEORGE T. HAY,
WARD D. WILLIAMS,
FRANCIS A. WILSON,
A. W. SMITH.

Plaintiff's Exhibit 136.

New York City, May 25, 1905.

Chapman vs. Frazer & Geyer Company.
Chapman Estate vs. Frazer & Geyer Company and Waterman Co.
2826 Frazer & Geyer Company vs. Waterman & Co.
Chapman vs. Frazer.

William G. Frazer, Esq.,
Hobart W. Geyer, Esq., and
Arthur A. Waterman.

Gentlemen:

Since the beginning of the above actions, Messrs. Frazer and Geyer have signed the consents to reorganization, and much more than two-thirds of the stockholders have agreed to the plan. The delay in signing these consents led to the beginning of the above suits, and a determination to pursue radical methods and abandon the reorganization.

Plaintiff's Exhibit 136 2827

If it should still seem advisable to continue the reorganization scheme, it will be only upon the following conditions.

1. Mr. Frazer and Mr. Geyer are to assign all their right, title and interest in and to the firm of A. A. Waterman & Co., to the Messrs. Chapman, who with Mr. Waterman will form a new firm of A. A. Waterman & Co.

2. Mr. Frazer and Mr. Geyer to resign all connections with the Frazer & Geyer Company and the new company to be formed, both as employees and officers.

3. The Messrs. Chapman are to loan Mr. Frazer the assessments on the stock now held by them as collateral, and the 2828
amount so paid shall be added to the notes already held, a new note being given for the increased amount, and stock in the new company, as soon as issued to be substituted for the stock in the old company now held as collateral and Mr. Frazer shall increase the security by adding, as collateral, all his holdings of stock in the new company.

4. If Mr. Frazer should desire the Messrs. Chapman to pay the assessments on the remaining stock held by him (that not now held by them as collateral) they will do so, upon consideration of one-half of such stock being conveyed to them in consideration of such advance.

5. The voting trust shall be dissolved. 2829

6. Mr. Frazer, Mr. Hobart W. Geyer and Mr. Charles T. Geyer to return to the treasury the stock dividend heretofore improperly declared, being one-third of the said stock dividend.

The above conditions being complied with, the above entitled actions will be discontinued, otherwise judgments will be taken.

Yours very truly,

ALEXANDER S. BACON,
Atty.

2830 *Plaintiff's Exhibit 137*

(Endorsement): New York Supreme Court, Hobart W. Geyer and William G. Frazer, plaintiffs, vs. Arthur A. Waterman and Gratz Nathan as Receiver of William G. Frazer, Defendants, Summons & Complaint. Straley & Hasbrouch, Attys. for Plfs., O. & P. O. Address, 257 Bway. N. Y., Filed July 11, 1905.

Plaintiff's Exhibit 137.

2831 SUPREME COURT,

NEW YORK COUNTY.

HOBART W. GEYER and WILLIAM G. FRAZER,
Plaintiffs,

vs.

ARTHUR A. WATERMAN and GRATZ NATHAN
as Receiver, etc.,
Defendants.

City of New York, ss.:

2832 Isaac E. Chapman being duly sworn, says that he is the president of the Frazer & Geyer Company, its largest stockholder and largest creditor. Deponent and his relatives and friends and the corporation of the estate William E. Chapman, Inc., are the owners of a large majority of the stock, and together, are its creditors in the sum of more than $30,000;

The corporation of Frazer & Geyer Company is really the party in interest in this controversy, inasmuch as A. A. Waterman & Co. are indebted to it in the sum of about $57,000, a larger sum than all the assets if sold by a receiver, all other creditors having claims amounting to about $4,500.

Plaintiff's Exhibit 137 2833

From a practical business standpoint, Frazer & Geyer Company and A. A. Waterman & Co. are one. The Frazer & Geyer Company furnished all the capital and manufactured fountain pens, while the firm of A. A. Waterman & Co. were their sales agent.

Before the year 1901, the Frazer & Geyer Company owned and controlled by the plaintiffs herein, were manufacturers of fountain pens. Mr. Frazer represented to deponent, who is the vice-president of the Merritt & Chapman Derrick & Wrecking Company, that the Frazer & Geyer Company were doing a profitable business, making money very fast and that with the addition of extra capital, their profits could be greatly increased. 2834

Relying upon the statements of Mr. Frazer, which deponent now knows to have been largely false, he was induced from time to time, to put up a large amount of capital for the Frazer & Geyer Company and deponent and his relatives and friends are today the owners of a large majority of the stock of the Frazer & Geyer Company, besides loaning it $30,000.

Mr. Frazer was given the management of the Frazer & Geyer Company and of A. A. Waterman & Co. At first this management was given to Mr. Frazer and Mr. Geyer jointly, but Mr. Geyer is a bookkeeper and wholly incompetent, and by an amendment to the articles of incorporation, the management was placed in the hands of Mr. Frazer, Mr. Waterman is too valuable man to be in New York. A very large proportion of the sales came through him and his representatives. It was for this reason that he had nothing to do with the local management. 2835

In order to utilize the name of A. A. Waterman & Co. and to obtain the very valuable services of Mr. A. A. Waterman who has been in the fountain pen business for more than 20 yrs. and is by far the most competent man connected with the business—a firm of A. A. Waterman & Co. was organized consisting of A. A. Waterman, Mr. Frazer and Mr. Geyer. This firm was organized without capital with this exception. Frazer & Geyer took out of the funds of the Frazer & Geyer Company, without consent and in violation of their duty as officers and trustees, the

2836 *Plaintiff's Exhibit 137*

sum of $1,000, which they called a loan and credited it to A. A. Waterman & Co. as capital $500, to each; that is to say: the firm of A. A. Waterman & Co. was practically nominal. Mr. Waterman put in no cash and Geyer and Frazer put in nothing except this forced loan from the Frazer & Geyer Company.

As soon as deponent learned of this loan, he required Geyer and Frazer to pay it back. Deponent personally loaned Mr. Frazer $500 in order to repay this improper loan.

The function of A. A. Waterman & Co. was, in effect, that if a sales agent for the Frazer & Geyer Company, which furnished all the capital, manufactured pens, and turned them over to A.
2837 A. Waterman & Co. for sale. *All profits were to go to Frazer & Geyer Company,* for the benefit of the stockholders who had put up the money. (See contract between A. A. Waterman & Co. and Frazer & Geyer Company.)

Deponent verily believes that from the very beginning of this arrangement, the Frazer & Geyer Company lost money. The books (as kept by Frazer & Geyer) did not show it, but it is known that those books were not properly kept, and at or about January, 1901, a stock dividend was declared, which was properly declared according to the books of the company, but deponent has since found—and Mr. Frazer has openly admitted—that the books of the Company were not correct; that the stock dividend was not properly declared and deponent turned back his stock into the treasury and demanded that Mr. Frazer and Mr.
2838 Geyer do the same. Mr. Frazer agreed to do so but did not. On one occasion a very large deficit was covered up by transferring it to "good will."

The whole administration of Mr. Frazer is subject to the acknowledged fact of incompetency and to the admitted fact of irregularity and improprieties.

Things kept going from bad to worse. Mr. Frazer continually saying that they merely needed more capital on account of the increasing business, claiming that they were making money all the time, but that the increased business required additional capital. As this could not be had from the stockholders, deponent, from time to time advanced to the Frazer & Geyer Com-

Plaintiff's Exhibit 137 2839

pany $20,000 in cash, upon representations as to the condition of the company that deponent now knows to have been false. The Estate Wm. E. Chapman, Inc., of which deponent is vice-president, loaned to the Frazer & Geyer Company $10,000 on a note with the endorsement of A. A. Waterman & Co.

The firm of A. A. Waterman & Co. is insolvent. The liabilities include about $57,000 due to the Frazer & Geyer Company, and about $4500 due to outside creditors exclusive of $10,000 due on an endorsement of a note of the Frazer & Geyer Company. The nominal assets about equal the liabilities; the actual assets are much less.

Mr. Frazer was the manager of the Frazer & Geyer Company, and of A. A. Waterman & Co., and he was responsible for present conditions. He received a salary from Frazer & Geyer Company of $50 per week. He took nothing from Waterman & Co. Mr. Geyer acted as cashier and received 65 cents per hour. His wages would not exceed, on the average, fifteen to twenty dollars per week. He is engaged in other business. 2840

Deponent and his relatives having advanced such large sums of money without adequate security and the owners of the majority of the capital stock and the principal creditors having finally found that such management was utterly incompetent, deponent and his relatives refused to advance any more money and a reorganization became imperative, as the company could not go on without more cash.

A meeting of the stockholders of the Frazer & Geyer Company was then called. At this meeting the affairs of the Company were discussed very bluntly, and the stockholders were asked to come into a reorganization company wherein each should pay in $15 per share. The scheme amounted to an assessment of that sum. Deponent offered to pay the assessment of certain minority stockholders provided each would give up to him 1/2 of their stock for such advance. In view of the financial condition of the company this was admitted to be a liberal offer. 2841

At this meeting the management of Mr. Frazer was criticised in very plain language and a large proportion of the stockholders agreed to the reorganization scheme, upon the express condi-

2842 *Plaintiff's Exhibit 137*

tion that the management should be taken from the hands of Mr. Frazer and put into the hands of deponent. An extract from the printed report of the reorganization committee is hereto annexed marked Exhibit 4.

At this meeting of stockholders and at a subsequent meeting of the committee on reorganization, Mr. Geyer and Mr. Frazer personally and through their personal attorney, Mr. Straley expressed their approval of the reorganization scheme and the form of consent and agreement that was then adopted.

Mr. Frazer owns about 80 shares only of the Frazer & Geyer Company, of which 29 shares are hypothecated with deponent or his relatives for money loaned, and as both Mr. Geyer and Mr.
2843 Frazer have stated that they were unable to pay the assessment on their stock, deponent personally, before the beginning of litigation, agreed to pay such assessment.

Notwithstanding the fact that Mr. Geyer and Mr. Frazer had promised to sign the consent for the reorganization (2/3 of stock being necessary) they neglected so to do and kept putting it off on one pretext or another. Finally deponent and his relatives caused the following suits to be begun for the purposes of aiding in the reorganization; (1) Isaac E. Chapman vs. Frazer & Geyer Company, $20,000 note, (2) Estate William E. Chapman, Inc. vs. Frazer & Geyer Company and A. A. Waterman & Co., $10,000 note; (3) Frazer & Geyer Company vs. A. A. Waterman & Co., $57,766.78, (4) Isaac E. Chapman vs. William
2844 G. Frazer, notes $1580.

After these suits were begun Mr. Frazer and Mr. Geyer signed the consents.

In the action of Chapman vs. Frazer (individually) judgment was entered by default, execution issued; returned unsatisfied, and the defendant Gratz Nathan, Esq., made Receiver in Supplementary Proceedings.

Deponent is advised by his attorney, Colonel Alexander S. Bacon, that this fact of receivership and the vesting of Mr. Frazer's title in another *ipso facto*, terminated the partnership of A. A. Waterman & Co., and it immediately went into liquidation, *i. e.*, the firm *is* in liquidation.

Plaintiff's Exhibit 137

Under the terms of copartnership, Mr. Frazer was the manager of the firm. He being disqualified from acting, Mr. Waterman took possession of the assets of the firm for purposes of liquidation jointly with Mr. Geyer, being very careful in every instance to do nothing that would interfere with Mr. Geyer's joint control in liquidation. 2845

Mr. Frazer having maintained upon the advice of his attorney, Mr. Straley, that the firm could not be dissolved except by an order of the court, Mr. Waterman rented a box for the reception of the mail, and offered one key thereof to Mr. Geyer, that they might have joint control. However, the mail has not been delivered at said box, but has in every instance been delivered at 22 Thames Street, the headquarters of the firm, where Mr. Geyer seldom comes. 2846

It was soon discovered that one of the checks of the A. A. Waterman & Co. check books was missing, and Mr. Geyer admitted that he knew that it was missing, and that it was to be used by Mr. Frazer to deliver to Straley & Hasbrouch, their personal attorneys, and thereafter said check turned up at the Oriental Bank filled in by Mr. Frazer and signed in the name of A. A. Waterman & Co., to the order of Straley & Hasbrouch. This was an attempt on the part of Mr. Frazer—after the receivership—to appropriate the funds of the firm to pay his own personal attorneys, Straley & Hasbrouch, who never have been the attorneys for A. A. Waterman & Co., or for the Frazer & Geyer Company, but represent Mr. Frazer and Mr. Geyer only in a personal capacity. Deponent is advised that this was a violation of the injunction contained in the order in supplementary proceedings. 2847

On learning of Mr. Frazer's attempt to misappropriate the funds of A. A. Waterman & Co. deponent caused a notice to be given to the Bank, a copy of which is here annexed marked Exhibit 5 and gave the Bank a bond signed by deponent and Mr. Waterman, to save the bank harmless from all loss upon refusing to pay the said check. A copy of this bond is hereto annexed marked Exhibit 6. These are referred to to show how carefully Mr. Waterman preserved Mr. Geyer's joint right to liquidate the firm.

2848 *Plaintiff's Exhibit 137*

Acting strictly under the advice of counsel, deponent and Mr. Waterman have been very careful in acting for said firm in liquidation to do nothing exclusive of Mr. Geyer—to keep a strict account of every dollar received and expended and to use all possible haste to fill all outstanding orders and liquidate the firm as of June 8, 1905.

Under the execution in the said action of Chapman vs. Frazer & Geyer Company, on June 16, 1905, all the property of the Frazer & Geyer Company was sold at auction and bid in by Mr. T. T. Quackenbusch, who holds the same for the benefit of the stockholders of the Frazer & Geyer Company and will transfer the same to a new company for the purposes of said reor-
2849 ganization.

Mr. Frazer is insolvent. Mr. Geyer is a person of no means is not a practical pen man, but is a bookkeeper and accountant only. The Frazer & Geyer Company is diverted of all its assets of every name and nature whatsoever; the firm of A. A. Waterman & Co. is insolvent. It owes far more than its assets.

Should a receiver be appointed for that firm, all creditors would have to be served alike, and the Frazer & Geyer Company would get its payment *pro rata*. In the event of the firm being liquidated without expense by Mr. Waterman or Mr. Waterman and Mr. Geyer, or by deponent, it is the desire of deponent and his relatives and friends to pay all creditors both of the Frazer and Geyer Company and A. A. Waterman & Co.,
2850 in full, irrespective of any obligations between Frazer & Geyer Company and A. A. Waterman & Co. Every act taken by deponent and Mr. Waterman has been in absolutely good faith with no other object than to transfer all of the assets of the corporation of Frazer & Geyer Company to the new corporation, the Modern Pen Company, for the benefit of the reorganization scheme, wherein every stockholder of the Frazer & Geyer Company will be treated exactly alike.

If, however, the court forces a legal winding up of the affairs of A. A. Waterman & Co., with the expenses of a receiver the Frazer & Geyer Company will necessarily come in for their *pro*

 2851

rata share of all assets, and the merchandise creditors will be paid in part only.

Deponent therefore asks that the application for a receiver be denied, or if the Court thinks that it is absolutely necessary that such receiver should be appointed that Mr. Waterman or deponent be appointed liquidator to serve without charge.

ISAAC E. CHAPMAN.

Sworn to before me this
20th day of June, 1905.
V. M. Turner,
Notary Public,
New York Co.

2852

Plaintiff's Exhibit 138.

SUPREME COURT,

NEW YORK COUNTY.

WILLIAM G. FRAZER and HOBART W. GEYER,
Plaintiffs,

against

2853

ARTHUR A. WATERMAN and GRATZ NATHAN
as Receiver in Supplementary Proceedings
of WILLIAM G. FRAZER,
Defendants.

State of New York,
City and County of New York, } ss.:

Alexander D. Henderson, being duly sworn, says: That by an order in this action, dated on the 10th day of July, 1905, and filed and entered in the office of the Clerk of the County of New

2854 *Plaintiff's Exhibit 138*

York on July 11, 1905, he was appointed receiver, *pendente lite*, of the copartnership property, assets and effects of the firm of A. A. Waterman & Co., which firm theretofore consisted of the plaintiffs in this action, and the defendant Arthur A. Waterman, upon his executing and filing a bond in the usual form prescribed by law, in the sum of five thousand dollars. A copy of said order is hereto annexed, marked "A" and made a part hereof.

That on the 14th day of July, 1905, deponent furnished a bond to the People of the State of New York, in the said sum of five thousand dollars, with the American Surety Company of New York as surety thereon, conditioned for the performance of his duties as such receiver.

2855 That by the terms of the order appointing deponent such receiver, the plaintiffs and defendants herein were ordered, under the direction of Henry Kroft, Esq., who was appointed Referee for that purpose, to turn over to said receiver all of the property and assets of said copartnership, as will more fully appear by reference to said order. That as your deponent is informed and believes copies of the said order were duly served upon the different parties, through their respective attorneys; but no property or assets of any kind of said firm has been turned over to or received by deponent, although the same have been duly demanded. That such receivership was made permanent and the bond continued. That, as your deponent is informed and verily believes, there are serious doubts as to the

2856 existence of any property or assets of said copartnership that can be realized on by the receiver; that when such demand was made it was denied that there were any assets or property; that its affairs have been and are involved in litigations, in one of which a judgment adverse to the interests of said copartnership has been obtained in an amount of upwards of $10,000. That your deponent is advised by his attorneys by reason of the facts above set forth an action for the purpose of reducing such property or assets if any to the possession of the receiver is not warranted; that deponent has not in his possession and does not know of the existence of any funds available for such purpose. That he has already suffered loss through payment of the premium on his bond.

Plaintiff's Exhibit 138

2857

That an order to show cause is asked by reason of the fact that a further annual premium on said bond will become due and payable on July 14, 1908, unless said bond be sooner cancelled and discharged.

That no other application has been made for the order now sought.

WHEREFORE, your deponent prays that an order may be made herein relieving and discharging him as such receiver and cancelling and discharging his said bond; without prejudice to the rights of any of the parties interested to make application for the appointment of a new receiver if they shall be so advised, and for such other and further relief in the premises as to the Court seems just.

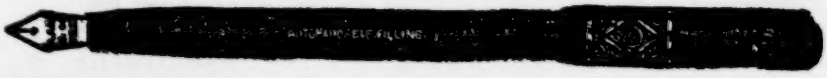
ALEXANDER D. HENDERSON.

Sworn to before me this
8th day of July, 1908.
Bronson P. Reynolds,
Notary Public, Kings Co., No. 1860.
Certificate filed N. Y. Co. No. 588.
Filed July 15, 1908.

2860 **Plaintiff's Exhibit 139.**

Advertisement of Aloe, St. Louis, Mo. of A. A. Waterman & Co. pens.

$4, $3, $2, Laughlin Fountain Pens in Gold, Silver, Aluminum, all go at.. $1.00



2861 **Waterman's Fountain Pens, $1.50**

The celebrated Waterman's Fountain Pen.— with 14-karat solid gold point— Special for this Christmas Sale at.... $1.50

Others $2.50, $5.00 and $10.00.

Plaintiff's Exhibit 140.

2862 **Waterman "Modern,,**

Fountain-Pen della Mondiale **A. A. WATERMAN Co.** di New-York.
LA MIGLIOR PENNA A SERBATOIO **MODERNA** RIEMPIMENTO AUTOMATICO, GARANTITA.
Trovasi nelle migliori Librerie-Cartolerie. Chiedere Cataloghi gratis.
Agente Generale per l'Italia e tutt'Europa: Ditta G. CABRINI - VERONA

Plaintiff's Exhibit 141. 2863

Special This Week

—AT—

LAZARUS JEWELRY STORE

513 Cherry Street

Reorganization Sale 2864

Waterman Fountain Pen

Former Price $2.50

NOW ONLY $1.25 2865

Pen is Solid Gold and Fully Guaranteed

2866 **Plaintiff's Exhibit 6.**

(Post Mark) Ottumwa, Iowa, 1910.

(From)
W. L. Sargent,
Ottumwa, Iowa.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

2867 (Post Mark) Brooklyn, N. Y., 1910.

The Waterman Pen Co.,
Broadway & Cortlandt St.,
New York City.

(Post Mark) Yonkers, N. Y., 1907.

(From)
Shrive,
Yonkers, N. Y.

Waterman Pen Co.,
2868 173 Broadway,
New York City.

(Post Mark) New York, N. Y., 1910.

(From)
161 West 61st St.,
New York.

The Waterman's Pen Co.,
173 Broadway,
N. Y. C.

Plaintiff's Exhibit 6 2869

(Post Mark) El Dorado, Kansas, 1910.

(From)
J. W. Kirkpatrick,
El Dorado, Kansas.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) New York, N. Y., 1910. 2870

Waterman Pen Co.,
173 Broadway,
New York.

(Post Mark) Troy, N. Y., 1910.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

2871

(Post Mark) New York, N. Y., 1910.

Waterman Pen Co.,
173 B'way.,
Manhattan, N. Y.

2872 *Plaintiff's Exhibit 6*

(Post Mark) Manchester, Va., 1910.

(From)
Washington & Earle,
Manchester, Va.

Waterman Pen Co.,
173 Broadway,
New York City.

2873 (Post Mark) Baltimore, Md., 1907.

Waterman Pen Co.,
173 Broadway,
New York.

(Post Mark) New York, N. Y., 1907.

Waterman Pen Co.,
173 Broadway,
City.

2874

(Post Mark) Worcester, Mass., 1908.

(From)
Wm. Pathie,
Worcester, Mass.

Waterman Pen Co.,
155-157 Broadway,
New York, N. Y.

Plaintiff's Exhibit 6

2875

(Post Mark) Richmond, Va., 1907.

(From)
M. Cohen Son & Co.,
Richmond, Va.

The Waterman Pen Co.,
173 Broadway,
New York.

(Post Mark) New Orleans, La., 1907.

2876

(From)
Hart Loan & Pledge Co., Ltd.,
New Orleans, La.

Waterman Pen Co.,
Broadway & Courtlandt St.,
New York City.

(Post Mark) New York, N. Y., 1907.

(From)
Peoples Surety Company,
78 William Street,
New York, N. Y.

2877

Waterman Pen Co.,
175 Broadway,
N. Y. City.

2878 *Plaintiff's Exhibit 6*

(Post Mark) Toledo, Ohio, 1907.

(From)
J. J. Freeman & Co.,
307 Summit St.,
Toledo, Ohio.

Waterman Pen Co.,
175 Broadway,
New York, N. Y.

2879

(Post Mark) Tiffin, Ohio, 1907.

(From)
Tiffin, Ohio,
M. K. Shelly.

Waterman Pen Company,
173 Broadway,
New York City.

(Post Mark) New York, N. Y., 1907.

2880 (From)
Geo. J. Worth,
396-398 Broadway,
New York.

Waterman Pen Co.,
B'way & Courtlandt,
City.

Plaintiff's Exhibit 6

2881

(Post Mark) Urbana, Ill., 1907.

(From)
Wm. Sim Drug Co.,
Urbana, Ill.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) New York, N. Y., 1907.

2882

(From)
Department of Public Charities,
Commissioners Office,
Foot of East 26th Street,
New York.

Waterman Pen Co.,
Broadway & Cortlandt St.,
City.

(Post Mark) Pella, Iowa, 1907.

2883

(From)
L. Van Houten,
Pella, Ia.

Waterman Pen Co.,
173 Broadway,
New York City, N. Y.

2884 *Plaintiff's Exhibit 6*

(Post Mark) Carthage, N. Y., 1908.

(From)
Hall & Lobdell,
Carthage, N. Y.

Waterman Pen Co.,
New York,
Corner Broadway & Cortland Sts.

2885 (Post Mark) Roanoke, Va., 1908.

(From)
Hotel Roanoke,
Roanoke, Virginia,
Fred E. Foster.

Waterman Pen Co.,
173 Broadway,
N. Y.

(Post Mark) Joplin, Mo., 1907.

2886 (From)
Ball & Putman,
Joplin, Missouri.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

Plaintiff's Exhibit 6

2887

(Post Mark) Portland, Ore., 1907.

(From)
Woodard, Clarke & Co.,
Portland, Ore.

The Waterman Pen Co.,
173 Broadway,
New York City, N. Y.

(Post Mark) Denver, Colo., 1907.

2888

(From)
The Denver Dry Goods Co.,
Denver, Colo.

The Waterman Pen Co.,
173 Broadway,
New York City.

(Post Mark) Stratford, Conn., 1908.

(From)
E. N. Packard,
Congregational Church,
Stratford, Conn.

2889

Waterman Pen Co.,
173 Broadway,
N. Y.

2890 *Plaintiff's Exhibit 6*

(Post Mark) Denver, Colo., 1907.

(From)
The Denver Dry Goods Co.,
Denver, Colo.

Waterman Pen Co.,
173 Broadway,
New York City.

(Post Mark) Canon City, Colo., 1907.

2891

(From)
G. A. Beghtol & Co.,
Canon City, Colo.

Waterman Pen Co.,
New York City,
New York.
173 Broadway.

(Post Mark) Okla., 1907.

(From)
2892 Manly Office Supply Co.,
Oklahoma City, Okla.

Waterman Pen Co.,
173 Broadway,
New York City.

Plaintiff's Exhibit 6

2893

(Post Mark) Portageville, Mo., 1907.

(From)
C. L. Patterson,
Poplar Bluff, Mo.

The Waterman Pen Co.,
173 Broadway,
New York City, N. Y.

(Post Mark) Fulton, Mississippi, 1907.

2894

(From)
The Hotchkiss-Parsons
Jewelry Company,
Water Valley, Mississippi.

Mess. Waterman Pen Co.,
173 Bway.,
New York, N. Y.

(Post Mark) Washington. D. C., 1910.

(From)
Department of Commerce and Labor,
Bureau of the Census,
Washington.

2895

The Waterman Pen Co.,
173 B'way,
New York, N. Y.

2896 *Plaintiff's Exhibit 6*

(Post Mark) Portland, Ore., 1907.

(From)
Woodard, Clarke & Co.,
Portland, Ore.

Waterman Pen Co.,
173 Broadway,
New York City, N. Y.

(Post Mark) Hoboken, N. J., 1910.

2897

Waterman Pen Co.,
Broadway & John St.,
New York, N. Y.

(Post Mark) Atlantic City, N. J., 1910.

(From)
Apollo,
1507-1/2 Boardwalk,
Atlantic City, N. J.

2898

The Waterman Pen Co.,
173 Broadway,
New York City, N. J.

(Post Mark) Delta, Colo., 1908.

Waterman Pen Co.,
173 Broadway,
New York.

Plaintiff's Exhibit 6

2899

(Post Mark) Saranac Lake, N. Y., 1910.

(From)
Saranac Lake, N. Y.,
in the Adirondacks.

Waterman Pen Co.,
173 Broadway,
New York City.

(Post Mark) Kankakee, Ill., 1907.

2900

(From)
The Kankakee Gazette,
Kankakee, Ill.

Waterman Pen Co.,
176 Broadway,
New York.

(Post Mark) Sumter, S. C., 1908.

(From)
L. L. Grand,
Sumter, S. C.

2901

The Waterman Pen Co.,
#173 Broadway,
New York City.

2902 *Plaintiff's Exhibit 6*

(Post Mark) Urbana, Ill., 1907.

(From)
Wm. Sim Drug Co.,
Urbana, Ill.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

(From)
J. E. Cuff,
2903 Danbury, Conn.

Waterman Pen Co.,
173 Broadway,
N. Y. City.

(Post Mark) Reading, Pa., 1910.

(From)
Eagle Book Store,
No. 542 Penn Street,
Reading, Pa.

2904 Waterman Pen Co.,
135 Broadway, N. Y.

(Post Mark) Wolcott, N. Y., 1907.

(From)
C. F. Van Valkenburg,
Wolcott, N. Y.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

Plaintiff's Exhibit 6

2905

(Post Mark) Provo, Utah, 1907.

(From)
The Brigham Young University,
Provo, Utah.

Waterman Pen Co.,
173 Broadway,
N. Y.

(Post Mark) Dayton, Tenn., 1907.

2906

(From)
Crawford & Robinson,
Dayton, Tennessee.

Waterman Pen Co.,
New York, N. Y.,
173 Broadway.

(Post Mark) Boston, Mass., 1907.

(From)
First Methodist Episcopal Church,
Chelsea, Mass.

2907

Waterman Pen Co.,
173 Broadway,
New York City.

2908 *Plaintiff's Exhibit 6*

(Post Mark) Walla Walla, Wash., 1907.

(From)
Geo. G. Hedger,
Walla Walla, Wash.

Waterman Pen Co.,
New York, N. Y.,
173 Broadway.

2909 (Post Mark) New York, N. Y., 1907.

(From)
The New York Edison Company,
55 Duane Street,
New York, N. Y.

The Waterman Pen Co.,
Broadway and Courtlandt St.,
New York City.

(Post Mark) Indianapolis, Ind., 1907.

2910 (From)
Sentinel Printing Co.,
Indianapolis.

Waterman Pen Co.,
173 Broadway, N. Y.

Plaintiff's Exhibit 6

2911

(Post Mark) Albany, N. Y., 1907.

(From)
Eliassof Bros. & Co.,
100 State St., Albany, N. Y.

Waterman Pen Co.,
157 Broadway,
New York.

(Post Mark) Minneapolis, Minn., 1907.

2912

(From)
Minneapolis Dry Goods Co.,
Minneapolis, Minn.

The Waterman Pen Co.,
155-157 Broadway,
New York, N. Y.

(Post Mark) New York, N. Y., 1907.

(From)
B. Illfelder & Co.,
97 & 99 Bleecker Street,
New York.

2913

Mess. Waterman Pen Co.,
173 Broadway Cor. Cortlandt St.,
New York City.

2914 *Plaintiff's Exhibit 6*

(Post Mark) Athens, Pa., 1907.

(From)
J. H. Dimon,
414 Main St.,
Athens, Pa.

Mess. Waterman Pen Company,
Broadway,
New York, N. Y.

2915 (Post Mark) Yonkers, N. Y., 1907.

Waterman Pen Co.,
B'way & Cortlandt St.,
N. Y. City.

(Post Mark) New York, N. Y., 1907.

(From)
Henry Phillips,
157 Bowery.

Waterman Pen Co.,
173 Broadway,
2916 City.

(Post Mark) New York, N. Y., 1907.

(From)
Barnard College,
Columbia University,
New York.

Waterman Pen Co.,
173 Broadway,
New York City.

Plaintiff's Exhibit 6

2917

(Post Mark) CHI. CED. RAP. & Co.
B. R. P. O. S. R.

(From)
W. F. Hackett,
Rochelle, Ill.

Waterman Pen Co.,
173 Broadway,
New York City.

(Post Mark) Benton, Ill., 1910. 2918

(From)
Benton City Schools,
Roy Wilkins, Superintendent,
Benton, Illinois.

The Waterman Pen Co.,
New York City.

(Post Mark) Albany, N. Y., 1910.

(From)
E. D. L., 2919
State of New York,
Executive Chamber,
Albany.

Waterman Pen Company,
Broadway,
New York City.

2920 *Plaintiff's Exhibit 6*

(Post Mark) Watertown, N. Y., 1910.

(From)
John Sterling,
100 Washington Street,
Watertown, N. Y.

The Waterman Pen Co.,
173 Broadway,
New York.

2921 (Post Mark) Middletown, Conn., 1910.

(From)
The Wesleyan Argus,
Middletown, Conn.

Waterman Co.,
Cortland cor. Broadway,
New York City, N. Y.

(Post Mark) Phoenix, Arizona, 1907.

2922 (From)
The Berry Hill Co.,
Phoenix, Arizona.

Waterman Pen Co.,
#173 Broadway,
N. Y.

Plaintiff's Exhibit 6

(Post Mark) Wampum, Penn'a, 1910.

(From)
D. C. Williams,
Wampum, Penn'a.

The Waterman Pen Co.,
#173 Broadway,
New York City.

(Post Mark) Toledo, Ohio, 1910.

2924

(From)
The Landman and Blevins Co.,
Toledo, Ohio.

Waterman Pen Company,
New York City, N. Y.

(Post Mark) Boston, Mass., 1910.

(From)
Hooper, Lewis & Co.,
107 Federal St., Boston.

Messrs. Waterman Pen Co.,
173 Broadway,
New York.

2925

(Post Mark) New London, Ct., 1907.

(From)
Perry & Stone,
New London, Ct.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

2926 *Plaintiff's Exhibit 6*

(Post Mark) Winchester, Tenn., 1910.

(From)
Norton's Jewelry Store,
Winchester, Tenn.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

2927 (Post Mark) New York, N. Y., 1910.

(From)
Charles L. Bowman & Co.,
225 Fifth Avenue,
New York.

Waterman Pen Company,
Broadway & Courtlandt Sts.,
City.

(Post Mark) New London, Ct., 1907.

2928 (From)
Perry & Stone,
New London, Ct.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

Plaintiff's Exhibit 6

2929

(From)
W. H. Spalter,
Keene, N. H.

Waterman Pen Co.,
#177 Broadway,
New York City.

(Post Mark) Middletown, P., 1910.

(From)
W. Luerneisen,
Middletown, Dauphin Co., Pa.

2930

Waterman Pen Co.,
#173 Broadway,
New York City.

(Post Mark) New York, N. Y., 1910.

(From)
Julius Blumberg,
262 Grand St.,
New York.

Waterman Pen Co.,
173 Broadway,
City.

2931

(Post Mark) Albany, N. Y., 1907.

(From)
W. M. Whitney & Co.,
Albany, N. Y.

Waterman Pen Co.,
175 Broadway,
New York.

2932 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1907.

(From)
Wabash Cabinet Co.,
296 Broadway,
New York.

Waterman Pen Co.,
Broadway & Cortlandt Sts.,
City.

2933

(Post Mark) Danbury, Conn., 1910.

(From)
James E. Cuff,
241 Main Street,
Danbury, Conn.

Waterman Pen Co.,
173 Broadway,
N. Y. City.

(Post Mark) Hawthorne, N. Y., 1910.

2934

Waterman Pen Co.,
Broadway & Courtlandt,
New York City.

(Post Mark) Houghton, Mich.

Waterman Pen Co.,
#173 Broadway,
New York, N. Y.

Plaintiff's Exhibit 6

2935

(Post Mark) New York, N. Y., 1910.

Waterman Pen Co.,
Broadway and Cortlandt St.,
City.

———

(Post Mark) New York, N. Y., 1910.

(From)
Corlies, Macy & Co.,
447 Pearl Street,
New York.

2936

Waterman's Pen Co.,
Broadway & Cortlandt St.,
City.
Wholesale Department.

———

(Post Mark) Saranac Lake, N. Y., 1910.

Waterman Pen Co.,
B'way & Cortland St.,
N. Y. City, N. Y.

2937

———

(Post Mark) Boston, Mass., 1907.

Waterman Pens,
170 Broadway,
New York.

2938 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1907.

(From)
American Printers Agency,
62 Liberty Street,
New York.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

2939 (Post Mark) Loveland, Colo., 1907.

(From)
A. L. Ragatz,
Pastor Methodist-Episcopal Church,
518 Lincoln Ave.,
Loveland, Colorado.

The Waterman Pen Co.,
173 Broadway,
New York, N. Y.

2940 (Post Mark) Knoxville, Tenn., 1910

(From)
Sharp's Drug Store,
Knoxville, Tenn.

Waterman Pen Co.,
Broadway,
N. Y.

Plaintiff's Exhibit 6

2941

(Post Mark) Essex, Conn., 1907.

(From)
Box 350,
Essex, Conn.

Mess. Waterman Fountain Pen Co.,
173 Broadway,
New York City.

(Post Mark) New York, N. Y., 1910.

2942

(From)
John Burkhardt Printing Co.,
108 Fulton St.,
New York City.

Waterman Pen Co.,
Cortlandt St. & B'way,
N. Y. City.

(Post Mark) New Orleans, La., 1907.

(From)
Hart Loan & Pledge Co., Ltd.,
New Orleans, La.,
204 Baronne St.

2943

Waterman Pen Co.,
Broadway & Cortlandt Sts.,
New York City.

2944 *Plaintiff's Exhibit 6*

(Post Mark) Lake Hopatcong, N. J., 1907.

(From)
H. O. Anderson,
"The Rocks,"
Nolan's Point.

The Waterman Pen Co.,
Broadway & Courtlandt St.,
New York City.

2945

(Post Mark) New York, N. Y., 1910.

(From)
John M. Murray,
488 6th Avenue, New York.

The Waterman Pen Co.,
N. West Corner of Cortlandt St.,
B'way,
City.

(Post Mark) Easton, Pa., 1907.

2946

(From)
Easton Cordage Company,
Easton, Pa.

The Waterman Pen Co.,
Cortlandt & Broadway,
New York City.

Plaintiff's Exhibit 6

2947

(Post Mark) New Orleans, La., 1907.

(From)
Harts,
204 Baronne St.,
New Orleans, La.

Waterman Pen Co.,
Broadway & Cortlandt Sts.,
New York City.

2948

(Post Mark) New York, N. Y., 1907.

(From)
Murray Hill Hotel,
New York, N. Y.

Waterman Pen Co.,
171 B'way,
N. Y.

(Post Mark) Cleveland, O., 1910.

2949

(From)
Percy Warner.

Waterman Pen Co.,
Broadway,
New York.

2950 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1907.

(From)
A. S. Barnes & Company,
11-15 East 24th Street,
New York.

The Waterman Pen Company,
173 Broadway,
New York City.

2951

(Post Mark) Philadelphia, Pa., 1907.

(From)
A. Pomerantz & Co.,
Phila.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) Charlottsville, Va., 1907.

2952 (From)
University Station,
Charlottesville, Va.

Waterman Pen Co.,
173 Broadway,
New York City.

Plaintiff's Exhibit 6

2953

(Post Mark) New Brunswick, N. J., 1907.

(From)
W. R. Reed,
New Brunswick, N. J.

Waterman Pen Co.,
173 Broadway,
New York City.

(Post Mark) New York, N. Y., 1907.

2954

(From)
American Specialty Co.,
Fifth Avenue Hotel,
New York.

Waterman Pen Co.,
173 Broadway,
City.

(Post Mark) Stamford, N. Y., 1907.

(From)
A. M. Warner,
Stamford, N. Y.

2955

Waterman Pen Co.,
173 Broadway,
New York City.

2956 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1910.

(From)
Brooklyn Council 165.

Waterman Pen Co.,
171 B'way,
New York.

(Post Mark) Wilmington, Del., 1907.

2957 (From)
E. S. R. Butler & Son,
Wilmington, Del.

Waterman Pen Co.,
173 Broadway,
New York City.

(Post Mark) New York, N. Y., 1907.

(From)
Raphael Tuck & Sons Company,
2958 Nos. 122-124 Fifth Avenue,
New York.

The Waterman Pen Co.,
173 B'way,
City.

Plaintiff's Exhibit 6 2959

(Post Mark) Newark, N. J., 1907.

(From)
Joseph Fass,
427 Broad St.,
Newark, N. J.

Waterman Pen Co.,
173 Broadway,
New York City.

(Post Mark) Syracuse, N. Y., 1907. 2960

(From)
Sloan Brothers,
209 East Jefferson Street,
Syracuse, N. Y.

The Waterman Pen Co.,
173 Broadway,
N. Y. City.

(Post Mark) New York, N. Y., 1910.

2961

(From)
Charles L. Bowman & Co.,
225 Fifth Avenue,
New York.

Waterman Pen Company,
Broadway and Cortlandt St.,
City.

2962 *Plaintiff's Exhibit 6*

(Post Mark) Petersburg, Va., 1910.

(From)
T. S. Beckwith & Co.,
Petersburg, Virginia.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

2963 (Post Mark) Baltimore, Md., 1910.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) Columbus, Ohio, 1910.

Waterman Pen Co.,
Broadway,
New York City.

2964

(Post Mark) Plattsmouth, Nebr., 1910.

(From)
B. A. McElwain,
Plattsmouth, Neb.

Waterman Pen Co.,
New York, N. Y.
#173 Broadway,

Plaintiff's Exhibit 6

2965

(Post Mark) Danbury, Conn., 1910.

(From)
The F. L. Wilson Co.,
Danbury Conn.

Waterman Pen Co.,
173 Broadway,
New York.

(Post Mark) Highland Falls, N. Y., 1910.

2966

(From)
Highland Falls, N. Y.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) Salem, Mass., 1910.

(From)
C. M. Duren & Co.,
No. 97 Washington Street,
Salem, Mass.

2967

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

2968 *Plaintiff's Exhibit 6*

(Post Mark) Zanesville, Ohio, 1910.

(From)
Edmiston Book & Stationery Co.,
Zanesville, Ohio.

Waterman Pen Company,
173 Broadway,
New York, N. Y.

2969 (Post Mark) New York, N. Y., 1910.

(From)
George F. Hills Co.,
108-110-112 Cliff Street,
New York.

Waterman Pen Co.,
#173 Broadway.
City.

(Post Mark) New York, N. Y., 1910.

2970 (From)
Riker's Drug Stores,
Brooklyn, N. Y.

Waterman Pen Co.,
171 B'way,
City.

Plaintiff's Exhibit 6

2971

(Post Mark) Albany, N. Y., 1910.

(From)
E. P. Miller,
Division St. near So. Pearl,
Albany, N. Y.

Waterman Pen Co.,
173 Broadway,
New York.

2972

(Post Mark) Liberty, N. Y., 1910.

(From)
Wm. Fahrenholz,
Liberty, N. Y.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) Jersey City, N. J., 1910.

2973

(From)
Kiernan-Hughes Company,
Ninth and Brunswick Streets,
Jersey City.

The Waterman Pen Co.,
173 Broadway,
New York City, N. Y.

2974 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1910.

(From)
Charles L. Bowman & Co.,
225 Fifth Avenue,
New York.

Waterman Pen Co.,
173 Broadway,
City.

2975

(Post Mark) Bridgeport, Conn., 1910.

(From)
M. J. Buechler,
Bridgeport, Conn.

Waterman Pen Co.,
Broadway & Cortland St.,
New York.

(Post Mark) Columbus, Ohio, 1910.

2976 (From)
A. H. Smyth.

Waterman Pen Co.,
Broadway,
New York City.

Plaintiff's Exhibit 6

2977

(Post Mark) Oklahoma, Okla., 1910.

(From)
Manly Office Supply Co.,
Oklahoma City, Okla.

Waterman Pen Company,
173 Broadway,
New York City, N. Y.

———

(Post Mark) Willimantic, Conn., 1910.

2978

(From)
C. R. Utley,
Willimantic, Conn.

Waterman Pen Co.,
177 Broadway,
New York.

———

(Post Mark) Brookline, Mass., 1910.

(From)
T. Fred Lee.

Waterman Pen Co.,
Broadway & Cortlandt St.,
New York City.

2979

———

(Post Mark) Buffalo, N. Y., 1910.

(From)
F. C. Humbert,

Waterman Pen Co.,
Bway. & Cortland St.,
N. Y. City.

2980 *Plaintiff's Exhibit 6*

(Post Mark) Ogdensburg, N. Y., 1910.

(From)
D. A. Kiah, Jr.,
6 Hamilton St.,
Ogdensburg, N. Y.

Waterman Pen Co.,
New York, N. Y.,
173 Broadway.

2981

(Post Mark) Pittsburg, Pa., 1910.

(From)
The Myers & Shinkle Co.,
711 Liberty Street,
Pittsburgh, Pa.

Waterman Pen Company,
Broadway,
New York City.

(Post Mark) Willimantic, Conn., 1910.

2982

(From)
C. R. Utley,
Lock Box 146,
Willimantic, Conn.

Waterman Pen Co.,
173 Broadway,
New York.

Plaintiff's Exhibit 6

2983

(Post Mark) New Orleans, La., 1910.

(From)
Perry & Buckley Company,
628-630 Poydras Street,
New Orleans.

Waterman Pen Co.,
173 Broadway,
New York.

(Post Mark) De Queen, Ark., 1910. 2984

(From)
Model Drug Co.,
De Queen, Ark.

Waterman Pen Co.,
New York, N. Y.,
173 Broadway.

(Post Mark) Calumet, Mich., 1910.

(From) 2985
Wilho Leihas & Co.,
Calumet, Mich.

Waterman's Fountain Pen Co.,
173 Broadway,
New York, N. Y.

2986 *Plaintiff's Exhibit 6*

(Post Mark) University, N. Dak., 1910.

(From)
The Quarterly Journal,
University, N. Dak.

The Waterman Pen Company,
173 Broadway,
New York City.

2987 (Post Mark) New Orleans, La., 1910.

(From)
Perry & Buckley Company,
628-630 Poydras Street,
New Orleans.

Waterman Pen Co.,
173 Broadway,
New York City.

(Post Mark) Plymouth, Mass., 1910.

2988 (From)
A. S. Burbank,
Plymouth, Mass.

The Waterman Pen Co.,
173 Broadway, N. Y.

(Post Mark) New York, N. Y., 1910.

Waterman's Fountain Pen Co.,
Broadway & Cortland St.,
N. Y. City.

Plaintiff's Exhibit 6

2989

(Post Mark) Prentiss, Miss., 1910.

(From)
Rev. F. H. Funderbunk, B. D., Ph. D.,
Baptist Pastor,
Prentiss, Miss.

Waterman's Fountain Pen Co.,
173 Broadway,
New York City, N. Y.

2990

(Post Mark) Buffalo, N. Y., 1910.

(From)
Cahoon-Lyon Drug Co.,
319 Main Street,
Buffalo, N. Y.

Waterman's Fountain Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) Denver, Colo., 1910.

2991

(From)
302 National Safety Vault Building,
Denver, Colo.

Waterman Fountain Pen Co.,
New York, N. Y.,
173 Bdway.

2992 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1910.

(From)
United States Express Company,
23d Street, New York.

Waterman Fountain Pen Co.,
173 B'way,
N. Y. City.

(Post Mark) New York, N. Y., 1910.

2993

Waterman Fountain Pen Co.,
Cortlandt & Bway.,
N. Y. C.

(Post Mark) New York, N. Y., 1910.

(From)
H. F. Drewes,
860 East 156th Street,
Bronx.

Waterman Fountain Pen Co.,
2994 173 Broadway,
City.

(Post Mark) Sault Sainte Marie, Mich., 1907.

(From)
J. P. Haller,
310 & 312 Ashmun Street,
Sault Ste. Marie, Mich.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

Plaintiff's Exhibit 6

2995

(Post Mark) Kansas City, Mo., 1907.

(From)
Frank E. Lott,
120 W. 8th St.,
Kansas City, Mo.

Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

2996

(Post Mark) Hartford, Conn., 1907.

(From)
P. O. Box 247,
Hartford, Conn.

Waterman Fountain Pen Co.,
Advertising Manager,
173 Broadway,
New York City.

(Post Mark) Pittsburgh, Pa., 1907.

2997

(From)
Baird Machinery Company,
Pittsburg, Pa.

Waterman's Fountain Pen Company,
New York City, N. Y.,
173 Broadway,

2998 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1907.

(From)
St. Christopher's Home,
New York.

Waterman Fountain Pen Co.,
173 Broadway,
N. Y. City.

(Post Mark) Dunellen, N. J., 1907.

2999 (From)
Ransome Concrete Machinery Co.,
Dunellen, N. J.

Waterman Fountain Pen Co.,
Cortlandt St. & Bway.,
New York City.

(Post Mark) New York, N. Y., 1908.

(From)
Underwood Typewriter Company,
3000 241 Broadway,
New York.

Waterman Fountain Pen Co.,
B'way & Cortlandt St.,
New York City.

(Post Mark) New Market, Va., 1910.

The Waterman's Fountain Pen Co.,
Broadway & Cortlandt St.,
New York City, New York.

Plaintiff's Exhibit 6

3001

(Post Mark) Louisville, Ky., 1910.

(From)
Kentucky Distilleries & Warehouse Co.,
Louisville, Ky.

Waterman's Fountain Pen Co.,
Broadway and Courtland St.,
New York, N. Y.

(Post Mark) Muskegon, Mich., 1908.

(From)
The Shaw-Walker Co.,
Muskegon, Michigan.

3002

Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) Ellicottville, N. Y., 1910.

(From)
M. Bartholonew,
Ellicottville, N. Y.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

3003

(Post Mark) Great Barrington, Mass., 1910.

(From)
I. R. Prindle,
Great Barrington, Mass.

Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

3004 *Plaintiff's Exhibit 6*

(Post Mark) Erie, Pa., 1910.

(From)
Boston Store,
Erie Dry Goods Co.,
Erie, Pa.

Waterman's Fountain Pen Co.,
173 Broadway,
New York, N. Y.

3005

(Post Mark) Morrisville, N. Y., 1910.

(From)
Madison County Leader,
Morrisville, New York.

Waterman Fountain Pen Company,
173 Broadway,
New York, N. Y.

(Post Mark) Tupper Lake, N. Y., 1910.

3006

Waterman's Fountain Pen Co.,
New York City.
#171 Broadway.

Plaintiff's Exhibit 6

3007

(Post Mark) Fayetteville, Ark., 1910.

(From)
J. B. Martin,
District Deputy, M. W. A.,
Fayetteville, Ark.

Waterman Fountain Pen Co.,
173 Broadway,
N. York City, N. Y.

3008

(Post Mark) Columbia, Mo., 1910.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

(Post Mark) Albion, N. Y., 1910.

(From)
Wm. E. Frank, Secy.,
Albion, N. Y.

Waterman Fountain Pen Co.,
New York.

3009

Broadway near Maiden Lane.

3010 *Plaintiff's Exhibit 6*

(Post Mark) Hastings, Nebr., 1910.

(From)
J. H. Riffe,
Hastings, Nebraska.

Waterman's Fountain Pen Co.,
173 Broadway,
New York, N. Y.

(From)
H. H. Carter & Co.,
3011 5 Ashburton Place, Boston.

Waterman Fountain Pen Co.,
School St.,
City.

(Post Mark) Cleveland, O., 1907.

(From)
The Bowler & Burdict Co.,
Cleveland, O.

3012 Waterman Fountain Pen Co.,
173 Broadway,
New York City.

(From)
G. K. Birge,
Davenport, Wash.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

Plaintiff's Exhibit 6

3013

(Post Mark) Detroit, Mich., 1907.

(From)
Wm. H. Warren,
Fort Street Congregational Church,
Detroit, Mich.

The Waterman Fountain Pen Co.,
157 Broadway,
New York City, N. Y.

(Post Mark) Brooklyn, N. Y., 1907. 3014

(From)
J. H. Holsten & Son,
Cor. Gravesend Ave. and Ave. I,
Brooklyn, N. Y.

Waterman's Fountain Pen Co.,
173 Broadway,
N. Y.

(Post Mark) New Haven, Conn., 1907.

3015

(From)
Edw. Malley,
P. O. Box, 442,
New Haven, Conn.

Waterman's Fountain Pens,
Broadway,
New York City.

3016 *Plaintiff's Exhibit 6*

(Post Mark) Morgantown, W. Va., 1907.

(From)
Acme Department Store,
Morgantown, W. Va.

Waterman Ftn. Pen Co.,
173 Broadway,
New York City.

(Post Mark) Philadelphia, Pa., 1907.

3017

(From)
C. A. Blessing,
Philadelphia, Pa.

Waterman Fountain Pen Co.,
Broadway,
New York, N. Y.

(Post Mark) Springfield, S. Dak.

(From)
Box 243.
3018 State Normal School,
Springfield, S. Dak.

Waterman's Fountain Pen Co.,
New York, N. Y.

(Post Mark) Easton, Pa., 1910.

Waterman Fountain Pen Co.,
Broadway & Cortland St.,
New York City.

Plaintiff's Exhibit 6 3019

(Post Mark) Syracuse, N. Y., 1910.

Waterman Fountain Pen Co.,
173 Broadway,
N. Y. City.

(Post Mark) Wilmot, S. Dak., 1910.

(From)
Wilmot Drug Company,
Wilmot, So. Dak.

3020

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

(Post Mark) Ottawa, Kans., 1910.

(From)
City Restaurant,
F. H. Bullock, Proprietor,
Ottawa, Kansas.

Waterman Fountain Pen Co.,
New York, N. Y.
173 Broadway.

3021

Waterman Fountain Pen Co.,
173 B'way,
New York City.

3022 *Plaintiff's Exhibit 6*

(Post Mark) Steubenville, Ohio, 1910.

(From)
F. E. Miller,
The Young Men's Christian Association,
Steubenville, Ohio.

Watermans Fountain Pen Co.,
173 Broadway,
New York, N. Y.

3023

(Post Mark) Mount Vernon, N. Y., 1910.

(From)
C. S.,
First National Bank of Mount Vernon,
Mount Vernon, N. Y.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3024

(Post Mark) Irvington, N. Y., 1910.

The Waterman F. Pen Co.,
173 Broadway,
N. Y. City.

(Post Mark) Newark, N. J., 1910.

Waterman Fountain Pen Co.,
Broadway Cor. Cortlandt St.,
New York City.

Plaintiff's Exhibit 6

(Post Mark) Lockport, N. Y., 1910.

(From)
Frank A. Crosby, M. D.,
Lockport, N. Y.

Waterman Fountain Pen Co.,
173 Broadway,
N. Y. City.

(Post Mark) Far Rockaway, N. Y., 1910.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

(Post Mark) Brooklyn, N. Y., 1907.

(From)
James Karins,
U. S. S. Hancock,
Navy Yard, N. Y.

The Waterman Fountain Pen Co.,
173 Broadway,
New York City.

(Post Mark) New Haven, Conn., 1907.

(From)
University Smoke Shops Co.,
New Haven, Conn.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3028 *Plaintiff's Exhibit 6*

(Post Mark) Houston, Texas, 1907.

(From)
Heaton & Polk,
Humble, Texas.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

3029 (Post Mark) Pittsburg, Pa., 1907.

(From)
John M. Roberts & Son Company,
441 Market Street,
Pittsburg, Pa.

Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) Washington, D. C., 1910.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3030

(Post Mark) Asbury Park, N. J., 1910.

(From)
Hotel St. George,
Asbury Park, N. J.

The Waterman Fountain Pen Co.,
Broadway,
New York City.

Plaintiff's Exhibit 6 3031

(Post Mark) Starkville, Miss., 1907.

(From)
J. J. Gill,
Starkville, Miss.

Waterman Ft. Pen Co.,
New York,
N. Y.
173 Broadway.

(Post Mark) Alliance, Nebr., 1907. 3032

(From)
Madge Harding,
Alliance, Neb.

Waterman Fountain Pen Co.,
Broadway,
New York,
N. Y.

(Post Mark) Brattleboro, Vt., 1910.

Waterman Fountain Pen Co.,
Broadway & Courtland St., 3033
New York,
N. Y.

(Post Mark) Philadelphia, Pa., 1907.

(From)
Geo. B. Evans.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

3034 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1907.

Waterman Fountain Pen Co.,
173 B'way.,
City.

(Post Mark) Lowell, Mass., 1907.

(From)
Millard F. Wood,
104 Merrimack Street,
3035 Lowell, Mass.

Waterman Fount. Pen Co.,
New York City,
N. Y.
#173 Broadway.

(Post Mark) Birmingham, Ala., 1907.

(From)
E. F. Huff,
Armour Packing Co.,
3036 Atlanta, Ga.

W. E. Waterman & Co.,
#173 Broadway,
New York,
N. Y.

Plaintiff's Exhibit 6

3037

(Post Mark) New York, N. Y., 1907.

(From)
Arkell & Douglass,
New York.

Waterman Fountain P. Co.,
173 Bway.,
City.

(Post Mark) New York, N. Y., 1907.

3038

(From)
Charity Organization Society,
1947 Broadway, Room 326,
New York, N. Y.

Mgr. Waterman's Fountain Pen Company,
173 Broadway,
City.

(Post Mark) Baltimore, Md., 1907.

(From)
W. L. Richards,
312 E. 22 St.,
Balto., Md.

3039

The Waterman Fountain Pen Co.,
173 Broadway,
New York City,
New York.

3040 *Plaintiff's Exhibit 6*

(Post Mark) Callicoon, N. Y., 1910.

(From)
Gustav Boehm,
Hoboken, N. J.

The Waterman Fountain Pen Co.,
Cor. Cortland St., and Broadway,
N. Y. City.

(No Post Mark.)

3041

(From)
The Multi-Typewriting Company,
170 Broadway,
New York.

Waterman Fountain Pen Co.,
173 Broadway,
City.

(Post Mark) New York, N. Y., 1907.

3042 (From)
Hotel Longacre,
H. R. Shares.
157-163 W. 47th St., Near Broadway,
New York.

Waterman Fountain Pen Co.,
173 Broadway,
New York,
N. Y.

Plaintiff's Exhibit 6 3043

(Post Mark) Omaha, Neb., 1907.

(From)
The Young Men's Christian Association,
Omaha, Nebraska.

Waterman Fountain Pen Co.,
173 Broadway,
New York,
N. Y.

3044

(Post Mark) Chicago, Ill., 1907.

(From)
The Little Chronicle Company,
Chicago.

Waterman Fountain Pen Co.,
173 Broadway,
New York City, N. Y.

(Post Mark) Kewanee, Ill., 1907.

3045

(From)
Lyman-Lay Co.,
Kewanee, Ill.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3046 *Plaintiff's Exhibit 6*

(Post Mark) Philadelphia, Pa., 1907.

(From)
The Sunday School Board of the Reformed Church,
1308 Arch Street,
Philadelphia, Pa.

The Waterman Fountain Co.,
173 Broadway,
New York, N. Y.

3047

(Post Mark) Tolbert, W. Va., 1907.

(From)
W. P. Helmick,
Tolbert, W. Va.

The Waterman Fountain Pen Co.,
Cortlandt St. & Broadway,
New York City.

(Post Mark) New York, N. Y., 1908.

3048 (From)
John Hiscox,
271 Col. Ave.

Waterman Fountain Pen Co.,
173 B'way.,
N. Y. C.

Waterman Fountain Pen Co.,
173 Broadway.

Plaintiff's Exhibit 6

3049

(Post Mark) Brooklyn, N. Y., 1910.

(From)
Progress Pub. Co.,
Business Office,
1122 Jefferson Ave.,
Brooklyn, N. Y.

Waterman Fountain Pen Co.,
173 B'dway,
New York City.

3050

(Post Mark) Kalamazoo, Mich., 1907.

(From)
Ihling Bros. & Everard,
Kalamazoo, Mich.

Waterman Fountain Pen Co.,
New York City,
N. Y.

(Post Mark) Liberal, Kans., 1910.

3051

(From)
Dr. E. F. Pellette,
Liberal, Kans.

Waterman Fountain Pen Co.,
New York City.

3052 *Plaintiff's Exhibit 6*

(Post Mark) Scranton, Pa., 1910.

(From)
International Textbook Company,
Scranton, Pa., U. S. A.
Geo. A. Sylvester.

Waterman Fountain Pen Co.,
Cortlandt St. & Broadway,
N. Y.

3053

(Post Mark) Philadelphia, Pa., 1910.

The Waterman Fountain Pen Co.,
Broadway,
New York.

(Post Mark) New York, N. Y., 1910.

(From)
Peper Bros.,
417 DeKalb Ave.,
Brooklyn, N. Y.

3054

Waterman Fountain Pen Co.,
173 Broadway,
New York.

Plaintiff's Exhibit 6 3055

(Post Mark) Philadelphia, Pa., 1910.

(From)
J. B. Beans,
Philadelphia, Pa.

The Waterman Fountain Pen Co.,
Broadway & Cortland St.,
New York City.

(Post Mark) Washington, D. C.. 1910. 3056

(From)
Gifford Pinchot,
Washington, D. C.

Waterman Fountain Pen Co.,
Cortlandt St. and Broadway,
New York City.

(Post Mark) Detroit, Mich., 1910.

(From)

Albert Schaub, 3057
Cor. Gratiot & Brush St.,
Detroit, Mich.

Messrs Waterman Fountain Pen Co.,
Broadway,
New York,
N. Y.

3058 *Plaintiff's Exhibit 6*

(Post Mark) Spring'd, Mass., 1910.

(From)
Powers Paper Co.,
Springfield, Mass.

Waterman Fountain Pen Co.,
Cortlandt St. & Broadway,
New York City.

3059 (Post Mark) Asbury Park, N. J., 1910.

(From)
Hotel St. George,
204 Second Ave.,
Asbury Park, N. J.

S. E. L. Ballard, Prop.

The Waterman Fountain Pen,
Broadway,
New York.

3060 (Post Mark) South Wallingford, Vt., 1910.

(From)
H. L. Rogers,
South Wallingford, Vt.

Waterman Fountain Pen Co.,
New York, N. Y.

Plaintiff's Exhibit 6 3061

(Post Mark) Utica, N. Y., 1910.

(From)
The School of Railway Signalling,
Utica, N. Y.

The Waterman Fountain Pen Co.,
Broadway and Cortlandt Sts.,
New York, N. Y.

(Post Mark) Paterson, N. J., 1907. 3062

(From)
Bamford Bros.,
Silk Manufacturing Co.,
Main Office:
Paterson, N. J.

The Waterman Fountain Pen Co.,
#173 Broadway,
New York.

(Post Mark) Allentown, Pa., 190[illegible]. 3063

(From)
Fred. F. Kramer,
Pianos, Organs and Musical Goods,
544 Hamilton Street,
Allentown, Pa.

Waterman's Fountain Pen Co.,
#173 Broadway,
New York City.

3064 *Plaintiff's Exhibit 6*

(Post Mark) Englewood, N. J., 1910.

Waterman Fountain Pen Co.,
173 Broadway,
New York City,
N. Y.

(Post Mark) Brooklyn, N. Y., 1910.

(From)
Flatbush Trust Company,
3065 Brooklyn,
New York.

Waterman Fountain Pen Company,
173 Broadway,
New York City.

(Post Mark) Knoxville, Tenn., 1910.

(From)
Sharp's Drug Store,
Gay & Wall,
3066 Knoxville, Tenn.

Waterman Pen Co.,
Broadway,
New York.

Plaintiff's Exhibit 6

3067

(Post Mark) Schenectady, N. Y., 1907.

(From)
General Electric Co.,
Schenectady, N. Y.

Waterman Fountain Pen Co.,
Cor. Cortland St. & Broadway.
New York City.

(Post Mark) Brooklyn, N. Y., 1907.

3068

(From)
St. Timothy's Church,
Howard Ave., near Atlantic Ave.,
Brooklyn, N. Y.

Waterman Fountain Pen Co.,
Cortland & Bway.,
N. Y. City

(Post Mark) Tunnelton, W. Va., 1907.

3069

(From)
A. R. Nine,
Tunnelton, West Va.

Wattermans Fountain Pen Co.,
Broadway,
New York City.

3070 *Plaintiff's Exhibit 6*

(Post Mark) Buffalo, N. Y., 1910.

(From)
A. G. Raynor,
16 Woodlawn,
Buffalo, N. Y.

The Waterman Fountain Pen Co.,
173 Broadway,
New York City,
N. Y.

3071

(Post Mark) New York, N. Y., 1907.

(From)
Technical Literature,
220 Broadway,
New York.

Waterman Fountain Pen Company,
173 Broadway,
New York City.

3072 (Post Mark) Brooklyn, N. Y., 1907.

(From)
Miss A. E. Laverty,
532 Grand St., Brooklyn, N. Y.

The Waterman Fountain Pen,
Cortland Street & Broadway,
New York City.

Plaintiff's Exhibit 6 3073

(Post Mark) Grass Valley, Cal., 1907.

(From)
H. Richard Condy,
Grass Valley, California.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

(Post Mark) Kidders, N. Y., 1907. 3074

(From)
D. H. Day,
Kidders, N. Y.

Waterman Fountain Pen Co.,
Broadway & Cortlandt St.,
New York City.

(Post Mark) Syracuse, N. Y., 1907.

(From)
Sloan Brothers, 3075
209 East Jefferson Street,
Syracuse, N. Y.

The Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3076 *Plaintiff's Exhibit 6*

(Post Mark) Manasquan, N. J., 1910.

(From)
G. V. W. Burroughs,
Main Street,
Manasquan, N. J.

Waterman F. Pen Co.,
173 Broadway,
N. Y. City.

3077

(Post Mark) New York, N. Y., 1910.

(From)
Parsons Trading Company,
20 Vesey Street,
New York, N. Y.

The Waterman Fountain Pen Co.,
Broadway & Cortlandt Street,
New York, N. Y.

(Post Mark) Freeland, Pa., 1907.

3078 (From)
Armour & Co.,
Freeland, Pa.,

Waterman Fountain Pen Co.,
New York City.
Bway. & Cortlandt St.

Plaintiff's Exhibit 6 3079

(Post Mark) St. Louis, Mo., 1907.

(From)
The Student Life,
Washington University,
Saint Louis.

The Waterman Fountain Pen Co.,
Advertising Dept.,
173 Broadway,
N. Y. City.

3080

(Post Mark) Troy, N. Y., 1907.

(From)
Hewitt Bros.,
9 Mansion Block,
Troy, N. Y.

Waterman Fountain Pen Co.,
New York City, N. Y.,
173 Broadway.

(Post Mark) New York, N. Y., 1907. 3081

(From)
Wm. Kleeman & Co.,
New York.

Waterman Fountain Pen Co.,
Cortlandt & Broadway,
City.

3082 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1907.

(From)
A. Epstein,
2049 Third Ave.,
New York.

Waterman Fountain Pen Co.,
173 Broadway,
City.

3083

(Post Mark) Elizabeth, N. J., 1910.

(From)
Ernest G. Gommel,
Elizabeth, New Jersey.

Waterman Fountain Pen Co.,
Broadway & Cortlandt St.,
New York City.

(Post Mark) New York, N. Y., 1907.

3084 (From)
Kraus Bros. & Co.,
24 Broad Street,
New York, N. Y.

The Waterman Fountain Pen Co.,
173 Broadway,
N. Y. C.

Plaintiff's Exhibit 6

(Post Mark) York Village, Me., 1907.

(From)
Mrs. A. C. E. McIntire.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

3085

(Post Mark) Brooklyn, N. Y., 1907.

(From)
Metropolitan Iron Foundry,
Brooklyn, N. Y.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

3086

(Post Mark) Batavia, N. Y., 1907.

(From)
Frank S. Wood,
Batavia, N. Y.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

3087

(Post Mark) New York, N. Y., 1907.

(From)
G. K. Fischer,
100 Broadway, N. Y.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3088 *Plaintiff's Exhibit 6*

(Post Mark) Hackensack, N. J., 1910.

The Waterman Fountain Pen Co.,
New York City.
Broadway.

(Post Mark) Englewood, N. J., 1910.

Waterman Fountain Pen Co.,
Cortland Street & Br'dway,
N. Y.

3089

(Post Mark) Ithaca, N. Y., 1910.

Waterman Fountain Pen Co.,
173 Broadway,
N. Y. City.

(Post Mark) York Village, Me., 1910.

Waterman's Ideal Fountain Pen Co.,
3090 Broadway,
New York.

(Post Mark) Philadelphia, Pa., 1910.

(From)
Dr. J. Y. King,
200 Walnut Place,
Philada., Pa.

Waterman Fountain Pen Co.,
179 Broadway,
New York City.

Plaintiff's Exhibit 6

3091

(Post Mark) Washington, D. C., 1910.

(From)
Dr. Frank P. Vale,
Washington, D. C.

Waterman Pen Co.,
173 Broadway,
New York City.

(Post Mark) Cambridge City, Ind., 1910.

3092

(From)
Chas. J. Marson,
Cambridge City, Ind.

Waterman Pen Co.,
#173 Broadway,
New York, N. Y.

(Post Mark) Belding, Mich., 1910.

(From)
Box 452,
Belding, Mich.

3093

Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

3094 *Plaintiff's Exhibit 6*

(Post Mark) Pasadena, Cal., 1910.

(From)
Jarvis & Prinz,
49 East Colorado St.,
Pasadena, Cal.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3095 (Post Mark) Monmouth, Ill., 1910.

(From)
W. P. Schall,
Monmouth, Ill.

Waterman Fountain Pen Co.,
New York, N. Y.
173 Broadway.

(Post Mark) Newark, N. J., 1910.

3096 (From)
Monitor Carpet Cleaning Works,
546-548 Central Ave.,
Newark, N. J.

Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

Plaintiff's Exhibit 6 3097

(Post Mark) Perth Amboy, N. J., 1910.

(From)
S. Mahler,
352 State Street,
Perth Amboy, N. J.

Watermans Fountain Pen Co.,
Broadway & Cortlandt St.
New York, N. Y.

(Post Mark) N. Y., 1910. 3098

Waterman's Fountain Pen Co.,
173 Broadway,
New York City.

(Post Mark) Harlem, Mont., 1910.

(From)
E. Atkinson,
Harlem, Mont.

Waterman's Fountain Pen Co.,
New York, N. Y. 3099

(Post Mark) Port Discovery, Wash., 1910.

(From)
Al. Kronquist,
Pt. Discovery, Wash.

Waterman's Fountain Pen Co.,
New York, N. Y.

3100 *Plaintiff's Exhibit 6*

(Post Mark) Cal., 1910.
Waterman Fountain Pen Co.,
Broadway,
New York.

(Post Mark) Charlottesville, Va., 1910.

(From)
Hotel Gleason,
F. D. Cunningham, Proprietor,
3101 Charlottesville, Va.

Waterman Fountain Pen Co.,
#173 B'way,
New York City, N. Y.

(Post Mark) Washington, D. C., 1910.

(From)
R. B. Green,
24-O St. N. W.,
Wash., D. C.

3102 Waterman Pen Co.,
173 Broadway,
New York City,
N. Y.

Plaintiff's Exhibit 6 3103

(Post Mark) Tannersville, N. Y., 1910.

(From)
Chas. Voss,
Tannersville, N. Y.

Waterman's Fountain Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) New York, N. Y., 1910. 3104

Waterman Fountain Pen Co.,
Cortlandt St. & Broadway,
City.

(Post Mark) New Orleans, La., 1910.

Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

3105

(Post Mark) New York, N. Y., 1910.

(From)
Bruno Steinel,
429 W. 26th Street,
New York City.

Waterman Pen Co.,
173 Broadway,
N. Y. City.

3106 *Plaintiff's Exhibit 6*

(Post Mark) Woodstock, Md., 1910.

(From)
Woodstock College,
Woodstock, Md.

Waterman Fountain Pen Co.,
Broadway and Cortlandt,
New York City,
N. Y.

3107 (Post Mark) El Paso, Texas, 1910.

(From)
Ellis Bros. Printing Company,
El Paso, Texas.

Waterman's Fountain Pen Co.,
New York, N. Y.
173 Broadway.

(Post Mark) Glen Cove, N. Y., 1910.

3108 (From)
Theo. Jospe,
Glen Cove, L. I.

Waterman's Fountain Pen Co.,
173 Broadway,
New York City.

Plaintiff's Exhibit 6 3109

(Post Mark) Greystone Park, N. J., 1910.

(From)
Warden's Office,
Greystone Park, Morris Co., N. J.

The Waterman Fountain Pen Co.,
173 Broadway,
New York City.

(Post Mark) University, Val., 1910.

3110

(From)
University of Virginia Magazine,
Charlottesville, Va.

Waterman Fountain Pen Co.,
Broadway and Courtlandt St.,
New York City.

(Post Mark) Hillsboro, N. H., 1910.

(From)
C. F. Butler,
Hillsboro, N. H.

3111

Waterman Fountain Pen Co.,
173 Broadway,
New York.

(Post Mark) Zanesville, Ohio, 1910.

The Waterman Fountain Pen Co.,
173 Broadway,
New York City,
New York.

3112 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1910.

Waterman Fountain Pen Co.,
173 Broadway, City.

(Post Mark) Washington, D. C., 1910.

(From)
H. L. Rust,
1400 H Street N. W.,
Washington, D. C.

3113

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

(Post Mark) Jersey City, N. J., 1910.

(From)
West Hoboken Public Schools,
School No. 6,
Lake Street, Near West Street,
West Hoboken, N. J.

3114

Waterman Fountain Pen Co.,
Broadway near Courtland St.,
New York City.

(Post Mark) Washington, D. C., 1910.

(From)
1217 K St.,
Washington, D. C.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

Plaintiff's Exhibit 6 3115

(Post Mark) New York, N. Y., 1910.

Waterman Fountain Pen Co.,
173 Broadway,
N. Y. City.

(Post Mark) Wilmington, Del., 1910.
The Waterman Fountain Pen Co.,
173 Broadway,
New York.

3116

(Post Mark) Milwaukee, Wis., 1910.

(From)
Gimbel Brothers,
Milwaukee.

Waterman Fountain Pen Co.,
173 Broadway St.,
New York, N. Y.

3117

(Post Mark) Bloomington, Ill., 1910.

(From)
C. Porter,
Y. M. C. A. Bldg.,
The Wesleyana Staff,
Bloomington, Ill.

Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

3118 *Plaintiff's Exhibit 6*

(Post Mark) Gary, Ind., 1910.

(From)
W. L. Cole Drug Co.,
E. W. Bostwick, R. Ph.,
718 Broadway, Gary, Ind.

Waterman Ft. Pen Co.,
New York, N. Y.
173 Broadway.

3119 (Post Mark) Cheshire, Conn., 1910

(From)
Box 140,
Cheshire, Conn.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

(Post Mark) New York, N. Y., 1910.

3120 (From)
Joseph Rocker,
89 West Houston Street,
New York.

Waterman Fountain Pen Co.,
#173 Broadway,
City.

Plaintiff's Exhibit 6 3121

(Post Mark) Washington, D. C., 1910.

(From)
1217 K St.,
Washington, D. C.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

(Post Mark) Cimarron, N. M., 1910. 3122

(From)
Lail & Wilkins,
Cimarron, New Mexico.

Waterman Fountain Pen Co.,
New York City.

(Post Mark) Toledo, Ohio, 1910.

(From)
N. Hess,
Hotel Seror, Toledo, Ohio. 3123

Waterman Fountain Pen Co.,
Cor. Broadway and Cortland St.,
New York City.

(Post Mark) New York, N. Y., 1910.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3124 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1907.

(From)
Box 232,
1230 Amsterdam Ave., City.

Waterman Fountain Pen Co.,
Corner Broadway & Cortlandt,
New York City.

(Post Mark) Covington, Tenn., 1910.

(From)
3125 J. L. McNeely,
Covington, Tenn.

Waterman Ft. Pen Co.,
173 Broadway,
New York.

(Post Mark) Minneapolis, Minn., 1907.

(From)
Minneapolis Dry Goods Co.,
Minneapolis, Minn.

Waterman Fountain Pen Co.,
3126 173 Broadway,
New York, N. Y.

(Post Mark) Emington, Ill., 1907.

(From)
L. H. Wikoff P. M.,
Emington, Ill.

Waterman Fountain Pens,
Broadway,
New York,
N. Y.

Plaintiff's Exhibit 6 3127

(Post Mark) Culpeper, Va., 1907.

(From)
H. C. Burrows,
Culpeper, Va.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

(Post Mark) Pennington, N. J., 1907. 3128

(From)
A. Bermens,
Pennington Sem.,
Pennington, N. J.

Waterman Fountain Pen Co.,
Cortland St. & B'way,
New York City.

(Post Mark) Colorado Springs, Colo., 1910.

(From) 3129
The El Paso Lumber Co.,
Colorado Springs, Colo.

Watermans Fountain Pen Co.,
173 Broadway,
New York.

3130 *Plaintiff's Exhibit 6*

(Post Mark) Helena, Mont., 1910.

(From)
Union Bank And Trust Co.,
Helena, Mont.,
John W. Dawson.

Waterman Fountain Pen Co.,
Lower Broadway,
New York City.

3131

(Post Mark) Arecibo, P. R., 1910.

The Waterman Fountain Pen Co.,
173 Broadway,
New York,
City.
U. S. A.

(Post Mark) Brooklyn, N. Y., 1907.

(From)
James P. Mayne,
3132 371 Fulton Street,
Brooklyn, N. Y.

Waterman Fountain Pen Co.,
173 Broadway,
New York City,
N. Y.

Plaintiff's Exhibit 6 3133

(Post Mark) Minneapolis, Minn., 1910.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

(Post Mark) Tacoma, Wash., 1910.

(From)
The Stone-Fisher Co.,
Tacoma, Washington.

Waterman Fountain Pen Co., 3134
173 Broadway,
New York, N. Y.

(Post Mark) Tarrytown, N. Y., 1908.

(From)
Hackley School,
Tarrytown, N. Y.

Waterman Fountain Pen Co.,
Broadway,
New York. 3135

(Post Mark) Brooklyn, N. Y., 1910.

Waterman Fountain Pen Co.,
Courtland St.,
New York.

3136 *Plaintiff's Exhibit 6*

(Post Mark) Brooklyn, N. Y., 1907.

(From)
Krauledis & Krewat,
133 Middleton St.,
Brooklyn, N. Y.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3137 (Post Mark) Philadelphia, Pa., 1907.

(From)
Bridgeton Hotel,
Cor. South Laurel and Warren Streets,
Bridgeton, N. J.,
Mrs. C. H. Gosbin, Prop.

Waterman Fountain Pen Co.,
Broadway & Cortland St.,
New York.

3138 (Post Mark) Ashland, Ohio, 1910.

(From)
W. W. Cooper & Co.,
Ashland, Ohio.

Waterman Fountain Pen Co.,
New York, N. Y.,
173 Broadway.

Plaintiff's Exhibit 6 3139

(Post Mark) New York, N. Y., 1907.

(From)
M. Brodsky,
91 E. Broadway,
New York.

Waterman Fountain Pen Co.,
173 B'way.,
City.

(Post Mark) Bethel, Wis., 1907.

(From) 3140
W. H. Thurston,
Bethel, Wis.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

(From)
Karl Bergt,
52 Hudson St.,
Tel. 162 J., Dover, N. J.

(Post Mark) Dover, N. J., 1907.

Waterman Fountain Pen Co., 3141
173 Broadway,
New York City.

(Post Mark) Albany, N. Y., 1910.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3142 *Plaintiff's Exhibit 6*

(Post Mark) Cleveland, Ohio, 1910.

(From)
The Sigler Brothers Co.,
Garfield Bldg.,
Cleveland, Ohio.

Waterman Ft. Pen Co.,
173 Broadway,
New York.

(Post Mark) Baltimore, Md., 1910.

3143 (From)
J. C. M. Lucas Co.,
Baltimore, Md.

Waterman Fountain Pen Company,
#173 Broadway,
New York, N. Y.

(Post Mark) Peekskill, N. Y., 1907.

Waterman Fountain Pen Co.,
#173 Broadway,
New York.

3144

(Post Mark) New York, 1907.

(From)
National Surety Company,
115 Broadway,
New York, N. Y.

Waterman Fountain Pen,
173 Broadway,
New York, N. Y.

(Post Mark) S. C., 1910.

Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

Plaintiff's Exhibit 6 3145

(Post Mark) New York, N. Y., 1907.

(From)
The Commerce Caravel,
155 West 65th St.,
New York.

The Waterman Fountain Pen Co.,
173 Broadway,
City.

(Post Mark) Tampa, Fla., 1907. 3146

(From)
Tampa Stock Farm,
Aug. VanEepoel,
P. O. Box 133,
Tampa, Florida.

The Waterman Fountain Pen Co.,
175 Broadway,
New York City.

(Post Mark) Dunbar, Pa., 1910. 3147

(From)
David C. Eason,
Dunbar, Pa.

Waterman Fountain Pen Co.,
Broadway,
New York City.

3148 *Plaintiff's Exhibit 6*

(Post Mark) Reading, Pa., 1910.

(From)
O. M. Weand,
Reading, Pa.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

3149 (Post Mark) Knoxville, Atlanta, R. P. O., 1910.

Waterman Fountain Pen Co.,
Broadway,
New York City.

(Post Mark) Rosedale, La., 1910.

(From)
Rosedale, Iberville Parish, La.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3150

(Post Mark) Jersey City, N. J., 1910.

(From)
Memphis Special.

Waterman Fountain Pen Co.,
New York,
N. Y.

Plaintiff's Exhibit 6 3151

(Post Mark) Latta, S. C., 1910.

(From)
Atlanta Coast Line Railroad Company,
Latta, S. C., Station.

Messers. Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) Charleston, W. Va., 1910. 3152

(From)
W. S. May,
Charleston, W. Va.,
Box 754.

Waterman Fountain Pen Co.,
#173 Broadway,
New York City,
New York.

(Post Mark) Hackensack, N. J., 1910. 3153

(From)
John B. Zabriskie,
Lawyers' Building,
Hackensack, N. J.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3154 *Plaintiff's Exhibit 6*

(Post Mark) Albert Lea, Minn., 1907.

(From)
Henry J. Harm,
211 S. Broadway,
Albert Lea, Minn.

Waterman Fountain Pen Co.,
New York City,
#173 Broadway.

3155 (Post Mark) College View, Nebr., 1907.

(From)
College Book Store,
College View, Nebr.

Waterman Fountain P. Co.,
173 Broadway,
New York, N. Y.

(Post Mark) New York, N. Y., 1910.

3156 (From)
Tony Saponara,
321 West Broadway,
New York.

The Waterman Fountain Pen Co.,
Courtland St., Cor. Bway.,
City.

Plaintiff's Exhibit 6 3157

(Post Mark) St. Louis, Mo., 1910.

(From)
801 Cass Ave.,
St. Louis, Mo.

Waterman Fountain Pen Co.,
#173 Broadway,
New York.

(Post Mark) Raquette Lake, N. Y., 1907. 3158

(From)
A. Carrington,
C/o Rev. Brown Serman,
St. Huberts Isle.

Waterman Fountain Pen Co.,
Broadway,
New York.

(Post Mark) Butte, Mont., 1907.

(From) 3159
B. K. Walton.

Waterman Fountain Pen Co.,
New York City,
N. Y.,
Bd'w. & Maiden Lane.

3160 *Plaintiff's Exhibit 6*

(Post Mark) Worchester, Mass., 1908.

(From)
William Pathie,
Worchester, Mass.

Waterman Fountain Pen Co.,
Broadway,
New York,
N. Y.

3161 (Post Mark) Pittsburg, Pa., 1907.

(From)
W. W. Warrick,
6109 Penn Ave., Pittsburg, Pa.

Waterman Pen Co.,
Broadway,
New York, N. Y.

(Post Mark) Danielson, Conn., 1910.

3162 (From)
M. J. Schoonman,
Danielson, Conn.

Waterman Fountain Pen Co.,
173 Broadway,
N. York City.

Plaintiff's Exhibit 6 3163

(Post Mark) Wilmington, N. C., 1910.

(From)
B. C. Moore.

Waterman Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) New York, N. Y., 1910.

3164

(From)
Success Magazine,
Success Magazine Building,
29-31 East 22d Street,
New York.

Waterman Fountain Pen Company,
173 Broadway,
New York City.

(Post Mark) Bradford, Pa., 1910.

3165

(From)
A. M. Boardman,
Secretary Guard No. 14,
Bradford, Pa.

Waterman Fountain Pen,
173 Broadway,
New York.

3166 *Plaintiff's Exhibit 6*

(Post Mark) Jamica, N. Y., 1910.
Waterman Co.,
173 Broadway,
N. Y. City.

(Post Mark) New York, N. Y., 1910.

Waterman Fountain Pen,
173 B'way.,
Man.

3167 Manager.

(Post Mark) Waltham, Mass., 1907.

(From)
Waltham Mfg. Co.,
Waltham, Mass.

The Waterman Co.,
173 Broadway,
New York, N. Y.

3168

(Post Mark) Newark, N. J., 1907.

(From)
Miss M. A. Titus.

Waterman Co.,
173 Broadway,
N. Y. City.

Plaintiff's Exhibit 6 3169

(Post Mark) Tarrytown, N. Y., 1907.

(From)
M. Kate Smith,
Tarrytown, N. Y.,
116 Grove St.

The Waterman Co.,
173 Broadway,
N. Y.

3170

(Post Mark) New York, N. Y., 1907.

(From)
National Bank of Commerce in N. Y.,
New York, N. Y.

Waterman Co.,
173 B'way.,
New York City.

(Post Mark) Merrill, N. Y., 1910.

3171

(From)
Henry J. Conant,
22 Norman Road,
Upper Montclair, N. J.

Waterman Fountain Pen Co.,
Broadway & Cortlandt Street,
New York, N. Y.

3172 *Plaintiff's Exhibit 6*

(From)
M. Roth,
Met. Bldg.,
Orange, N. J.

Waterman & Co.,
173 Broadway,
New York City.

(Post Mark) Minneapolis, Minn., 1910.

3173 (From)
Henry Y. Cohen,
3410 So. 10 Ave.,
Minneapolis, Minn.

Waterman Fountain Pen Co.,
Broadway,
New York City.

(Post Mark) Brooklyn, N. Y., 1910.

(From)
3174 J. P. Duffy,
51st St. and Second Ave.,
Brooklyn.

Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

Plaintiff's Exhibit 6 3175

(Post Mark) Medfield, Mass., 1907.

(From)
Grace L. Diggen,
Clark's Camp,
Medfield, Mass.

The Waterman Fountain Pen Co.,
School Street,
Boston, Mass.

3176

(Post Mark) Allegheny, Pa., 1910.

(From)
Charles Fehrenbach,
Corner Ohio and Chestnut Streets,
Allegheny, Pa.
Pittsburg, Pa.

Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

3177

(Post Mark) Pennington, N. J., 1910.

(From)
W. J. Frye,
Pennington, N. J.

Waterman Fountain Pen Co.,
Broadway,
New York, N. Y.

3178 *Plaintiff's Exhibit 6*

(Post Mark) Spencer, Ind., 1910.

(From)
Sadler Bros.,
Spencer, Ind.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3179 (Post Mark) Jackson, La., 1910.

(From)

H. M. Todd,
843 Camp,
N. O., La.

Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) Denver, Colo., 1910.

3180 (From)
H. G. Mundhenk,
Majestic Building,
Denver, Colo.

The Waterman Fountain Pen Co.,
173 Broadway,
New York.

Plaintiff's Exhibit 6 3181

(Post Mark) New York, N. Y., 1910.

(From)
The Wuensch Paper Box Manufacturing Co.,
317 to 329 East 153d Street,
New York.

Waterman Fountain Pen Co.,
No. 173 B'dway,
N. Y. C.

(Post Mark) Hartford, Conn.. 1910. 3182

(From)
Wm. J. P. Jansen.

Waterman Fountain Pen Co.,
Broadway,
New York.

(Post Mark) Hudson Term. Sta., N. Y., 1910.

(From)
John H. Huxley, 3183
107 John Street,
New York.

Waterman Fountain Pen Co.,
B'way & Cortlandt St.,
City, N. Y.

3184 *Plaintiff's Exhibit 6*

(Post Mark) St. Paul, Minn., 1910.

(From)
Gertrude Williams,
St. Paul, Minnesota.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

3185 (Post Mark) Lebanon, Pa., 1910.

(From)
L. G. Harpel,
Lebanon, Pa.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

(Post Mark) Brooklyn, N. Y., 1910.

(From)
3186 Brooklyn Law School,
Eagle Building,
Brooklyn, N. Y.

Waterman Fountain Pen Co.,
173 Broadway,
New York City.

Plaintiff's Exhibit 6 3187

(Post Mark) Philadelphia, Pa., 1910.

(From)
R. L. Coates, Sec.,
S. W. Cor. Ninth & Chestnut Sts.,
Burd Bldg., Philadelphia.

The Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

3188

(Post Mark) Indianapolis, Ind., 1910.

(From)
G. & J. Tire Co.,
Indianapolis, Ind.,
P. O. Box 126,

Waterman Fountain Pen Company,
Cortland St. & Broadway,
New York, N. Y.

(Post Mark) Indianapolis, Ind., 1910.

3189

(From)
The Cliff Stationery Company,
Indianapolis, Ind.

Waterman Fountain Pen Co.,
New York City, N. Y.

3190 *Plaintiff's Exhibit 6*

(Post Mark) Ashland, Pa., 1910.

(From)
Leonard W. Wetterau,
Frackville, Penna.

The Waterman Fountain Pen Co.,
173 Broadway,
New York City, N. Y.

(Post Mark) New York, N. Y., 1907.

3191

(From)
New York Commercial,
8 Spruce Street, New York.

Waterman Fountain Pen Co.,
Broadway,
N. Y. City.

(Post Mark) Elizabeth, N. J., 1907.

(From)
245 Franklin St.,
3192 Elizabeth, N. J.

Waterman Fountain Pen Co.,
Broadway & Cortlandt St.,
New York City,
N. Y.

Plaintiff's Exhibit 6 3193

(Post Mark) Wilkesbarre, Pa., 1910.

(From)
Diamond City News Agency,
27 N. Franklin Street.

Waterman Fountain Pen Co.,
Cor. Broadway & Courtland Sts.,
New York,
N. Y.

3194

(Post Mark) Hughesville, Pa., 1910.

(From)
Brady Bartlow,
Hughesville, Pa.

Waterman Fountain Pen Co.,
New York,
N. Y.
170 Broadway.

(Post Mark) South Orange, N. J., 1907. 3195

(From)
A. A. Robinson,
Orange, N. J.

Waterman Ft. Pen Co.,
173 Broadway,
New York City.

3196 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1907.

(From)
M. Gropper & Sons,
123 Bowery, New York.

The Waterman Fountain Pen Co.,
173 Broadway,
N. Y. City.

(Post Mark) Booth Bay Harbor, Me., 1907.

3197

(From)
Edgar V. Moffat,
Southport, Me.

Waterman Fountain Pen Co.,
Broadway cor. Cortland St.,
New York, N. Y.

(Post Mark) Paris, Ill., 1910.

(From)
3198 Howard A. Archer,
Paris, Illinois.

Waterman Fountain Pen Company,
New York,
New York.
173 Broadway.

Plaintiff's Exhibit 6 3199

(Post Mark) Chicago, Ill., 1907.

(From)
The Little Chronicle
Pontiac Building, Chicago.

Waterman Fountain Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) New York, N. Y., 1910. 3200

(From)
Wm. B. Riker & Son Co.,
141st St. & Broadway,
New York.

Waterman Fountain Pen Co.,
173 Bdway,
N. Y. City.

(Post Mark) Macon, Ga., 1907.

(From) 3201
J. M. Walsh, s. j.,
Saint Stanislaus' College,
Macon, Ga.

Waterman Fountain Pen Co.,
#173 Broadway,
New York,
N. Y.

3202 *Plaintiff's Exhibit 6*

(Post Mark) Providence, R. I., 1910.

(From)
Livermore & Knight Co.,
Providence, R. I.

The Waterman Pen Co.
Broadway,
New York,
N. Y.

3203

(Post Mark) Sacramento, Cal., 1907.

(From)
Wm. C. Allen,
1308-8th,
Sacto', Cal.

Mess. Waterman Fountain Pen Co.,
173 Broadway,
New York,
N. Y.

3204

(Post Mark) Ukiah, Calif., 1907.

(From)
The Joseph Jewelry Company,
Ukiah, Calif.

Waterman Fountain Pen Co.,
173 Broadway,
New York,
N. Y.

Plaintiff's Exhibit 6

(Post Mark) Scranton, Pa., 1907. 3205

(From)
Technical Supply Company,
Scranton, Pennsylvania.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

(Post Mark) Ash. Abb. & Mil. W., R. P. O., 1907. 3206

(From)
S. H. Abisch,
Armour & Company,
Ashland, Wis.

Waterman Fountain Pen Co.,
New York City,
New York.
173 Broadway.

(Post Mark) Hartford, Conn., 1907. 3207

(From)
F. L. Palmer,
370 Asylum St.,
Hartford, Conn.

Waterman Fount. Pen Co.,
New York, N. Y.
173 Broadway.

3208 *Plaintiff's Exhibit 6*

(Post Mark) Philadelphia, Pa., 1910.

(From)
Albert J. Gannon,
1004 Chestnut Street,
Philadelphia.

Waterman Fountain Pen Co.,
157 Bway,
N. Y. City.

3209 (Post Mark) Philadelphia, Pa., 1908.

(From)
George H. Vanderbeck,
217 Walnut St., Philadelphia.

Waterman Fountain Pen Co.,
New York City,
#173 Broadway.

(Post Mark) Davenport, Wash., 1908.

3210 (From)
Davenport Jewelry Co.,
G. K. Birge, Manager,
Davenport, Washington.

Waterman Fountain Pen Co.,
173 Broadway,
New York.

Plaintiff's Exhibit 6 3211

(Post Mark) Boston, Mass., 1910.

(From)
Bates Torrey,
709 Barristers Hall,
Boston, Mass.

Waterman Fountain Pen Co.,
New York City,
N. Y.
"Waterman Ideal Pen."

3212

(Post Mark) New York, N. Y., 1907.

(From)
Parsons Brothers,
20 Vesey Street,
New York.

Waterman Fountain Pen Co.,
173 Broadway,
City.

(Post Mark) Fitchburg, Mass., 1907. 3213

(From)
German Co-Operative Grocery Co.,
106 Kimball St.,
Fitchburg, Mass.

Waterman Fountain Pen Co.,
#173 Broadway,
New York, N. Y.

3214 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1907.

(From)
Greater New York Bedding Co.,
103 Mott St.,
New York, N. Y.

The Waterman Co.,
173 Bway.

(Post Mark) Philadelphia, Pa., 1907.

3215

(From)
Geo. W. Eranich,
2742 Germantown Ave.,
Philadelphia.

Waterman Company,
173 Broadway,
New York, N. Y.

(Post Mark) New York, N. Y., 1907.

3216 (From)
W. E. Cramer,
Park Avenue, Cor. 73d Street,
New York.

Waterman Co.,
173 Broadway,
City.

Plaintiff's Exhibit 6 3217

(Post Mark) Tarrytown, N. Y., 1907.

(From)
Hackley School,
Tarrytown, N. Y.

Waterman Co.,
173 Broadway,
New York.

(Post Mark) Spokane, Wash., 1907. 3218

(From)
John W. Graham & Co.,
Spokane, Wash.

Waterman Co.,
173 Broadway,
New York City.

(Post Mark) New York, N. Y., 1910.

(From)
Sprague Electric Company, 3219
527 West 34th Street,
New York.

Waterman Co.,
173 B'way,
N. Y. City.

Waterman Co.,
173 Broadway,
New York City.

3220 *Plaintiff's Exhibit 6*

(Post Mark) Yonkers, N. Y., 1907.

Waterman Fountain Pen,
173 Broadway,
New York.

(Post Mark) Brooklyn, N. Y., 1907.

Waterman,
173 Broadway,
New York City.

3221

(Post Mark) New York, N. Y., 1910.

(From)
Parish House,
213 East 115th Street,
New York.

Waterman's,
173 Broadway,
N. Y. City.
Fountain Pen.

3222

(Post Mark) Ithaca, N. Y., 1910.

(From)
1911 Class Book,
Ithaca, N. Y.

Waterman's Fountain Pen,
173 Broadway,
New York City.

Plaintiff's Exhibit 6 3223

(Post Mark) New York, N. Y., 1910.

(From)
Thomas J. Dunn Co.
101 Chambers St., cor. Church St.,
New York.

Waterman Fountain Pen,
Cortlandt St. & W. B'way,
New York.

(Post Mark) Lake Kushaqua, N. Y., 1910. 3224

Waterman & Co.,
Broadway,
New York City.

(Post Mark) Des Moines & K City, R. P. O., 1910.

(From)
Brown Mercantile Co.,
Runnells, Iowa.

Waterman Co.,
173 Broadway, 3225
New York City.

(Post Mark) Youngsville, N. Y., 1910.

(From)
Edward Homer,
Youngsville, Sullivan Co., N. Y.

Waterman & Co.,
Cortlandt St. & Broadway,
New York, N. Y.

3226 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1910.

(From)
Mexico Tramways Co.,
25 Broad St.,
New York.

Waterman & Co.,
Cortland St. & Bway.,
City.

3227 (Post Mark) New York, N. Y., 1910.

Waterman Pens,
173 Broadway,
City.

(Post Mark) Manhassett, N. Y., 1908.

(From)
Mr. Mitchell,
Manhassett, N. Y.

Waterman's,
3228 173 Broadway,
N. Y.

(Post Mark) Baltimore, Md., 1910.

(From)
Kahn's Reliable Drug Store,
Baltimore.

Waterman Pen Co.,
Broadway,
New York, N. Y.

Plaintiff's Exhibit 6 3229

(Post Mark) Binghamton, N. Y., 1910.

The Waterman Co.,
173 Broadway,
N. Y.

(Post Mark) Grand Rapids, Mich., 1910.

(From)
B. S. Sevensma,
345 So. East Street,
Grand Rapids, Mich. 3230

Waterman Co.,
173 Broadway,
N. Y.

(Post Mark) Hoboken, N. J., 1910.

(From)
Gustav Boehm,
Hoboken, N. J.

Waterman's Fountain Pen, 3231
Office
Cortlandt & Broadway,
N. Y. City.

(Post Mark) New York, N. Y., 1910.

Waterman's Co.,
173 Broadway,
City.

Plaintiff's Exhibit 6

3232

(Post Mark) Mount Vernon, Wash., 1907.

(From)
Mount Vernon Drug Co.,
Mount Vernon, Wash.

Waterman & Co.,
New York City,
N. Y.
173 Broadway.

3233

(Post Mark) Molson, Wash., 1907.

(From)
Tompkins & Co.,
Molson, Wash.

Waterman & Co.,
173 Broadway,
New York.

(Post Mark) Valdez, Alaska, 1907.

(From)
3234 Owl Drug Co.,
Valdez, Alaska.

Waterman & Co.,
New York,
N. Y.
173 Bway.

Plaintiff's Exhibit 6 3235

(Post Mark) New York, N. Y., 1907.

(From)
Fred G. Earl,
103-8th Ave.,
City.

Waterman & Co.,
173 Broadway,
City.

3236

(Post Mark) Bridgeport, Conn., 1910.

(From)
The Bridgeport Trust Company,
Bridgeport, Conn.

Waterman Fountain Pen,
173 Broadway,
N. Y.

(Post Mark) New York. 1910.

3237

(From)
Max S. Fersko,
1928 Third Ave.,
New York.

Waterman's Fountain Pen,
173 Broadway,
City.

3238 *Plaintiff's Exhibit 6*

(Post Mark) Sea Girt, N. J., 1907.

(From)
E. L. Spencer,
Sea Girt, N. J.

Waterman & Co.,
Broadway,
New York City.
Mdse.

3239 (Post Mark) Brooklyn, N. Y., 1907.

(From)
Office of
Publicity Committee
of
St. John's Church,
Webster Avenue,
Brooklyn, N. Y.

Waterman & Co.,
73 Broadway,
N— York Cy,
N— York.

3240

(Post Mark) Niagara Falls, N. Y., 1910.

Waterman Fountain Pen,
173 Broadway,
New York City,
New York.

Plaintiff's Exhibit 6

3241

(Post Mark) Tannersville, N. Y., 1907.

(From)
Oscar Langer,
Tannersville, G. C. N. Y.

Waterman & Co.,
Broadway, Corner Cortland St.,
New York City.

(Post Mark) Asbury Park, N. J., 1907.

3242

(From)
Steinbach Company,
Asbury Park,
New Jersey.

Waterman,
173 Broadway,
New York,
N. Y.

(Post Mark) New York, N. Y., 1907.

3243

(From)
S. Rottman,
368-8th Ave.,
New York City.

Watermans,
171-173 Broadway,
New York City.

3244 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1910.

Waterman & Company,
173 Broadway,
City.

(Post Mark) New Rochelle, N. Y., 1910.

Waterman and Co., Fntn. Pens,
173 Broadway,
New York City,
3245 N. Y.

(Post Mark) New York, N. Y., 1907.

(From)
Mark Cross Co.,
210 5th Ave.,
New York, N. Y.

Waterman & Co.,
173 B'way,
City.

3246 (Post Mark) Endicott, N. Y., 1907.

(From)
International Time Recording
Company of New York,
Bundy Square,
Endicott, N. Y.

Waterman & Co.,
173 Broadway,
New York City.

Plaintiff's Exhibit 6 3247

(Post Mark) Washington, D. C., 1910.

Waterman & Co.,
173 Broadway,
New York City,
N. Y.

(Post Mark) New York, N. Y., 1910.

(From)
H. B. Kruger,
1650 Amst., City. 3248

Waterman & Co.,
171 B'way,
City.

(Post Mark) N. Y. & Salamanda, R. P. O., 1910.

(From)
Fulboam Dairy Company,
Office Millsville, Pa.

Waterman Fountain Pen Co.,
B'way & Cortland St., 3249
New York,

(Post Mark) Shaft, Md., 1910.

Waterman & Co. (Ideal Fountain Pen),
175 Broadway,
New York.

3250 *Plaintiff's Exhibit 6*

(Post Mark) Santa Cruz, Cal., 1907.

(From)
Fred R. Howe,
Santa Cruz, Cal.

Waterman Co.,
New York City,
N. Y.
173 Broadway St.

3251 (Post Mark) Brooklyn, N. Y., 1907.

(From)
C. Handman,
334 Sumner Ave.,

The Waterman Co.,
173 Broadway,
New York City.

(Post Mark) New York, N. Y., 1910.

3252 (From)
Underwood Typewriter Company,
241 Broadway,
New York.

Waterman Co.,
171 Broadway,
N. Y. City.
F.

Plaintiff's Exhibit 6 3253

(Post Mark) Providence, R. I., 1907.

(From)
Weybosset Jewelry Co.,
Cor. Weybosset & Mathewson Sts.,
Providence, R. I.

Waterman Pen Co.,
6 School St.,
Boston,
Mass.

3254

(Post Mark) delivered by boy, 1907.

(From)
Thomas Groom & Co.,
105 State St., Boston.

Waterman Pen Co.,
School St.,

Repoint. Thomas Groom & Co.,
D. Hough.

3255

(Post Mark) Lowell, Mass., 1907.

(From)
H. C. Kittredge,
Lowell,
9 Central St.

Waterman Pen Co.,
School St.
Boston,
Mass.

3256 *Plaintiff's Exhibit 6*

(Post Mark) Brockton, Mass., 1907.

(From)
Thayer Bros.
Brockton.

Waterman Pen Co.,
School St.
Boston, Mass.

(Post Mark) Providence, R. I., 1910.

3257

(From)
The Hallett,
Simon McWey, Prop.
Providence, R. I.

Waterman Pen
#173 Broadway
New York.

(Post Mark) Buffalo, N. Y., 1910.

3258 (From)
Rocco N. Dominicis,
128 Ellicott St.
Buffalo, N. Y.

The Watermans Fountain Pen
173 Broadway
New York
N. Y.

Plaintiff's Exhibit 6 3259

(Post Mark) Walden, N. Y., 1910.

(From)
The Walden Knife Co.,
Walden, N. Y.

Waterman & Co.,
173 Broadway,
N. Y. City.

(Post Mark) North Tarrytown, 3260

Waterman Fn'tn. Pens,
173 Broadway,
New York City.

(Post Mark) Brooklyn, N. Y., 1910.

Waterman Fountain Pen,
173 Broadway,
New York,
N. Y.

--- 3261

(Post Mark) Washington, D. C., 1910.

Waterman Fountain Pen,
173 Broadway,
N. Y. City.

3262 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1910.

(From)
David Killoch Co.,
193 Greenwich Street,
New York, N. Y.

Waterman Co.,
173 B'way,
New York City.

3263 (Post Mark) Jacksonville, Fla., 1910.

(From)
The Aragon,
J. A. Newcomb,
Proprietor.

The Waterman Co.,
New York,
N. Y.
#173 Bdwy.

3264 (Post Mark) New York, N. Y., 1910.

Watermans,
173 Broadway,
N. Y. C.

Plaintiff's Exhibit 6 3265

(Post Mark) New Haven Conn., 1910.

(From)
Yale Scientific Monthly,
Byers Memorial Hall,
New Haven, Conn.

Watermans,
173 Broadway,
New York City.

(Post Mark) New York, N. Y., 1910. 3266

(From)
Mutual Milk and Cream Co.,
214-224 East 22nd Street,
New York.

Waterman & Co.,
173 Broadway,
New York City.

(Post Mark) Trenton, N. J., 1910.

3267

(From)
Samuel J. Kelly,
No. 147 E. State Street,
Trenton, N. J.

Waterman Co.,
173 Broadway,
New York.

3268 *Plaintiff's Exhibit 6*

(Post Mark) Scranton, Pa., 1910.

(From)
Thos. F. Leonard Co.,
505 Lackawanna Av.,
Scranton, Pa.

Waterman Co.,
Broadway,
N. Y. City, N. Y.

3269 (Post Mark) Sussex, N. J., 1910.

(From)
Chas. E. Willson,
Sussex, N. J.

Waterman's Ideal Fountain Pen Co.,
Cor. Broadway & Cortlandt St.,
N. Y. City.

(Post Mark) Burlington, Vt., 1910.

Waterman's Ideal Pens,
3270 173 Broadway,
New York City.

(Post Mark) Va., 1910.

Waterman's Ideal Fountain Pen Co.,
$173 Broadway,
New York City, N. Y.

Plaintiff's Exhibit 6 3271

(Post Mark) Paterson, N. J., 1910.

(From)
Quackenbush & Co.,
Paterson, N. J.

Waterman Ideal Co.,
173 Bway.,
N. Y. City.

(Post Mark) New York, N. Y., 1910.

3272

The Waterman Fountain Pen Co.,
173 Bway.,
City.

(Post Mark) Raleigh, N. C., 1910.

(From)

John C. Drewry,
State Agent,
The Mutual Benefit Life Insurance Company,
Raleigh, N. C.

The Waterman Ideal Fountain Pen Co., 3273
Broadway,
New York, N. Y.

(Post Mark) Stillmore, Ga., 1910.

(From)
G. A. Daughtry,
Stillmore, Ga.

Waterman's Ideal Pen Co.
New York City.

Plaintiff's Exhibit 6

3274 (Post Mark) Buffalo, N. Y., 1910.

(From)
Charles L. Bullymore,
73 West Eagle Street,
Buffalo, N. Y.

Waterman Ideal Pen Company,
New York City,
New York.

3275 (Post Mark) Lakeland, Fla., 1910.

(From)
Lake Pharmacy,
Lakeland, Florida.

Waterman Ideal Fountain Pen Co.,
#173 Broadway,
New York City.

(Post Mark) Jamaica, N. Y., 1910.

3276 The Waterman Ideal Fountain Pen Co.
173 Broadway,
New York.

(Post Mark) Burlington, Vt., 1910.

Waterman's Ideal Pen,
173 Broadway,
New York City.

Plaintiff's Exhibit 6 3277

(Post Mark) Brooklyn, N. Y., 1910.

"Waterman Ideal Fountain Pen Co.,"
Broadway cor. Cortlandt St.,
New York.

(Post Mark) Bluffton, Ohio, 1910.

(From)
Bixel Jewelry & Music Co.,
Bluffton, Ohio. 3278

Waterman Ideal Pen Co.,
New York City.

(Post Mark) West Point, Ga., 1910.

(From)
Adams Hardware Co.,
West Point, Ga.

Waterman Ideal Fountain Pen Co.,
New York, N. Y.
#173 Broadway. 3279

(Post Mark) Globe, Ariz., 1910.

(From)
Arizona & Michigan Mining Company,
S. W. Clawson, Gen. Mgr.,
Globe, Arizona.

Waterman's Ideal Pen Co.,
New York, N. Y.

Plaintiff's Exhibit 6

3280 (Post Mark) Mount Vernon, Ohio, 1910.

The Waterman Ideal Fountain Pen Co.
New York City, N. Y.
173 Broadway, N. Y.

(Post Mark) Wilmington, N. C., 1910.

(From)
Harriss,
Wilmington, N. C.

3281 Waterman Ideal Fountain Pen Co.,
173 Broadway,
New York.

(Post Mark) St. Louis, Mo., 1910.

(From)
W. J. Kennedy Stationery Co.,
212 N. 4th St.,
St. Louis.

Waterman's Ideal Fountain Pen Co.,
173 Broadway,
3282 New York, N. Y.

(Post Mark) Cincinnati, O., 1910.

(From)
Queen City Publishing Company,
Number 705 Pine Street,
Cincinnati, O.

Waterman Ideal Pen Co.,
New York, N. Y.

Plaintiff's Exhibit 6 3283

(Post Mark) Portland, Ind., 1910.

(From)
Phil Stachler,
Portland, Indiana.

Waterman Ideal Pen Co.,
New York City,
N. Y.

(Post Mark) New York, N. Y., 1910. 3284

(From)
Sussman's,
Theatre Ticket Office,
253 Broadway, New York.

Waterman Ideal Fountain Pen Co.,
173 Broadway,
City.

(Post Mark) St. Louis, Mo., 1910.

(From) 3285
Berthold & Jennings Lbr. Co.,
St. Louis, Mo.

Watermen's Ideal Fountain Pen Co.,
Broadway & Courtland St.,
New York, N. Y.

3286 *Plaintiff's Exhibit 6*

(Post Mark) Woodbury, N. J., 1910.

(From)
G. G. Green,
Woodbury, N. J.

Waterman Ideal Fountain Pen Co.,
New York City,
173 Broadway.

(Post Mark) Waltham, Mass., 1910.

3287 (From)
T. L. Lancisi,
Waltham, Mass.

Waterman Ideal Pen Co.,
173 Broadway,
New York City.

(Post Mark) Elmira, N. Y., 1910.

(From)
B. H. Norton,
3288 Elmira, N. Y.

Waterman Ideal Pen Co.,
Cortlandt St. & Bway.,
N. Y. City.

(Post Mark) Ann Arbor, Mich., 1910.

(From)
David B. Phillips.

The Waterman Ideal Pen Co.,
New York, N. Y.

Plaintiff's Exhibit 6 3289

(Post Mark) Buffalo, N. Y., 1910.

(From)
R. N. Frame,
Tropical Development Company,
Buffalo, N. Y.

Waterman Ideal Fountain Pen Co.,
173 Broadway,
New York City,
N. Y.

3290

(Post Mark) New York, N. Y., 1907.

(From)
New York Journal.

Ideal Pen Co.,
173 Broadway,
N. Y. City.

(Post Mark) New York, N. Y., 1907.

(From) 3291
Advertising Department,
The Delineator,
The Designer,
New Idea Woman's Magazine,
Butterick Building, N. Y.

Ideal Pen Co.,
173 Broadway,
N. Y. City.

8292 *Plaintiff's Exhibit 6*

(Post Mark) Boston, Mass., 1907.

(From)
American Gutta Percha & Rubber Co.,
186 Devonshire Street,
Boston, Mass.

Ideal Pen Co.,
173 Broadway,
New York, N. Y.

Mgr.
Ideal Pen Co.,
173 Broadway,
3293 City.

(Post Mark) New York, N. Y., 1907.

(From)
Advertising Department,
The Delineator,
The Designer,
New Idea Woman's Magazine,
Butterick Building, N. Y.

Ideal Pen Co.,
3294 173 Bway.,
N. Y. City.

(Post Mark) San Jose, Cal., 1910.

(From)
Geo. D. Abbott,
26 N. Second St., San Jose, Cal.

Waterman's Ideal Pen Co.,
New York, New York.

Plaintiff's Exhibit 6

3295

(Post Mark) Hurleyville, Sull. Co., N. Y., 1910.

(From)
Waldorf Hotel,
B. F. Clark, Prop.,
Hurleyville, Sull. Co., N. Y.

Waterman Ideal Pen Co.,
173 Broadway,
New York.

3296

(Post Mark) Washington, N. J., 1910.

(From)
James H. Johnston,
10 East Washington Ave.,
Washington, N. J.

L. E. Waterman Fountain Pen Co.,
New York, N. Y.
173 Broadway.

(Post Mark) Sterling, Ill., 1910.

3297

(From)
S. P. Giddings & Son,
Sterling, Ill.

The L. E. Waterman Pen Co.,
173 Broadway,
New York, N. Y.

3298 *Plaintiff's Exhibit 6*

(Post Mark) Kansas City, Mo., 1910.

(From)
C. B. Norton Jewelry Co.,
Kansas City, Mo.

L. E. Waterman Pen Co.,
173 Broadway,
New York, N. Y.

(Post Mark) Portland, Ore., 1907.

3299

(From)
A. N. Wright,
293 Morrison St.,
Portland, Oregon.

E. L. Waterman Co.,
173 Broadway,
New York, N. Y.

(Post Mark) Philadelphia, Pa., 1907.

3300 (From)
N. Snellenburg & Company,
Philadelphia.

L. Waterman & Son,
173 B'way,
N. Y. City.

Plaintiff's Exhibit 6 3301

(Post Mark) Salmon Falls, N. H., 1907.

(From)
John Brisard,
Salmon Falls, N. H.

E. L. Waterman & Co.
173 Broadway,
New York, N. Y.

(From) 3302
C. J. Whitinie,
Port Republic, Va.

E. L. Waterman & Co.
173 Broadway,
New York.

(From)

G. S. Kean,
Grand Valley, Pa.

E. L. Waterman & Co. 3303
173 Broadway,
N. Y.

(From)
Thos. E. Cable,
Midland Beach, S. I.

D. F. Waterman,
173 Broadway,
City.
Fountain Pen.

3304 *Plaintiff's Exhibit 6*

(Post Mark) New York, N. Y., 1907.

(From)
Fred F. A. Treuleben,
Successor to
Ferdinand Kreuter,
45 Second Avenue, New York.

E. L. Waterman,
Broadway and Courtland St.,
City.

3305

(Post Mark) Kahlotus, Wash., 1907.

(From)
A. J. McCallum,
Kahlotus, Wash.

E. L. Waterman Co.,
173 Broadway,
N. Y.

(Post Mark) New York, 1907.

3306

(From)
373 High W.,
Newark, N. J.
Emma Mendel.

A. F. Waterman,
173 Broadway,
N. Y. C.

Plaintiff's Exhibit 6

3307

(Post Mark) New York, N. Y., 1907.

(From)
Fordham Stone Renovating Co.,
1123 Broadway,
New York.

E. L. Waterman Co.,
173 Broadway,
N. Y. City.

3308

(Post Mark) Kinderhook, N. Y., 1907.

(From)
A. C. Kilner,
Kinderhook, N. Y.

L. F. Waterman,
173 Broadway.
N. Y. City, N. Y.

(Post Mark) Tescott, Kansas, 1907.

3309

(From)
Baker Bros.,
Tescott, Kansas.

J. E. Watterman Pen Co.,
173 Broadway,
N. Y. City, N. Y.
J. E. Watterman.

3310 *Plaintiff's Exhibit 6*

(Post Mark) Brooklyn, N. Y., 1907.

Messrs. J. E. Waterman Co.,
173 Broadway,
New York.

(Post Mark) Emporia, Va., 1907.

(From)
A. F. Slate & Son,
Emporia, Virginia.

3311

Mr. L. A. Waterman Co.,
New York, N. Y.
173 Broadway.

(Post Mark) Dubuque, Iowa, 1907.

(From)
Harger & Blish,
Dubuque, Iowa.

L. A. Waterman Co.,
New York, N. Y.
3312 173 Broadway.

(Post Mark) Boston, Mass., 1910.

(From)
United Stationery Co.,
Boston, Mass.

L. E. Waterman & Sons,
173 Broadway,
New York City.

Plaintiff's Exhibit 6 3313

(Post Mark) Washington, D. C., 1908.

(From)
The Law Reporter Co.,
M. W. Moore, Manager,
Washington, D. C.

The A. A. Waterman Co.,
173 Broadway,
New York, N. Y.

(Post Mark) Corona, Ala., 1910. 3314

(From)
Corona Coal & Iron Co.,
Corona, Walker Co., Ala.

A. A. Waterman & Company,
Broadway & Cortland Sts.,
New York City.

(Post Mark) Georgetown, S. C., 1910.

Mess. A. A. Waterman & Co., 3315
New York, N. Y.
#173 Broadway.

(Post Mark) New York, N. Y., 1910.

(From)
M. W. Hale,
208 East 19th Street,
Manhattan.

A. A. Waterman Fountain Pen Co.,
173 Broadway,
City.

3316 *Plaintiff's Exhibit 6*

(Post Mark) Scranton, Pa., 1908.

(From)
Reynolds Bros.,
Scranton, Pa.

A. A. Waterman,
#173 Broadway,
N. Y.

(Post Mark) Norfolk, Va., 1908.

3317

(From)
Jacob Bennett,
386 Main St.,
Norfolk, Va.

A. A. Waterman & Co.,
173 Broadway,
New York.

(Post Mark) Kalamazoo, Mich., 1910.

3318 (From)
The Accident Cabinet Co.,
Kalamazoo, Mich.

A. A. Waterman & Co.,
173 B'way,
New York City, N. Y.

Plaintiff's Exhibit 6 3319

(From)
Whitehall Tatum Company,
New York, N. Y.

A. A. Waterman,
173 Broadway,
City.

Waterman's Ideal Fountain Pen Co.,
22 Thames St.,
New York, N. Y. 3320

Opened by A. A. Waterman & Co.

3321

3322 **Memorandum Decision of the Circuit Court on Motion for Preliminary Injunction.**

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Plaintiff,
against
MODERN PEN COMPANY,
Defendant.

3323

Motion for preliminary injunction, argued August 12, 1910.

Mr. Watson, for complainant.
Mr. Bacon, for defendant.

MEMORANDUM.

Since in pleading and argument defendant has asserted that no disputed question of fact exists in this case, any necessity for dwelling upon the history of this litigation disappears.

It is not meant by the foregoing that the parties are in agreement; but their differences arise not from quarrels over what
3324 happened at a given time and place, but over the inferences to be drawn from what confessedly did happen.

No further opinion will therefore be filed than to state the nature of complainant's demands, and my conclusions thereon.

An injunction is asked restraining the Modern Pen Company from

"Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any fountain pens of other manufacture than that of the plaintiff under the name of Waterman or Waterman's or Waterman Fountain Pens or Waterman's Fountain Pens or Ideal Pens, or any mark or name in imitation thereof or near resemblance

thereto as might be calculated to deceive or be likely to cause confusion or mistake in the mind of the public or deceive purchasers, or which would indicate that the fountain pens so sold, represented or advertised are fountain pens of plaintiff's manufacture." 3325

Whatever may be thought of the right of some parties to make and sell fountain pens described as these of A. A. Waterman, the admitted facts show an endeavor to sell defendant's goods on complaintant's reputation,—and this branch of the motion is granted.

Next complainant prays for injunction against defendants.

"Infringing the plaintiff's trade-mark 'Waterman's', or infringing the plaintiff's trade-mark 'Waterman's Ideal Fountain Pen, N. Y.,' or infringing the plaintiff's trade-mark 'Ideal' and from manufacturing or selling fountain pens (other than fountain pens of plaintiff's manufacture) having the said trademarks or either of them, or any simulation or colorable imitation thereof, on such fountain pens, whether on the holder or on the gold pen, or on labels, boxes, signs, letter heads, bill heads, circulars, or advertisements accompanying or used in connection with the making or selling of such fountain pens, in any manner whatsoever." 3326

I find no proof of use by defendant of the exact trade-mark "Waterman's." There is clear proof of misuse of the word "Ideal," and injunction may issue accordingly.

Complainant's principal demand is that defendant be restrained from 3327

"Using in connection with the manufacture and sale of fountain pens (other than fountain pens of plaintiff's manufacture) the name 'A. A. Waterman,' or 'A. A. Waterman & Co.,' or 'A. A. Waterman & Company,' or 'Arthur A. Waterman & Company,' or any corporate, firm or individual name containing the words *Waterman, Waterman's* or *Watermans*, or any mark or name containing the word Waterman in any form, whether the same be or be not coupled with the names or initials, or with

3328 the initials 'A. A.,' or with the initial 'A.' or whether the same be or be not used in collocation with the word 'Pen' or 'Fountain Pen' or other descriptive words."

On this point from the undisputed facts, I think that while Arthur A. Waterman may have the right to use some or all of the trade names so objectionable to complainants,—the Modern Pen Company has no such right. Mr. Arthur A. Waterman is not interested in the defendant, nor in the concern for which it is the selling agent.

He does seem to have permitted the use of his name, but even if that name be considered a trade-mark it does not in defendant's hands accompany any business, and it is clear that the name as used by defendant is but the cause of the confusion admitted
3329 and asserted by defendant, a confusion in no way benefitting the man whose name is used.

The injunction *pendente lite*, as above outlined may issue on filing a bond in the sum of $25,000.

August 24, 1910.

C. M. HOUGH,
J.

U. S. Circuit Court, Southern District of N. Y. Filed August 25, 1910, John A. Shields, Clerk.

3330

Original Preliminary Injunction Order. 3331

At a Stated Term of the United States Circuit Court for the Southern District of New York, sitting in Equity, at the Main Post Office Building in the City of New York, Borough of Manhattan, State of New York, on the 29th day of August, 1910.

Present: Hon. Charles M. Hough, United States District Judge.

L. E. Waterman Company,
Plaintiff,

against

Modern Pen Company,
Defendant. 3332

This cause having come on to be heard upon the motion by plaintiff for a preliminary injunction, and on reading and filing the notices of motion for a preliminary injunction herein and admission of service thereof, and the affidavits on behalf of the plaintiff annexed thereto, and on reading and filing affidavits on behalf of the defendant, and Alexander S. Bacon, Esq., counsel for the defendant, and Samuel S. Watson, Esq., counsel for the plaintiff having been heard, and it appearing that this Court has jurisdiction over the parties and the subject-matter, and upon full consideration of the facts presented it appearing that the 3333
plaintiff is a corporation under the laws of the State of New York and is the owner of the trade-mark "Waterman's Ideal Fountain Pen, N. Y.," for fountain pens and of the trade-mark "Ideal" for fountain pens, and that the same have been duly registered by the plaintiff in the United States Patent Office, and that the defendant is a corporation under the laws of the State of West Virginia, and has infringed plaintiff's said trade-marks, and it also appearing that the defendant is guilty of unfair competition in trade with the plaintiff by using the name "Waterman," and "A. A. Waterman & Co." in connection with the

8334 marking, advertising and selling of fountain pens and parts thereof;

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED that a writ of injunction be issued pursuant to the prayer of the bill of complaint herein, strictly commanding and enjoining the defendant, Modern Pen Company, and its officers, servants, agents, attorneys and workmen, and each and every one of them, under the pains and penalties which may fall upon them, and each of them, in case of disobedience, that they forthwith, and until the further order, judgment or decree of this Court, desist from:

1. Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any
8335 fountain pens of other manufacture than that of the plaintiff under the name of Waterman or Waterman's or Waterman Pens, or Waterman's Pens or Waterman Fountain Pens or Waterman's Fountain Pens or Ideal Pens, or any mark or name in imitation thereof or near resemblance thereto as might be calculated to deceive or be likely to cause confusion or mistake in the mind of the public or deceive purchasers, or which would indicate that the fountain pens so sold, represented or advertised are fountain pens of plaintiff's manufacture.

2. Infringing the plaintiff's trade-mark "Waterman's Ideal Fountain Pen, N. Y.," or infringing the plaintiff's trade-mark "Ideal" and from manufacturing or selling fountain pens (other than fountain pens of plaintiff's manufacture) having the said
8336 trade-marks or either of them, or any simulation or colorable imitation thereof, on such fountains pens, whether on the holder or on the gold pen, or on labels, boxes, signs, letter heads, bill heads, circulars, or advertisements accompanying or used in connection with the making or selling of such fountain pens or in any manner whatsoever.

3. Using in connection with the manufacture or sale of fountain pens (other than fountain pens of plaintiff's manufacture) the name "A. A. Waterman," or "A. A. Waterman & Co.," or "A. A. Waterman & Company," or "Arthur A. Waterman &

Company," or any corporate, firm or individual name containing the words *Waterman, Waterman's* or *Watermans,* or any mark or name containing the word Waterman in any form, whether the same be or be not coupled with other names or initials, or with the initials "A. A." or with the initial "A." or whether the same be or be not used in collocation with the word "Pen" or "Fountain Pen" or other descriptive words. 3337

Dated, New York, N. Y., Aug. 27, 1910.

C. M. HOUGH,
United States District Judge.

Copy received Aug. 27/10. Alex. S. Bacon, Deft's Atty. U. S. Circuit Court, Southern District of N. Y. Filed Aug. 29, 1910. John A. Shields, Clerk. 3338

3339

3340 **Decision of Circuit Court of Appeals on Preliminary Injunction (Reported 183 Fed. Rep., 118).**

UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT.

Before: Noyes, Circuit Judge, and
Hazel and Holt, District Judges.

L. E. WATERMAN COMPANY,
Complainant-Appellee,

3341 vs.

MODERN PEN COMPANY,
Defendant-Appellant.

Appeal from an order of the Circuit Court, Southern District of New York, granting a preliminary injunction in a suit for the infringement of trade-marks and for unfair competition. The injunctive provisions of the order are printed in the foot note.*

The complainant—a New York corporation—has been engaged for many years in the manufacture and sale of fountain pens under the name of the L. E. Waterman Company and has built
3342 up a large business therein. It has also registered the following

* "1. Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any fountain pens of other manufacture than that of the plaintiff under the name of Waterman or Waterman's or Waterman Pens, or Waterman's Pens or Waterman Fountain Pens or Waterman's Fountain Pens or Ideal Pens, or any mark or name in imitation thereof or near resemblance thereto as might be calculated to deceive or be likely to cause confusion or mistake in the mind of the public or deceive purchasers, or which would indicate that the fountain pens so sold, represented or advertised are fountain pens of plaintiff's manufacture.

trade-marks as applied to such pens: "Ideal;" "Waterman's Ideal Fountain Pen, N. Y.," and "Waterman's." 3343

The defendant—a West Virginia corporation—is selling agent of a firm called A. A. Waterman & Company which manufacture fountain pens and marks them with such name.

Arthur A. Waterman had been employed by the complainant but in 1898 he formed a partnership for the manufacture of fountain pens under the name of the A. A. Waterman Pen Company. The present complainant brought suit against said firm for the infringement of trade-mark and unfair competition in the Supreme Court of the State of New York and a decree was rendered in September, 1898, enjoining the defendant from using a corporate name containing the word "Waterman" but providing as follows: 3344

"But the defendants are not prohibited from indicating that fountain pens made by them are made or prepared or sold for

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"2. Infringing the plaintiff's trade-mark 'Waterman's Ideal Fountain Pen, N. Y.,' or infringing the plaintiff's trade-mark 'Ideal' and from manufacturing or selling fountain pens (other than fountain pens of plaintiff's manufacture) having the said trade-marks or either of them, or any simulation or colorable imitation thereof, on such fountain pens, whether on the holder or on the gold pen, or on labels, boxes, signs, letter heads, bill heads, circulars, or advertisements accompanying or used in connection with the making or selling of such fountain pens, or in any manner whatsoever. 3345

"3. Using in connection with the manufacture or sale of fountain pens (other than fountain pens of plaintiff's manufacture) the name 'A. A. Waterman,' or 'A. A. Waterman & Co.' or 'A. A. Waterman & Company,' or 'Arthur A. Waterman & Company,' or any corporate, firm or individual name containing the words Waterman, Waterman's or Watermans, or any mark or name containing the word Waterman in any form, whether the same be or be not coupled with other names or initials or with the initials 'A. A.' or with the initial 'A.' or whether the same be or be not used in collocation with the word 'Pen' or 'Fountain Pen' or other descriptive words."

3346 or by Arthur A. Waterman & Company or A. A. Waterman & Company."

Subsequent to this decision the name A. A. Waterman & Company was used by successive partnerships of which said Waterman was a member. The business was not successful and in 1905 a reorganization took place and an agreement was entered into whereby in effect said Waterman assignd to Isaac E. and William L. Chapman, who had been previously interested with him in the business, the right to use in connection therewith the name "A. A. Waterman & Co."

The defendant was shown to have sold a limited number of fountain pens marked "Royal Ideal Pen." The evidence also tended to show some use of the word "Waterman" in connec-
3347 tion with the sale of the goods of the firm of A. A. Waterman & Company without the distinguishing initials.

NOYES, Circuit Judge (after making the foregoing statement): The complainant's trade-mark "Ideal" is conceded to be valid. The defendant infringed it by the sale of the pens marked "Royal Ideal Pen." Consequently the second paragraph of the injunction order was proper.

Assuming that the present co-partnership of A. A. Waterman & Company has the right under the agreement with Arthur A. Waterman to use that firm name, they have no right to use the name "Waterman" without the initials. The use of the name which they may have the right to employ concededly causes confusion and they have no right to increase that confusion by em-
3348 ploying any name less definite.

The defendant disclaims the use of the name "Waterman" alone. If so an injunction against such use will do it no harm. But, as already stated, we think there was sufficient evidence of such use to warrant the first paragraph of the injunction.

The third paragraph of the injunction order is, in our opinion, erroneous. It is clear that the partnerships of which Arthur A. Waterman was a member, had the right to use the name A. A. Waterman & Co., in connection with their business and to so mark their pens. The decision of the Supreme Court of the

State of New York in which all parties acquiesced for many years, was in accordance with principles now well established by decisions of the Supreme Court of the United States. 3349

Similarly, said Waterman had the right to transfer to his former partners in connection with the reorganization and sale of the business, the right to continue the use of his name. It is true that it became their duty, as it had been the duty of the previous co-partnerships, to do no act to increase the confusion necessarily arising from the use of a name similar to that of the complainant. But we find nothing in the record showing any such acts except those which we have seen to be covered by the first two paragraphs of the injunction.

There is insufficient basis presented for the contention that the agreement granting the right to use the name "A. A. Waterman & Co." to the present firm was a mere sham and fraudulent device, not connected with the reorganization and sale of the business. 3350

The order of the Circuit Court is modified by striking out the last paragraph thereof (paragraph 3) together with the finding that the defendant has been guilty of unfair competition by using the name "A. A. Waterman & Co.," and as so modified is affirmed. The costs of this Court may be divided between the parties.

3351

3352 **Modified Preliminary Injunction Order.**

At a Stated Term of the United States Circuit Court for the Southern District of New York, sitting in Equity, at the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, on the 10th day of December, 1910.

Present: Hon. Charles M. Hough, United States District Judge.

L. E. WATERMAN COMPANY,
Plaintiff,
against
3353
MODERN PEN COMPANY,
Defendant.

This cause having come on to be heard for a second time upon the motion by the plaintiff for a preliminary injunction, and on reading and filing the mandate of the United States Circuit Court of Appeals for the Second Circuit in this cause, bearing date the first day of December, A. D., 1910, in obedience to said mandate and in cognizance with the opinion of said United States Circuit Court of Appeals herein, in which said mandate it is

"ORDERED, ADJUDGED AND DECREED that the order of said Circuit Court be and it hereby is modified by striking out the
3354 last paragraph thereof (paragraph 3) together with the finding that the defendant has been guilty of unfair competition by using the name 'A. A. Waterman & Company,' and as so modified is affirmed, with costs in favor of the appellant taxed at the sum of $441.86,"

it is hereby

ADJUDGED, ORDERED AND DECREED that the order herein, entered in the office of the Clerk of this Court on the 29th day of August, 1910, be and the same hereby is modified by striking therefrom the words "and it also appearing that the defendant is guilty of unfair competition in trade with the plaintiff by using

the name 'A. A. Waterman & Co.' in connection with the marking, advertising and selling of fountain pens and parts thereof" and by striking out the "3" paragraph of said preliminary injunction reading as follows: 3355

"3. Using in connection with the manufacture or sale of fountain pens (other than fountain pens of plaintiff's manufacture) the name 'A. A. Waterman,' or 'A. A. Waterman & Co.,' or 'A. A. Waterman & Company,' or 'Arthur A. Waterman & Company,' or any corporate, firm or individual name containing the words *Waterman, Waterman's* or *Watermans,* or any mark or name containing the word Waterman in any form, whether the same be or be not coupled with other names or initials, or with the initials 'A. A.' or with the initial 'A.' or whether the same be or be not used in collocation with the word 'Pen' or 'Fountain Pen' or other descriptive words." 3356

And it is further

ORDERED, ADJUDGED AND DECREED that the said order of August 29, 1910, be and the same hereby is modified so as to read as follows:

3357

8358 At a Stated Term of the United States Circuit Court for the Southern District of New York, sitting in Equity, at the Main Post Office Building in the City of New York, Borough of Manhattan, State of New York, on the 29th day of August, 1910.

Present: Hon. Charles M. Hough, United States District Judge.

L. E. WATERMAN COMPANY,
Plaintiff,
against
MODERN PEN COMPANY,
Defendant.

8359

This cause having come on to be heard upon the motion by plaintiff for a preliminary injunction, and on reading and filing the notices of motion for a preliminary injunction herein and admission of service thereof, and the affidavits on behalf of the plaintiff annexed thereto, and on reading and filing affidavits on behalf of the defendant, and Alexander S. Bacon, Esq., counsel for the defendant, and Samuel S. Watson, Esq., counsel for the plaintiff, having been heard, and it appearing that this court has jurisdiction over the parties and the subject matter, and upon full consideration of the facts presented it appearing that the plaintiff is a corporation under the laws of the State of New
3360 York, and is the owner of the trade-mark "Waterman's Ideal Fountain Pen, N. Y.," for fountain pens and of the trade-mark "Ideal" for fountain pens and that the same have been duly registered by the plaintiff in the United States Patent Office, and that the defendant is a corporation under the laws of the State of West Virginia, and has infringed plaintiff's said trade-marks, and it also appearing that the defendant is guilty of unfair competition in trade with the plaintiff by using the name "Waterman" in connection with the marking, advertising and selling of fountain pens and parts thereof;

Now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that a writ of injunction be 3361
issued pursuant to the prayer of the bill of complaint herein, strictly commanding and enjoining the defendant, Modern Pen Company, and its officers, servants, agents, attorneys and workmen, and each and every one of them, under the pains and penalties which may fall upon them, and each of them, in case of disobedience, that they forthwith, and until the further order, judgment or decree of this Court desist from:

1. Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any fountain pens of other manufacture than that of the plaintiff under the name of Waterman or Waterman's or Waterman Pens, or Waterman's Pens or Waterman Fountain Pens or Waterman's Fountain Pens or Ideal Pens, or any mark or name 3362
in imitation thereof or near resemblance thereto as might be calculated to deceive or be likely to cause confusion or mistake in the mind of the public or deceive purchasers, or which would indicate that the fountain pens so sold, represented or advertised are fountain pens of plaintiff's manufacture.

2. Infringing the plaintiff's trade-mark "Waterman's Ideal Fountain Pen, N. Y.," or infringing the plaintiff's trade-mark "Ideal" and from manufacturing or selling fountain pens (other than fountain pens of plaintiff's manufacture) having the said trade-marks or either of them, or any simulation or colorable imitation thereof, on such fountain pens, whether on the holder or on the gold pen, or on labels, boxes, signs, letter heads, bill heads, circulars, or advertisements accompanying or used in con- 3363
nection with the making or selling of such fountain pens, or in any manner whatsoever.

Dated, New York, N. Y., Aug. 27, 1910.

C. M. HOUGH,
United States District Judge.

3364 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Plaintiff,
against
MODERN PEN COMPANY,
Defendant.

Alexander S. Bacon, Esq.,
Attorney for Defendant.

3365 Dear Sir:

Referring to your communication to us, dated May 17, 1911, we beg to remind you that at the time you made the offer which was spread on the record of this action and marked "Defendant's Exhibit A of December 12, 1910," that at that time we offered to limit the proofs to the subject-matter covered by paragraph marked "3" of the preliminary injunction order signed by Judge Hough, provided that the defendant would consent that at the final hearing an injunction order should be made which would include the prohibitions contained in the paragraphs marked "1" and "2" of the present temporary injunction order. In other words, we offered to consider as settled, the subject-
3366 matter of the present temporary injunction order and limit the proof to the subject-matter of paragraph "3" of the preliminary injunction order entered by Judge Hough. This would have materially curtailed the testimony and greatly reduced the expense. You declined our proposal and consequently we were compelled to take proofs regarding the subject-matter of the present preliminary injunction order as well as all other allegations of the complaint.

In view of the foregoing, and also for other reasons not necessary now to state, your claims, that defendant's expenses and disbursements be taxed against plaintiff, are without merit.

We now offer on behalf of the plaintiff, to consent that a final order and decree shall be entered in this action in favor of plaintiff and against the defendant, its officers, agents, etc., which shall contain the prohibitions and subject-matter of the preliminary injunction order entered herein by Judge Hough on August 29, 1910, that each party pay its own costs, and that defendant pay plaintiff the sum of Seventy-five dollars ($75.00) as damages on account of its use of the word "Ideal" on fountain pens manufactured for John Saadi of Washington. 3367

We make this offer, on behalf of the plaintiff, without prejudice and without recognizing or admitting any of the defendant's claims, or the statements of your communication of May 17, 1911, but make the offer solely as a compromise settlement and to avoid further labor and expense in connection with this action. 3368

Dated, New York, N. Y., May 19, 1911.

Yours, etc.,

WATSON & RAYMOND,

Attorneys for Plaintiff.

Endorsement: Copy Received May 19, 1901. Alex. S. Bacon, Deft.'s Atty.

3369

3370 *Theodore A. Steinmuller*

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK,

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

vs.

MODERN PEN COMPANY,
Defendant.

3371

Testimony taken *de bene esse* for the final hearing on part of the complainant under Sections 863 and 864 of the Revised Statutes of the United States in pursuance of the rules and practice of said Court, before Arthur L. Spamer, Esq., Clerk of the United States District Court, for the District of Maryland, at his office in the Main Postoffice Building, in the City of Baltimore, State of Maryland, on the 4th day of April, 1911, at 9:30 o'clock in the forenoon, pursuant to notice hereto annexed.

Appearances:

Samuel S. Watson, Esq., for plaintiff, and

3372 Morton Stein, Esq., for the defendant.

THEODORE A. STEINMULLER, of full age, who resides in Baltimore, a witness produced on behalf of the plaintiff, being duly cautioned and sworn, testified as follows:

By Mr. Watson:

Q1. Please state your name, place of residence and your occupation? A. Theodore A. Steinmuller; 1821 W. Fayette St., Baltimore, Md.; merchant.

Q2. In what line of business are you engaged? A. Stationery and printing.

Q3. With what concern are you connected? A. Lucas Bros., incorporated.

Q4. Where is their place of business? A. 221 and 223 E. Baltimore St., Baltimore, Md.

Q5. How long have you personally been in the stationery business? A. Twenty-five years.

Q6. All that time in Baltimore? A. Yes, sir.

Q7. In connection with your business as a stationer, have you dealt in and handled fountain pens? A. We have.

Q8. For how long personally? A. Twenty-five years.

Q9. What kind of fountain pens, during this period, have you handled and sold? A. We have sold various makes, including the A. A. Waterman and L. E. Waterman, and almost any pen that was offered at the time. 3374

Q10. Have you ever sold a Sterling Fountain pen? A. Yes, sir.

Q11. A Wirt? A. Yes, sir.

Q12. A Swan? A. I don't recall that.

Q13. A Conklin? A. Yes, we have sold a few of those.

Q14. How long have you handled and sold the Waterman Ideal Fountain pens? A. Twenty-five years.

Q15. By what names are these pens usually called for by your customers? A. Usually they call for the Waterman pen.

Q16. How long has that been the fact? A. To my recollection it has always been the fact.

Q17. Are these pens well known among the public? A. They are. 3375

Q18. What is the name by which the Waterman Ideal Fountain Pens are usually referred to by the trade so far as it has come to your attention? A. We usually know them as the L. E.; sometimes as the Ideal, but more frequently as the L. E. Waterman pen.

Q19. How long has that been the fact? A. That has been the fact all the time I have sold them; twenty-five years.

Q20. Are they known in the trade as Waterman pens?

Objected to as leading.

3376 *Theodore A. Steinmuller*

A. They are.

Q21. How long has that been the fact? A. Always, since I have sold them.

Q22. These pens were on the market many years before pens stamped "A. A. Waterman" were on the market; were they not? A. Yes, sir; quite a number of years.

Q23. Were they well known on the market prior to any pens stamped A. A. Waterman Co. coming to your attention? A. They were.

Q24. What was the name by which they were known at that time? A. Waterman.

3377 Q25. Just the same as now? A. Just the same as now.

Q26. From your experience in handling and selling fountain pens for twenty-five years, what do you consider the best fountain pen on the market?

Objected to as incompetent, immaterial and irrelevant.

A. The Waterman, the L. E. Waterman pen, we have always considered the best.

Q27. As far as the matter has come to your attention, what is the opinion of the trade as to what is the best pen on the market?

Objected to on the same grounds.

A. The L. E. Waterman or Waterman pen.

3378 Q28. When you speak of the Waterman pen do you refer to the Waterman Ideal Fountain pen? A. I do.

CROSS-EXAMINATION by Mr. Stein:

XQ1. Do you still buy and sell A. A. Waterman Company's fountain pen? A. No, sir.

XQ2. When did you discontinue the handling of that line? A. I should say approximately ten years ago.

XQ3. Are you familiar at all personally with the A. A. Waterman Company pen manufactured since July 1st, 1905? A. No, sir.

XQ4. You have not handled them? A. No, sir.

XQ5. You don't know anything about their manufacture? A. No, sir.

XQ6. Or in what way they differ from the pens manufactured by A. A. Waterman Co., ten or fifteen years ago? A. I do not.

XQ7. So when you speak today of considering the L. E. Waterman Company's pen the best in the market, I refer to the Waterman Ideal Fountain Pen, you speak without any knowledge as to the A. A. Waterman Company Fountain Pen manufactured during the last five years? A. Yes, sir, I have not any knowledge of the A. A. Waterman Pen in recent years.

XQ8. So you cannot say, personally, and will be unable to say, 3380
personally, whether the L. E. Waterman pen is a better pen than the A. A. Waterman pen until you have had an opportunity to examine and experiment with the A. A. Waterman pen? A. The only experience we have had is the same in recent years as in past years which caused us to discontinue the sale of that pen; that is, that some of the people who purchased this other Waterman pen under various initials, I have known them to bring them back and complain.

XQ9. Do any purchasers of the Ideal pen bring them back and complain? A. Yes, sir.

XQ10. As a matter of fact, a number of the purchasers of each kind of fountain pen manufactured, bring them back and complain, do they not? A. Yes, sir.

XQ11. Of the point being too hard or too soft, or something 3381
getting out of order with the pen? A. Yes, sir.

XQ12. You have testified that the trade refers to the Ideal pen, manufactured by the L. E. Waterman Co., as the L. E. Waterman pen? A. Yes, sir.

XQ13. That is correct, is it not? A. Yes, sir.

XQ14. And sometimes refers to that kind of pen as the Ideal fountain pen? A. Yes, sir.

XQ15. How does the trade refer to the A. A. Waterman Company's pen? A. I don't know just what the trade does do.

XQ16. How did you refer to them when dealing in them and showing them to customers in times past? A. I have not had

3382 *Theodore A. Steinmuller*

any talk or any experience with any of my competitors, or the trade, in respect to the A. A. Waterman pen.

XQ17. How did you describe the A. A. Company pen to possible customers, when you were exhibiting those pens to those customers? A. We described them as a pen that was a cheaper grade of pen.

XQ18. By what name? A. By the name of the A. Waterman, the same name it went under, I don't recall exactly; I know one was the A. A. Waterman, I believe, or A. Waterman.

XQ19. When were the A. A. Waterman pens first put on the market? A. I could not tell you that, but it was several years after we started to sell the L. E. Waterman pens that we started
3383 to put in a stock of the other Waterman pens.

XQ20. I think you said a moment or two ago, that you never discussed the A. A. Waterman Co. pen very freely with the trade generally; is that correct? A. Yes, sir.

XQ21. Have you discussed the merits or demerits of that particular pen? A. No, sir.

XQ22. Or compared that particular pen with the L. E. Waterman, Swan, Conklin, Sterling, Wirt or any other pen mentioned by Mr. Watson? A. No; not at the time that we were selling them.

XQ23. When did you last generally discuss with the trade the comparative qualities of these pens? A. With the manufacturing trade?

3384 Mr. Stein: No; with the selling trade? A. Off and on we spoke of it as the L. E. Waterman method of doing business as well as the superiority of his pen; we spoke of some of the other makes of pens mentioned, including, I think, this other Waterman pen and we have always practically agreed that the L. E. Waterman pen method of doing business and also the pen was superior to any other and gave us less trouble.

XQ24. As a matter of fact you liked the way the L. E. Waterman Company did business with you? A. We certainly did.

XQ25. They took back any pens that you cannot sell and give you full credit? A. Yes, sir.

XQ26. You have that agreement with them? A. Yes, sir.

3385

XQ27. And if you go out of business they take the stock off your hands at cost? A. Yes, sir.

XQ28. They will stand back of all their pens and make good, no matter why they have to make good? A. Yes, sir.

XQ29. That is what you like about their way of doing business? A. We like that about their way of doing business.

XQ30. Do you consider the self-filling qualities of the A. A. Waterman pen any advantage or disadvantage over the old style of the L. E. Waterman pen? A. I don't know anything about the A. A. Waterman self-filling pen; I never saw one of them.

XQ32. Have you ever seen any of their pens manufactured since July 1st, 1905? A. Not unless some of those which were brought back to the store to be repaired were those; I am unable to say.

3386

XQ33. But you have never seen a self-filling A. A. Waterman pen? A. I have never seen one; no, sir.

XQ34. You have based your expert opinion as to the comparative qualities of the two pens without any knowledge or any view or any inspection of the A. A. Waterman pen manufactured since July 1st, 1905? A. I have no knowledge or experience with any pens of the A. A. Waterman Company, since 1905.

RE-DIRECT EXAMINATION by Mr. Watson:

3387

RDQ1. I think you testified on your direct-examination—if I am not correct, please say so—that the trade usually, or commonly, I think was your expression, referred to the Waterman Ideal fountain pen as the Waterman pen; am I correct in that? A. Yes, sir.

RDQ2. I think that you said they sometimes called it the "Ideal;" is that right? A. Occasionally.

RDQ3. And sometimes they referred to it as the L. E. Waterman pen; is that correct? A. Occasionally; yes, sir.

RDQ4. And those are the facts? A. Yes, sir.

RDQ5. Has the Waterman Ideal fountain pen, so far as the matter has come to your personal knowledge, proved satisfactory to your customers?

Objected to as incompetent, immaterial and irrelevant.

3388 *Theodore A. Steinmuller*

RE-CROSS EXAMINATION by Mr. Stein:

RXQ1. Do you not recall, that upon your direct-examination, in answer to Mr. Watson's question, which in substance was: By what name does the public refer to the pens of L. E. Waterman Company and the trade, and you answered that L. E. Waterman pens and sometimes the Ideal; that is right, is it not? A. If I said that, I should have said it is generally referred to as the Waterman pen.

RXQ2. Is it not a fact that it was only after you made that answer, or a similar answer and Mr. Watson then asked, do they not refer to them as Waterman pens, that you first answered yes?

3389 A. The real facts are that people asked for the Waterman pen and mean to get the L. E. Waterman pen or the Ideal pen; those are the real facts.

RXQ3. Do they ever ask for the Ideal? A. Sometimes.

RXQ4. When they ask you for the Waterman pen, what do you tell them, that there are two kinds of Waterman pens? A. No, sir.

RXQ5. Or simply go ahead and show them the L. E. Waterman pen? A. We show them the L. E. Waterman pen; we haven't any other kind to show them.

RXQ6. Do you tell them there is another kind of pen known as the A. A. Waterman pen? A. No, sir.

RXQ7. That claim certain unusual and distinctive advan-

3390 tages?

Mr. Watson: I object to that statement on the record. If counsel desires to testify to the merits of the pen I would like him to be put under oath.

A. No, sir.

RXQ8. You simply go ahead on the assumption they want the Ideal pen or the L. E. Waterman pen, and sell them such a pen? A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Watson:

RDQ6. Have you ever known any person to come into your store during your business career and ask for a Waterman pen and expecting or giving you in any manner to understand, that they expected to receive a pen stamped "A. A. Waterman Co."? A. I never did.

RDQ7. What was the reason you gave up the sale of the A. A. Waterman Company's fountain pen?

Objected to as incompetent, immaterial and irrelevant and no proper foundation shown and the record also discloses the fact that such giving up was ten years ago and consequently the time is too remote. 3392

A. Because they were unsatisfactory.

RDQ8. Did you find there was any confusion between pens stamped "A. A. Waterman & Co." and those marked "Waterman Ideal Fountain Pens"?

Objected to as incompetent, immaterial and irrelevant.

A. At that time there was considerable confusion.

RDQ9. What was the cause of that confusion, the particular cause of that confusion, so far as you observed? A. The confusion was particularly caused by competitors putting out the pen marked "A. A. Waterman" at a reduced price and people come into your establishment and when you charged them the 3393 price for the L. E. Waterman pen, complained of the excess in the price and wanted to know why your competitor could sell it for so much less and we were in consequence compelled at that time to put in a line of the cheaper grade of Waterman pens to show the customers the difference.

RDQ10. When you were selling pens stamped "A. A. Waterman & Co." were people complaining to you that they had purchased these pens when they had expected to purchase the Waterman Ideal Fountain pen?

Objected to as incompetent, irrelevant and immaterial, hearsay, as leading and as calling for a conclusion; and

3394 *Theodore A. Steinmuller*

counsel states upon the record that he again calls attention to complainant's counsel to the fact that complainant's counsel's questions to the various witnesses are altogether too leading and direct the attention of the witness to the answer that the counsel apparently wishes to have.

A. Sometimes people came in and were much surprised to find that they had a pen that was not a Waterman pen, which they had expected to get; and we had to explain to them that there were other Waterman pens and they invariably felt sore at the idea of having purchased a pen other than what they expected to buy.

3395 *RE-CROSS EXAMINATION by Mr. Stein:*

RXQ9. Do you know any one who uses the A. A. Waterman pens and who has used them steadily for some years? A. No, sir.

RXQ10. You don't know of anybody? A. No, sir.

RXQ11. In the entire city of Baltimore, who has been using the A. A. Waterman pen steadily for some years?

Objected to on the ground of attempt to confuse witness.

A. No, sir.

RXQ12. Do you know anybody in Baltimore who is using the
3396 A. A. Waterman pens? A. I do not.

RXQ13. Have you met any such person in the last five years? A. I have not.

RXQ14. And you have not discussed the quality of the A. A. Waterman pen with such a person? A. No, sir; not with such a person.

RXQ15. As a matter of fact, do not people who use, or want to use, the A. A. Waterman pen, describe their pens as the Waterman pen; do not consumers so describe them? A. We have not handled any of the other makes of Waterman pen in the past few years, and consequently I am unable to answer that question.

RXQ16. Have you not met or seen or talked with people who used the A. A. Waterman pen, consumers who have used it? A. I have not.

RXQ17. And without any discussion with anybody who has used that pen and does use it as a consumer, and without having seen that pen, you are still willing to testify as an expert that the L. E. Waterman pen today is superior as a pen to the A. A. Waterman pen? A. I am.

RXQ18. You testified that the A. A. Waterman pen was sold cheaper than the L. E. Waterman pen? A. Yes, sir.

RXQ19. And you were compelled to put in a cheaper line or lines at reduced prices, in order to meet competition? A. Yes, sir. 3398

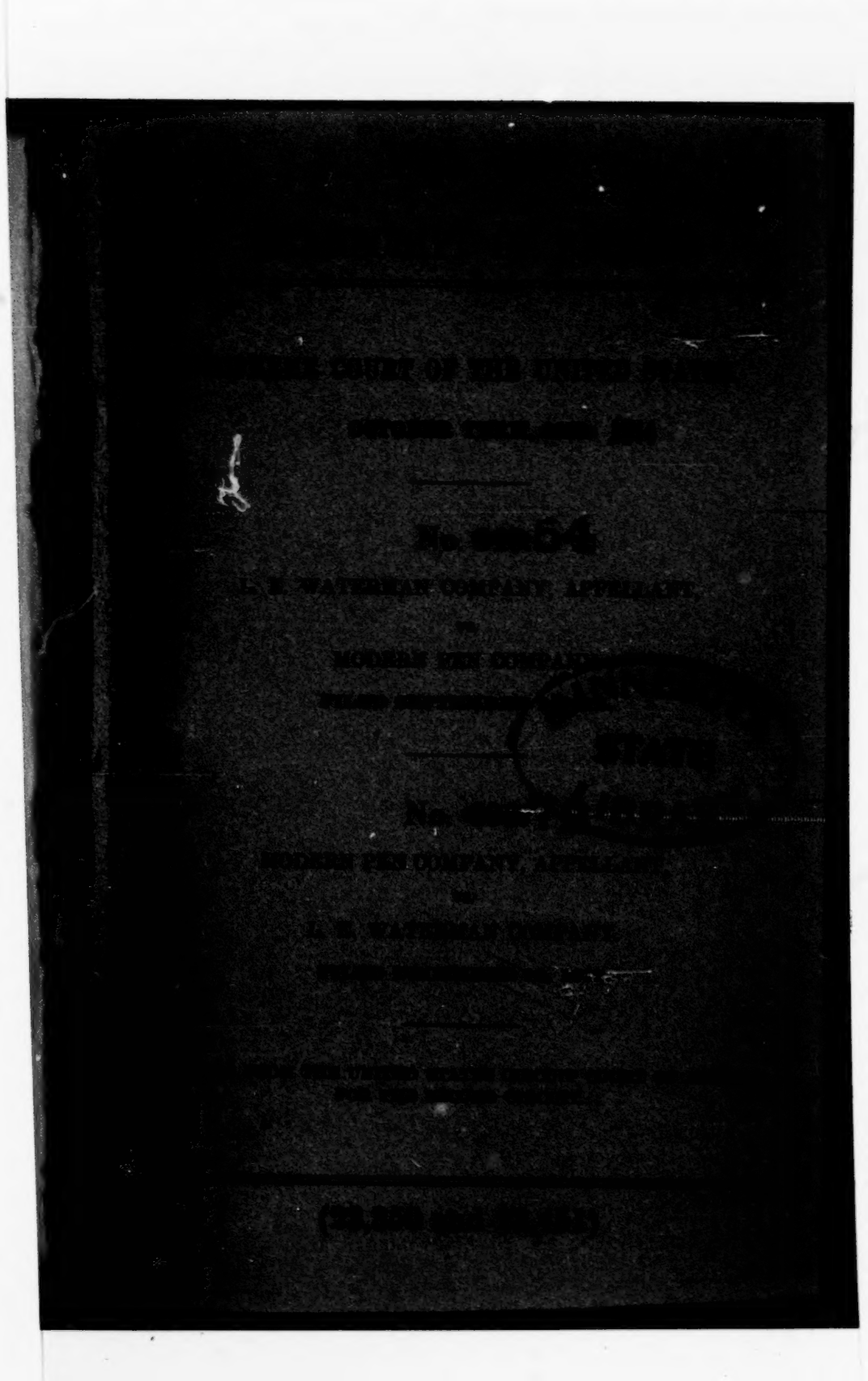
RXQ20. Whose line at reduced prices did you put in to meet that competition? A. We put in various makes and I think amongst them was the A. A. Waterman pen, or the A. Waterman pen; I don't recall just exactly the name it was sold under at that time.

RXQ21. Did you put in a line, at a reduced price, manufactured and sold by L. E. Waterman Co.? A. We did.

RXQ22. The confusion then, I understand, was due to the fact that the competition required you to put in a cheaper line of pens including a cheaper line manufactured by L. E. Waterman Co.? A. Yes, sir.

RXQ23. On those cheaper lines your profits were not as large as on the higher priced lines? A. They were not. 3399

Examination concluded and signing of signature waived.



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Opinion on petition for rehearing	1901
Petition of the Modern Pen Company for a modification	1901
Affidavit of Hobart W. Geyer	1903
Order denying further changes	1906
Election by the L. E. Waterman Company	1907
Order denying petition for rehearing	1908
Final decree	1908
Petition for appeal by the L. E. Waterman Company	1909
Affidavit of Frank D. Waterman	1909
Assignment of errors by the L. E. Waterman Company	1910
Order granting appeal of L. E. Waterman Company	1912
Bond on appeal of L. E. Waterman Company	1912
Clerk's certificate	1915
Citation to Modern Pen Company and service	1916
Petition for appeal by the Modern Pen Company	1917
Affidavit of Hobart W. Geyer	1917
Assignment of errors by Modern Pen Company	1918
Order allowing appeal of Modern Pen Company	1919
Bond on appeal of Modern Pen Company	1920
Clerk's certificate	1921
Citation to the L. E. Waterman Company and service	1922

Demurrer. 3403

UNITED STATES CIRCUIT COURT,

In Equity.

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Complainant,

vs.

MODERN PEN COMPANY,
Defendant. 3404

To the Honorable, the Justices of the Circuit Court of the United States, for the Southern District of New York:

The demurrer of the Modern Pen Company, the above named defendant, to the bill of complaint of the L. E. Waterman Company, the above named complainant:

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true, in such manner and form as the same are herein set forth and alleged, demurs to said bill and for causes of demurrer shows:

1. That it appears by the complainant's own showing by the 3405
said bill, that the complainant corporation is a citizen of the State of New York, having its principal place of business in the Southern District of New York, and that the defendant is a corporation, existing under the laws of the State of West Virginia, and having its principal place of business in the Southern District of New York, and that therefore this Court has no jurisdiction of the parties hereto because of the diverse citizenship thereof.

2. That it appears upon the face of said bill of complaint, by complainant's own showing, that it does not state facts sufficient

3406 *Demurrer*

to constitute a cause of action, and that the complainant is not entitled to the relief prayed by the bill against this defendant.

3. Said bill of complaint shows upon its face that the alleged offense of the defendant arose in selling fountain pens and parts thereof, bearing the stamp "A. A. Waterman & Co." but contains no allegation of fact to show that this defendant, as the selling agent of A. A. Waterman & Co., is not entitled to the use of the said trade name of "A. A. Waterman & Co."

4. Said bill of complaint contains no allegation that the defendant has simulated the alleged trade-mark of the complainant, except in the bare fact that it stamps its wares with the trade
3407 name of "A. A. Waterman & Co." and alleges no fact to show that the complainant is entitled to the exclusive use of the word "Waterman" or "Waterman's" or that the defendant, or A. A. Waterman & Co. or any other person or firm having the right to use the word "Waterman" either as a family name or by the proper assignment thereof, has not the equal right with the complainant to the use of such name.

5. That it appears in the bill of complaint that the alleged registered trade-mark of the complainant, to wit, the word "Waterman's" is merely the name of the complainant's assignor, not written, printed, impressed or woven in some particular or distinctive manner nor associated with a portrait of the individual.

3408 6. That it does not appear by the bill of complaint that the said alleged registered trade-mark, to wit, the word "Waterman's" had been in actual and exclusive use by the applicant therefor, or by complainant or its predecessors, in commerce with foreign nations, or among the several States, or with the Indian tribes, for ten years preceding the passage of the Trade-Mark Act of 1905.

7. That it does not appear by said bil of complaint that the defendant has used any of the said alleged trade-marks set forth in said bill of complaint in commerce with foreign nations, or among the several States of the United States or with Indian tribes.

Demurrer

3409

8. That it does not appear from the said bill of complaint that this defendant has ever used the word "Ideal" in connection with the manufacture and sale of fountain pens or the parts thereof, nor does said bill of complaint allege any fact to show that the defendant has infringed the complainant's trade-mark in so far as the word "Ideal" is concerned.

9. That the alleged registered trade-mark "Waterman's" of the complainant is shown by the bill of complaint to be invalid, at least as against this defendant, and that the alleged registered trade-mark "Waterman's Ideal Fountain Pen, N. Y." of the said complainant is shown by the bill of complaint to be invalid, at least as against this defendant, except as to the word "Ideal" concerning which there is no allegation of infringement.

3410

10. That the acts of infringement of said trade-mark alleged in the bill of complaint to have been done by the defendant were no infringement of said registered trade-marks—

And that therefore this complainant has not in and by said bill of complaint made or stated any such cause as doth or ought to entitle this Honorable Court to take jurisdiction over this cause, or the alleged acts of unfair competition alleged in the bill of complaint.

Wherefore this defendant demurs to the jurisdiction of this Court and humbly demands the judgment of this Court whether they shall be compelled to make any further or other answer to the bill of complaint and pray to be hence dismissed with the costs and charges in this behalf most wrongfully sustained.

3411

And this defendant, as grounds of special demurrer, does hereby demur:

11. To so much of the prayer for relief as asks for damage suffered by the complainant for any infringement of said registered trade-marks and for cause therefor, shows that it does not appear from the bill of complaint that the registrant of said registered trade-marks has given any notice to the public or to this defendant that the said trade-marks were registered or of any infringement of said defendant as required by statute.

3412

12. As to so much of the prayer for relief as asks for an injunction against the defendant restraining it as alleged in the paragraphs of said prayer marked "1," "2" and "3" and from each and every part of said prayer for relief.

And for cause of demurrer shows that the complainant is not entitled to any such relief as prayed for, because such injunction, if granted as prayed, would prevent defendant from so doing in a lawful way or manner.

Wherefore this defendant demurs to said prayer for relief and each and every part thereof separately and humble prays that the bill of complaint as to such prayer of relief and each part
3413 thereof, be dismissed with costs against this plaintiff.

ALEXANDER S. BACON,
Attorney for Defendant,
37 Liberty Street,
New York City.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

Dated, New York City, June 2, 1910.

ALEXANDER S. BACON,
Of Counsel for Defendant,
Modern Pen Company.

3414 State of New York,
City and County of New York, } ss.:
Southern District of New York,

I, Isaac E. Chapman, being duly sworn, deposes and says: I am the president of the defendant, the Modern Pen Company, above named, and that the foregoing demurrer is not interposed for delay.

ISAAC E. CHAPMAN.

Sworn to before me this
3rd day of June, 1910.
Joseph J. Glatzmayer,
Notary Public,
Kings County, No. 125.
Certificate filed in New York County.

(Endorsed): U. S. Circuit Court, Southern District N. Y.—Filed June 6, 1910—John A. Shields, Clerk.

Answer to Amended Bill of Complaint.

3415

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Complainant,
against
MODERN PEN COMPANY,
Defendant.

3416

The answer of the above named defendant to the amended bill of complaint of the above named complainant:

In answer to the said amended bill of complaint, the defendant, the Modern Pen Company, says as follows:

A. This defendant admits the allegations of the FIRST paragraph of the said amended bill of complaint, which paragraph relates to the incorporation and residence of the parties hereto.

B. This defendant has no knowledge or information, sufficient to form a belief, as to the allegations contained in the SECOND paragraph of the said amended bill of complaint and therefore denies each and every allegation thereof. This de- 3417
defendant alleges, on information and belief, that the word "WATERMAN'S" and the words "WATERMAN'S IDEAL FOUNTAIN PEN, N. Y." are not trade-marks of the complainant and are not susceptible of being adopted as trade-marks in that the family name "WATERMAN'S" and the word "Fountain Pen, N. Y." cannot legally be used or adopted as a trade-mark.

C. This defendant has no knowledge or information sufficient to form a belief, as to the allegations contained in the THIRD paragraph of the said amended bill of complaint and it therefore denies each and every allegation thereof. This defendant alleges on information and belief, that the word

3418 *Answer to Amended Bill of Complaint*

"WATERMAN'S" and the words "WATERMAN'S IDEAL FOUNTAIN PEN, N. Y." are not trade-marks of the complainant and are not susceptible of being made trade-marks, in that the word "WATERMAN'S" and the words "FOUNTAIN PEN, N. Y." cannot legally be adopted as a trade-mark.

D. This defendant has no knowledge or information sufficient to form a belief, as to the allegations contained in the FOURTH paragraph of the said amended bill of complaint and therefore denies each and every allegation thereof. This defendant alleges on information and belief, that the word "WATERMAN'S" and the words "WATERMAN'S IDEAL FOUN-
3419 TAIN PEN, N. Y." are not trade-marks of the complainant and are not susceptible of being made trade-marks in that the word "WATERMAN'S" and the words "FOUNTAIN PEN N. Y." cannot be legally registered or adopted as trade-marks. Defendant denies absolutely that during the time indicated in said paragraph "the name "WATERMAN" and "WATERMAN'S" affixed to, or used in connection with the sale of fountain pens has denoted and indicated origin and has denoted and indicated that the plaintiff company is the maker of fountain pens bearing said name" but on the contrary, this defendant alleges, on information and belief that the use of the name "Waterman" and "Waterman's" by the complainant has not been exclusive at any time for more than twelve years last past; that others have legally made use
3420 of the words "Waterman" and "Waterman's" in connection with the manufacture and sale of fountain pens and the parts thereof, and the word "Waterman" is a family name and not susceptible of being appropriated and registered as a valid trademark; that during said period various firms of "A. A. Waterman & Company" with the full knowledge of this complainant, have been continuously manufacturing and selling fountain pens and parts thereof bearing the stamp and trade name of "Waterman" without interference from this complainant and under the express permission of a decree of the Supreme Court of the State of New York entered in the office of the Clerk of the County of New York on the 23rd day of September, 1898, in an action in the said Court, entitled L. E. Waterman Company,

plaintiff, against Arthur A. Waterman and Edward L. Gibson, defendants, and that the use of the said trade name "Waterman" or "Waterman's" is not exclusive in this complaint but the respondent has equally with the complainant the right to the use of the said name.

E. This defendant denies each and every allegation contained in the FIFTH paragraph of the said amended bill of complaint, excepting that it denies any knowledge or information, sufficient to form a belief, as to what unnamed dealers may have done by way of advertising and offering for sale the wares sold by the defendant; and except that this defendant admits, and it alleges, that it is a selling agent of the firm of A. A. Waterman & Co., 3422
which manufactures and sells fountain pens and the parts thereof stamped with the words "A. A. Waterman & Co., N. Y." as they have a right so to do, and it alleges that the said stamp "A. A. Waterman & Co., N. Y." is not an imitation or simulation of the complainant's corporate name or trade-marks or the trade name of any of its goods but on the contrary this defendant alleges that it has the exclusive right to use, in the Eastern part of the United States the trade name of "A. A. Waterman & Co." and has the right to the use of the words "Waterman" or "Waterman's" in connection with the manufacture and sale of fountain pens and the parts thereof.

F. This defendant denies each and every allegation contained in the SIXTH paragraph of the said amended bill of complaint 3423
except that the defendant admits (1) that there is no person by the name of Waterman now connected with the defendant's business in that the defendant is a corporation; (2) that the defendant advertises and holds itself out as sole selling agent of A. A. Waterman & Co.; (3) that it, the defendant, advertises and represents that the fountain pens advertised, offered for sale and sold by the defendant, and which bear the mark or stamp of A. A. Waterman & Co., are manufactured by the said A. A. Waterman & Co.

Defendant denies that the firm name of A. A. Waterman & Co., is a fictitious business name and alleges that it legally and

3424 *Answer to Amended Bill of Complaint*

rightfully bears that name and denies that the business of A. A. Waterman & Co., is used for the purpose of deceiving the public; denies that it is used with the intention or purpose of passing off on the public, pens other than those manufactured by the said A. A. Waterman & Co., and alleges that it has never used such name for the purpose of indicating that its wares were those manufactured by the complainant, but on the contrary it has at all times sought to have the public distinguish the inferior out-of-date pens manufactured by the complainant under an expired patent from the superior up-to-date pens manufactured by A. A. Waterman & Co. under existing patents; and alleges that the defendant and various firms of A.
3425 A. Waterman & Co., have spent hundreds of thousands of dollars in advertising its wares in order that the public might know that the defendant's fountain pens were to be distinguished from the inferior pens manufactured by the complainant.

G. This defendant denies each and every allegation contained in the SEVENTH paragraph of the said amended bill of complaint except that it has no knowledge or information sufficient to form a belief as to the allegations thereof relating to the repair and exchange of pens and the belief of unnamed purchasers as to what party was the manufacturer of their pens. Defendant admits that some confusion necessarily has arisen by reason of the fact that the name L. E. Waterman Company and A. A. Waterman
3426 & Co., are somewhat similar but alleges that such confusion arises from that similarity only and from no other reason and that A. A. Waterman & Co., have as much right to the word "Waterman" or "Waterman's" as has the complainant and the defendant has the exclusive right to use, in the Eastern part of the United States, of the trade name A. A. Waterman & Co.

H. This defendant denies each and every allegation contained in the EIGHTH paragraph of the said amended bill of complaint.

I. This defendant denies each and every allegation contained in the NINTH paragraph of the said amended bill of complaint.

J. This defendant denies each and every allegation contained in the TENTH paragraph of the said amended bill of complaint.

K. FOR A FURTHER SEPARATE AND DISTINCT DEFENSE TO THE SAID AMENDED BILL OF COMPLAINT THIS DEFENDANT ALLEGES:

(1) That it is the sole selling agent of the firm of A. A. Waterman Co., composed of Isaac E. Chapman and William L. Chapman who legally do business under the firm name of A. A. Waterman & Co., as the owners, and entitled to the exclusive use, in the Eastern part of the United States, of the trade name of A. A. Waterman & Co., by lawful assignment in writing of the good will, trade name, trade-marks and patents of the firm of A. A. Waterman & Co., which at the time of said written assignment was composed of Arthur A. Waterman, Isaac E. Chapman and William L. Chapman, and the said firm of A. 3428
A. Waterman & Co., have the same right under the laws of the State of New York, and of the United States to the use of the trade name of A. A. Waterman and of A. A. Waterman & Co., as if the said Arthur A. Waterman were a member of said firm after July 1st, 1906, as he was prior to that time.

Defendant alleges, on information and belief, that said A. A. Waterman, either individually or as a member of a firm of A. A. Waterman & Co., of which he was an actual and *bona fide* member, has continuously manufactured and sold fountain pens and the parts thereof, stamped with the trade name A. A. Waterman & Co., for more than twelve years last past. That this complainant is not entitled to the exclusive use of the word "Waterman" in that it is a family name and cannot legally be appro- 3429
priated and registered as a trade-mark or a trade name, in that neither this complainant nor any other person has had, nor has been entitled to the right to the exclusive use of the word "Waterman" for the ten years preceding the year 1905.

That in the year 1893 this complainant brought an action in the Supreme Court of the State of New York, entitled L. E. Waterman Company, plaintiff, against Arthur A. Waterman and Edward L. Gibson, defendants, wherein a decree was entered enjoining the defendants therein from the use of the form of a corporate name of A. A. Waterman Pen Co., but expressly permitted those defendants the use of the trade name of A. A. Waterman & Co. in the words following, "But the defendants are

3430 *Answer to Amended Bill of Complaint*

not prohibited from indicating that the fountain pens made by them are made or prepared or sold for or by Arthur A. Waterman & Company or A. A. Waterman & Company."

That continuously since said decree and with the full knowledge, and without opposition of this complainant said A. A. Waterman (the said assignor of the present firm of A. A. Waterman & Co.) either individually or as a member of the firm of A. A. Waterman & Co., has continuously manufactured and sold fountain pens and the parts thereof bearing the stamp of A. A. Waterman & Co., and the present firm of A. A. Waterman & Co., now maintains that it has the absolute right, by valid assign-
3431 ment, to the exclusive use of the good will, trade name, trade-marks and patents lately belonging to Arthur A. Waterman and that this complainant is not entitled to the exclusive use of the word "Waterman" or "Waterman's" and this defendant has never, either directly or indirectly, violated any valid trade-mark or trade name of the complainant of which it has the exclusive right to use.

Wherefore this defendant demands that the complainant's amended bill of complaint be dismissed with costs and that a decree may be entered giving to the defendant affirmative relief as to its rights as claimed in this answer.

ALEXANDER S. BACON,
Solicitor for Defendant,
37 Liberty Street,
3432 City of New York.

City, County and State of New York,
Eastern District of New York, } ss.:

Hobart W. Geyer, being duly sworn, says that he is the Treasurer of the Modern Pen Company, the defendant above named that he has read the foregoing answer to the amended bill of complaint herein and knows the contents thereof, that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the reason that this verification is made by deponent and not by the defendant in per-

son is that the defendant is a foreign corporation; the sources of deponent's information and the grounds of his belief as to all matters therein alleged to be stated on information and belief are conversations with Mr. A. A. Waterman and documents subject to deponent's inspection.

HOBART W. GEYER.

Sworn to before me this
5th day of August, 1910.
Richard E. Nebel,
Notary Public,
Kings County.
(Seal)
Certificate filed in New York County. 3434

A copy of the within answer is hereby admitted.
Dated, August 6th, 1910.

WATSON & RAYMOND,
Attorneys for Complainant.

(Endorsed): U. S. Circuit Court, Southern District of N. Y., Filed Aug. 8, 1910, John A. Shields, Clerk.

3435

3436 CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

vs.

MODERN PEN COMPANY,
Defendant.

3437 Please to take notice that we shall proceed to take proofs for final hearing on the part of the defendant, under the Equity Rules and in accordance with the Statutes of the United States in such cases made and provided, and in pursuance of the rules and practice of this Court, before Frederick M. Adams, an Examiner of this Court, under such statutes and rules, at the office of Alexander S. Bacon, #37 Liberty Street, Borough of Manhattan, City of New York, on the 13th day of April, 1911, at 10:30 o'clock in the forenoon.

We desire the evidence to be adduced in this cause to be taken orally.

You are invited to attend and cross-examine the witnesses produced. The examination will be adjourned to such time and
3438 place as may be required, without further notice.

Dated, New York City, April 12, 1911.

Very respectfully,
ALEXANDER S. BACON,
Solicitor for Defendant,
37 Liberty Street,
New York City.

To:
Messrs. Watson & Raymond,
Solicitors for Complainant,
10 Wall Street,
New York City.

Harry C. Bartlett, Jr. 3439

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.

3440

Proofs for final hearing on the part of the defendant under the Equity Rules and Act of Congress as amended, and in accordance with the Statutes of the United States, and in pursuance of the rules and practice of this Court, taken before Frederic M. Adams, an Examiner of this Court, at the office of Alexander S. Bacon, at No. 37 Liberty Street, Borough of Manhattan, New York City, on the 27th day of March, 1911, at 10 o'clock in the forenoon, pursuant to notice hereunto annexed.

Appearances:

Samuel S. Watson, for Plaintiff.
Alexander S. Bacon, for Defendant.

3441

HARRY C. BARTLETT, JR., a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct-examination by Mr. Bacon:

Q1. State your name, residence and business? A. Harry C. Bartlett, Jr., Owensboro, Kentucky; my present business is with the Weidlich and Simpson Pen Company.

Q2. Were you formerly employed by the Modern Pen Company? A. I was.

Q3. When did that employment begin? A. In January, 1908, I think.

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Q4. And continued until when? A. Until the first of February, 1911.

Q5. Did you cover the states of Ohio, Indiana and Michigan during that period of employment by the Modern Pen Company? A. Yes.

Q6. Do you remember calling at Delaware, Ohio, and selling a bill of goods to Mr. Sells, or Sells Brothers, in 1910? A. I remember calling on him, but I don't think I sold him anything.

Q7. Whom did you see, if your remember, when you called upon them? A. The two brothers.

Q8. You saw them both? A. Yes.

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Q9. Do you remember what conversation you had with them at that time, calling your special attention to whether or not you introduced yourself and told who you were representing? A. Yes.

Q10. State what you said to these brothers? A. I told my name and gave them my card and told them I was selling A. A. Waterman's fountain pens, self-filler.

Q11. Did you call them merely Waterman pens? A. No, sir.

Q12. Did you say anything about the Modern Pen Company? A. Yes, I showed them a line of pens.

Q13. Are you sure that you told them that you represented the A. A. Waterman pen and not merely the Waterman pen? A. I am sure I told them the A. A. Waterman pen.

Q14. And he knew what you were talking about? A. Yes, I

3444

think he did.

Mr. Raymond: I object to the question and ask that the answer be stricken out on the ground that it is a conclusion of the witness as to what he knew.

Q15. Did you give him any advertising literature? A. Nothing, only my card.

Q16. Have you one of those cards? A. I don't believe I have. I have not any.

Defendant's counsel produces a card which is offered in evidence.

3445

Objected to as incompetent, irrelevant and immaterial.

Marked Defendant's Exhibit A, March 27, 1911, F. M. A., Exr.

Q17. Do you remember the substance of the entire conversation? A. Yes.

Q18. Give it to us as nearly as you can? A. I tried to sell them pens and they looked the pens over and the prices, etc., and then said they handled a large stock of Bolles' pens and they would have to dispose of them before they could buy any more pens; and I talked about trading them out of those pens, taking them up in exchange for our pens, and the one that I was talking to at that time said that he would have to take it up with his brother and I should come back later. I did call, I think, two or three hours later, and talked to the brother, and he told me he would let me know this fall.

3446

Q19. When you talked with the second brother, did you say that you represented the Waterman Company? A. He asked me which one, which company, I represented and I told him the Modern Pen Company, A. A. Waterman.

Q20. About what time of the year was this? A. The last of August or along the first of September, 1910.

Q21. Do you also remember being in Newcastle? A. Yes.

Q22. And calling upon Mr. Buhrman? A. Yes.

Q23. That was about the same time? A. It was several weeks later; it was in October, I think.

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Q24. Do you remember what conversation you had with him along the same lines? A. Yes, when I went in and introduced myself I asked him how the A. A. Waterman self-fillers were selling with him, and he went right up in the air; he said he didn't want any more of them, he had so much trouble with them that he didn't want to handle them any further.

Q25. Then he had been accustomed to selling them before, had he? A. Yes, he sold them before.

Q26. Did you tell him that you represented the Waterman pen or the A. A. Waterman? A. The A. A. Waterman.

Q27. He stated in his examination that he did not know the firm called A. A. Waterman & Co.; is that true?

Mr. Raymond: Objected to.

A. I can only state the conversation when I sold him the first time.

Q28. Please do so? A. I called on him shortly after they had bought this store, their present place of business. I showed him a line of pens and he asked me what the difference was between our pens and the L. E. Waterman pens. I showed him the difference, and he said he could get our pens from the jobbers. I told him he could. He got McClurg's catalogue and compared the prices and I showed him where he could buy the pens direct from us cheaper than he could buy them from McClurg. I also
3449 told him that he could buy L. E. Waterman pens from Montgomery Ward. I showed him in the catalogue cuts of their pens and the description of them, prices, etc.

Q29. Was the first time you went to him on or about the 31st of March, 1910? A. Yes, about that.

Q30. Then this conversation that you have just now referred to was the first conversation in March, 1910? A. Yes.

Q31. Did you introduce yourself at that time as selling Waterman pens? A. No, sir.

Q32. What did you tell him then? A. I told him I was selling A. A. Waterman pens, self-fillers.

Q33. Did you tell him anything about the Modern Pen Company? A. Yes, when he signed the order he asked me who the
3450 Modern Pen Company was. I told him it was the same as A. A. Waterman.

Q34. When you took his order, did you give him a duplicate of the order? A. Yes, always.

Q35. Is that the order that you took, on March 12, 1910, shipped March 21, 1910 (showing the witness a paper)? A. Yes.

Q36. Did he have a carbon copy? A. I gave it to him.

Q37. At the time? A. I did.

Q38. Is that the blank that you always used in making a sale? A. It is.

Q39. Did you ever make a sale at any time when you did not give to the customer at the time of taking the order a duplicate order filled out on that bank? A. I always gave them a duplicate.

Defendant's counsel offers in evidence the blank referred to.

Same objection.

Marked Defendant's Exhibit B, March 27, 1911, F. M. A., Exr.

Q40. Have you sold him a number of bills after that? A. No, sir, only that one bill.

Q41. Do you remember selling a bill of goods to Herbert Baker, druggist, of Allegan, Michigan? A. Yes.

Q42. About August 26, 1910? A. Along there, yes.

Q43. What did you say when you introduced yourself to Mr. Baker? A. I told him I was selling the A. A. Waterman pens 3452
and showed him a line and he looked it over and talked about it and he asked me to come back after supper, that the man he bought out would be there and go over the line with him. I went back after supper and they were both there and looked the line over, talked about our pens and Parker pens and L. E. Waterman pens and John Holland pens.

Q44. Did you sell him a bill of goods that day? A. I did.

Q45. Did you give him a duplicate order? A. I did.

Q46. And was that on the same blank as the one in evidence? A. Yes; and while I was selling this bill of goods he had two customers come in who selected pens, special pens, and ordered them.

Q47. From your samples? A. Yes. 3453

Q48. These pens were shipped to him? A. I think so.

Q49. You promised him a case? A. Yes.

Q50. And the case was not sent on? A. I told him the case probably would follow; it might be a week or two weeks behind the pens, but that they would be shipped directly from the factory at Kendallville, Indiana, where the cases were made; and I also gave him exclusive agency of the town.

Q51. Did you explain to him the difference between L. E. Waterman and A. A. Waterman? A. Yes.

Q52. And told him that he must make a distinction in selling the goods? A. Yes.

Q53. What did you say about it? A. I didn't tell him what he could do, no. I showed him our pens and explained the difference between our pen and the L. E. Waterman.

Q54. He sent back the pens unopened, didn't he? A. I don't know.

Q55. You have not seen him since? A. No.

Q56. Didn't you have any correspondence with him? A. Yes.

Q57. Have you a copy of the letter? A. I have not. Mr. Geyer wrote me that he returned the pens, claiming that he thought at the time he was buying L. E. Waterman pens, and he wrote him about it.

3455 Q58. Didn't he say that the reason he sent them back was because they had not sent the case? A. Yes, he said he thought he was buying the L. E. Waterman pens and as the case had not come the pens were of no use to him without the case; he kept them, I believe, two or three weeks and said that he now had bought the L. E. Waterman pens.

Q59. Some time before the case came the Waterman people had been around and sold him a lot of goods so he sent them back? A. Yes, he sent them back, I guess so; that is what he said.

Q60. I show you this order taken on August 26th, 1910, and ask you if that is the Herbert Baker order (handing witness the paper)? A. Yes.

Q61. Signed by you? A. Yes.

3456 Q62. And it is in all respects similar to the other order put in evidence today? A. It is.

Q63. "The Modern Pen Company, 22 Thames Street, Selling Agents for A. A. Waterman Company"—in large letters at the bottom? A. Yes.

Q64. Did you call on anybody else there? A. No.

Q65. Do you remember calling at Holland, Michigan, on a Mr. Henry R. Brink, at about just the same time? A. Yes.

Q66. What did you say to Mr. Brink when you went to see him? A. I introduced myself and told him I was selling the A. A. Waterman pens.

Q67. Did you give him a card, too? A. I don't remember whether I did or not. Some of them I would give a card and some I would not.

Q68. Did he know all about the difference?

Mr. Raymond: That is objected to.

Q69. Did he state anything about the two companies? A. Yes.

Q70. What did he say about them? A. He asked me if they were not in trouble. I told him they were having a little trouble, yes. I talked quite a bit about it. I did not sell him any pens, I don't believe; I don't remember whether I sold him or not.

Q71. Here are two letters marked for identification. Just 3458
read those (handing witness the papers). I show you what purports to be an order dated August 26th and ask you if you can now state whether you sold him a bill of goods? A. I did.

Q72. How much did it amount to? A. $30 to $35, I should think; $35, I guess.

Mr. Bacon: We offer in evidence the letters for identification, dated December 15th, 1910, H. R. Brink to Modern Pen Company; and December 19th, 1910, Modern Pen Company to H. R. Brink.

Mr. Raymond: Objected to as incompetent, irrelevant and immaterial and not binding in any way on the plaintiff.

3459

The two letters are marked Defendant's Exhibits C and D, March 27th, 1911, F. M. A. Exr.

Copies to be substituted for the originals.

Q73. Did you also call upon a man named Donald D. Bradford of Holland, Michigan, at about the same time? A. I called on several there, but I don't remember the names. I called on a druggist there that, I think, used to handle our pens.

Q74. Did you go into the store of any person there in Holland and say that you were the western representative of the Waterman pen? A. No, sir; only the A. A. Waterman.

3460

Q75. Did you in each case state that you represented A. A. Waterman & Company and the Modern Pen Company? A. Yes.

Q76. Do you remember at all calling upon this druggist, Mr. Bradford? A. I called on a druggist there; I don't remember the name.

Q77. But you do know that if you had any conversation with him at all, in relation to your pen, that you told him whom you represented?

Mr. Raymond: That is objected to as purely theoretical.

A. Yes.

3461

Q78. Had you had any instructions when you first started out to sell A. A. Waterman pens, as to what you should do, and if so, state what the instructions were and when they were given and who gave them? A. The Modern Pen Company, Mr. Geyer instructed me that they had no connection whatever with the L. E. Waterman Pen Company and that I must sell the Modern Pen Company, A. A. Waterman pens, on their reputation and must never state that they were the L. E. Waterman or Ideal Waterman, or that they had any connection whatever with that company.

Q79. Did he say anything about using the word Waterman alone, or that you were to use the initials in all cases? A. He did not say anything about that, no; only he instructed me as

3462

to the name of the company.

Q80. And that you were to tell them in each instance that they were A. A. Waterman goods?

Mr. Raymond: Objected to as leading.

A. Yes.

Q81. Did you ever at any time, during the period that you were working for the Modern Pen Company, or A. A. Waterman Company, introduce yourself as a representative of the Waterman pen? A. No, sir.

Q82. Did you at all times and in every instance represent plainly to the purchaser, or attempted purchaser, that you represented A. A. Waterman's goods?

Mr. Raymond: Same objection and leading.

A. Yes.

Q83. Had you any correspondence in relation to these matters with the home company? A. Yes.

Q84. Are these letters and copy letters that you sent and received in relation to this matter, and to a controversy with the A. A. Waterman Company of Chicago (showing witness paper)? A. Yes.

Mr. Bacon: I offer these letters in evidence and will furnish copies of them. They are as follows:

Modern Pen Company to H. C. Bartlett, March 31, 1909. 3464

Marked Defendant's Exhibit E, March 27th, 1911, F. M. A., Exr.

Modern Pen Company to Bartlett, dated April 7, 1909.

Marked Defendant's Exhibit F, March 27, 1911, F. M. A., Exr.

Bartlett to Modern Pen Company, dated April 4, 1909.

Marked Defendant's Exhibit G, March 27, 1911, F. M. A., Exr.

Bartlett to Modern Pen Company, dated May 15, 1910.

Marked Defendant's Exhibit H, March 27, 1911, F. M. A., Exr.

Modern Pen Company to Bartlett, dated May 19, 1910.

Marked Defendant's Exhibit I, March 27, 1911, F. 3465 M. A., Exr.

Modern Pen Company to Bartlett, dated August 6th, 1909.

Marked Defendant's Exhibit J, March 27, 1911, F. M. A., Exr.

Modern Pen Company to Bartlett, dated September 7th, 1909.

Marked Defendant's Exhibit K, March 27, 1911, F. M. A., Exr.

Modern Pen Company to Bartlett, dated September 13, 1909.

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Marked Defendant's Exhibit L, March 27, 1911, F. M. A., Exr.

Bartlett to Modern Pen Company, dated September 9th, 1909.

Marked Defendant's Exhibit M, March 27, 1911, F. M. A., Exr.

Bartlett to Modern Pen Company, dated October 23, 1910.

Marked Defendant's Exhibit N, March 27, 1911, F. M. A., Exr.

Mr. Raymond: I object to all the above letters on the ground that they are incompetent, irrelevant and im-

3467 material and are an attempt on the part of the defendant company to make a record for the purposes of this suit.

CROSS-EXAMINATION by Mr. Raymond:

XQ85. Will you state specifically what instructions were given you at the time when you became a member of the selling force of the Modern Pen Company? A. I was instructed to sell the pen as Modern Pen Company—selling agent for A. A. Waterman.

XQ86. Who gave you these instructions? A. The company—the Modern Pen Company.

XQ87. Who in the company? A. Mr. Geyer.

3468 XQ88. Is he the only person you had any conversation with on this subject? A. He is the man I received the instructions from, yes.

XQ89. Have you talked with any of the other salesmen? A. Mr. Rightmire, yes.

XQ90. Did you ever have any conversation with him or receive any instructions from him as to how you should sell these pens? A. No.

XQ91. Had you had any previous experience in the fountain pen business? A. Yes.

XQ92. Who were you with? A. William A. Welty of Waterloo, Iowa.

XQ93. Is he a manufacturer of fountain pens? A. I don't know.

XQ94. Did you sell pens for him? A. Yes.

XQ95. What make of pens did you sell? A. William A. Welty.

XQ96. Were you familiar with the pens that were manufactured by the L. E. Waterman Company? A. Yes.

XQ97. Did you know at the time when you came to the Modern Pen Company that the pens that you were to sell were not the pens of the L. E. Waterman Company? A. Yes.

XQ98. How long have you been familiar with the pens of the defendant, the Modern Pen Company? A. Ten or fifteen years. 3470

XQ99. Did you ever handle them or use them? A. Yes.

XQ100. Will you state just what was told you at the time when Mr. Geyer gave you the instructions and started you on the road? A. Nothing further than I have stated.

XQ101. Is that all the conversation that you had about it? A. Yes.

XQ102. And I understand he did not give you any instructions as to how you should sell the pens to the customers, other than that you were to say that you were selling A. A. Waterman pens? A. A. A. Waterman or Modern pens; never to represent them to be L. E. Waterman. He always told me that—wrote me that.

XQ103. Did he give you any instructions as to how you should inform the dealers that they should sell the pens? A. Just what 3471 they bought.

XQ104. I ask you that question. Did Mr. Geyer tell you to instruct the dealers to whom you sold pens how they should sell them to the public? A. No, it was not necessary.

Mr. Raymond: I move to strike out the answer.

XQ105. Did you ever give any dealer to whom you sold pens instructions as to how he should sell the pen to the public? A. I always instructed them as to the working of the pen and explained the pen to them and showed them how to explain it to their customers.

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XQ106. How did you introduce yourself to the trade? A. Sometimes with a card and sometimes told them who I was.

XQ107. What did you say when you told them who you were? A. I told them my name was H. C. Bartlett, Modern Pen Company, A. A. Waterman, New York.

XQ108. Did you know who composed this A. A. Waterman, as you call it? A. Yes.

XQ109. Who did you say composed the concern of A. A. Waterman? A. Mr. Chapman and the Chapman estate.

XQ110. What was said to you by Mr. Geyer about A. A. Waterman? A. Mr. A. A. Waterman personally?

XQ111. Yes? A. That he was not connected with this concern

3473 here; that they bought his interest.

XQ112. Do you remember this letter that you wrote under date of April 4, 1909? A. I don't remember all of it.

XQ113. Do you remember asking "What relation or connection has A. A. Waterman with L. E. Waterman"? A. Yes.

XQ114. Was that ever explained to you? A. Yes.

XQ115. Prior to the date of this letter? A. Yes.

XQ116. Why did you write about it then? A. A dealer asked the question if they were brothers.

XQ117. What did you tell them? A. I told them I didn't think so.

XQ118. Didn't you tell them that they were brothers? A. No, sir, because I did not know.

3474 XQ119. Did you say that you thought they were brothers? A. No, sir.

XQ120. What did you tell the trade about A. A. Waterman? A. I did not tell them anything about A. A. Waterman personally.

XQ121. Did not the trade ever ask you about A. A. Waterman? A. They would ask me sometimes where he was, what he was doing, yes.

XQ122. Did they ask who he was? A. Yes, some of the trade that was not familiar with the two companies would ask.

XQ123. Did you find any of the trade who were familiar with the plaintiff company and A. A. Waterman & Company? A. Yes.

XQ124. And when you found one that was not familiar what did you say to him with reference to A. A. Waterman? A. I explained to him that they had no connection with one another whatever, a different pen, altogether different pen; and I always gave L. E. Waterman credit of having a good pen.

XQ125. What did you say in reference to the organization of the different companies? A. I simply stated that they were two different companies, had no connection whatever with one another.

XQ126. Did you tell them that A. A. Waterman was a company, or his company? A. No, sir.

XQ127. What did you tell them? A. I told them that the Modern Pen Company had bought the A. A. Waterman plant 3476 and patents and business.

XQ128. And that they were the same thing? A. Manufactured the same pen, yes.

XQ129. Did you tell them that A. A. Waterman was a corporation? A. No, sir.

XQ130. What did you say with reference to that? A. It was not necessary to tell them that it was a corporation. The printed matter shows what they are. I told them it was a company. It was not necessary to state that it was a corporation.

XQ131. You told them that it was a company? A. Yes.

XQ132. How did you introduce yourself; how did you try to sell these different dealers? Imagine for a moment that I am a dealer, unfamiliar with the line and you were trying to sell 3477 me a bill of pens? A. I have stated before how I introduced myself.

XQ133. Tell us again? A. I would ask for the buyer. I would say to the buyer, "My name is Bartlett. Modern Pen Company, A. A. Waterman, New York." I would ask if you was in the market for fountain pens. If you said no I would bid you good bye and leave. If you said yes I would show you the pens and explain them to you, giving the discount.

XQ134. How did you describe the pens to the dealer? A. Simply showed him the working of the pen.

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XQ135. What name did you call the pen by that you were showing to the dealer? A. As I stated before, Modern Pen Company, A. A. Waterman.

XQ136. Do you mean to say every time you spoke of these pens you said Modern Pen Company, A. A. Waterman? A. I don't know that it was every time but I always introduced myself as representing that firm.

XQ137. What did you call the pen? A. When I was showing them to you?

XQ138. Yes? A. I would show the pen and tell the number and the price.

XQ139. What did you call it—"Modern Pen Company—
3479 A. A. Waterman"? A. Not every particular pen, no.

XQ140. How would you describe the pen? A. As I have stated before.

XQ141. You have not stated once? A. I have stated that I represented myself to be selling Modern Pen Company pens and A. A. Waterman. It is not necessary in selling a bill of goods to take a pen and say, "This is one of the A. A. Waterman pens. Do you see the name on it?" I did not do that; it was not necessary.

XQ142. What did you call the pen when you talked about it? A. No. 4, No. 12 or whatever it is, 2, 3, 4, 5; $1.50, or whatever the price was.

XQ143. You never mentioned the name of the pen? A. Not
3480 in introducing myself and telling them what I was selling. The name is on the pen. A man could see it.

XQ144. Were you not instructed to talk about the reputation of the pen? A. Certainly.

XQ145. How did you describe the pen when you were talking about its reputation? A. I told them that I had as good a pen as was made.

XQ146. What name did you call the pen? A. Modern Pen Company.

XQ147. And every time—A. Not every pen that I picked up, no.

XQ148. But every time you spoke about the reputation of the pen you talked about Modern Pen Company and A. A. Waterman? A. Yes.

XQ149. Is that the name you gave the pen when you were selling it? A. That is the name; that is the name I introduced myself by—that firm.

XQ150. Have you not some trade name that you usually use in speaking of these pens? A. Some of them were branded A. A. Waterman and some of them Modern Pen Company. If it was Modern Pen Company, self-filler, middle joint, I call it Modern Pen Company. If it was a low joint I would call it A. A. Waterman.

3482

XQ151. What name did you give this pen when you were describing it and talking about its reputation? A. If I was showing him a self-filler I would say "This is a self-filler." If I was showing him a middle joint I would say it was a middle joint, Modern Pen Company.

XQ152. What did you do with the self-filler? A. Called it Modern Pen Company's self-filler.

XQ153. Did you not call them Waterman pens in talking of them? A. No, certainly not. This is an A. A. Waterman. You could call it a Waterman if you wanted to. The name was on there; it shows for itself.

XQ154. Didn't you do it as a matter of fact? A. Not in introducing myself, no.

XQ155. Didn't you do it in talking about the pen? A. No. 3483

XQ156. Didn't you say, "This is a Waterman"? A. An A. A. Waterman pen, yes.

XQ157. When you spoke about the reputation of the pen didn't you say the Waterman pen had a good reputation? A. I said our pen is as good a pen as is made.

XQ158. And you call it a Waterman pen in doing so? A. I might have, yes.

XQ159. Were you in Newark, Ohio, during the last month? A. This last month?

XQ160. Yes? A. No.

XQ161. I mean during the month of February? A. No.

XQ162. The month of January? A. No.

XQ163. The month of December last? A. No. This year you mean 1911?

XQ164. December, 1910? A. No.

XQ165. When were you last in Newark? A. August or September?

XQ166. Is that the last trip you made through that country? A. Newark, Ohio, you mean?

XQ167. Yes, Newark, Ohio? A. Yes.

XQ168. When were you last in Marion, Ohio? A. Last fall.

XQ169. Have you not made any trip through Ohio? A. Not this year, for this company, no. I did make some towns
3485 in Ohio this year for this company, yes.

XQ170. Were you in Zanesville, Ohio, in the present year? A. No, sir.

XQ171. Didn't you call on Mr. Bauer of Zanesville, Ohio? A. I think not. What month was it?

XQ172. January? A. No, sir, I did not.

XQ173. When did you last call on Mr. Marquart, Crestline, Ohio? A. In August, I think, July or August.

XQ174. How did you introduce yourself to him? A. In the usual way.

XQ175. Didn't you tell him you were selling Waterman pens? A. A. A. Waterman yes.

XQ176. Didn't you say you were selling the Waterman pen?
3486 A. No, sir.

XQ177. Did you sell him any goods? A. I don't remember whether I did or not. I sold two or three dealers there but I don't remember whether I sold him or not.

XQ178. Did you call on Mr. Pfleuger in Crestline, Ohio? A. I think I did. I called on several. I don't remember the names.

XQ179. What did you tell Mr. Pfleuger? A. As stated before.

XQ180. Did you hand him a card? A. I don't remember whether I did or not.

XQ181. Didn't you tell Mr. Pfleuger you were selling Waterman pens? A. A. A. Waterman, yes.

XQ182. Did you ever go into a store yet that you said that you represented the Modern Pen Company? A. Did I ever go into a store?

XQ183. Yes? A. And say I was selling A. A. Waterman, Modern Pen Company? Modern Pen Company pens, A. A. Waterman, New York.

XQ184. Did you always put "Modern Pen Company" in front of the "Waterman"? A. Not always.

XQ185. As a matter of fact, you would seldom if ever do it? A. In a majority of times.

XQ186. And say you represented the Modern Pen Company? A. Modern Pen Company, A. A. Waterman & Company, New York; or A. A. Waterman Pen Company, New York. 3488

XQ187. When were you last in Mount Vernon, Ohio? A. I never was there.

XQ188. Steubenville, Ohio; when were you there last? A. I never was there.

XQ189. Didn't you call on Mr. Erwin? A. I did not.

XQ190. Of Erwin & Robinson? A. I did not, I never was in Steubenville in my life.

XQ191. Are you the only man who was covering the Ohio territory during the last year? A. I don't know.

XQ192. For A. A. Waterman? A. I think I was—from New York. Probably A. A. Waterman of Chicago might have had a man in there.

XQ193. Do you remember of anybody else representing the A. A. Waterman Company that was in Ohio during the last month or two months? A. I don't know who they have got covering the territory now. 3489

XQ194. Who was covering it in December, 1910? A. I was there.

XQ195. Were you in Ohio in December, 1910? A. I think not, no, sir. I was not.

XQ196. When were you last in Michigan representing this company? A. August or September? I don't remember the date.

XQ197. Did you go to Ishpeming? A. No.

XQ198. Up in the northern peninsula? A. I never was there.

XQ199. Are you the only man representing the A. A. Waterman Company that was in Michigan? A. No.

XQ200. Who else was there? A. Mr. Rightmire covered part of Michigan.

XQ201. What part of Michigan did you cover? A. Most of the state, except a few of the larger towns.

XQ202. Were you in Port Huron? A. I never was in Port Huron in my life.

XQ203. Detroit? A. I have been in Detroit but never worked it.

XQ204. In Mount Clemens? A. Yes.

3491 XQ205. Who did you call on in Mount Clemens? A. Schweitzer Bros. I believe some drug company, I don't remember. I sold two bills there.

XQ206. When did you call on them? A. In August or September.

XQ207. How did you introduce yourself to Mr. Schweitzer? A. As H. C. Bartlett.

XQ208. Did you give him a card? A. It was not necessary. He knew us, was acquainted with us, handled our goods for years.

XQ209. Did you ever give him any instructions as to how he should sell these pens? A. Mr. Schweitzer?

XQ210. Yes? A. No, sir, he was handling them for years.

3492 XQ211. Did you tell him he should sell them as A. A. Waterman pens? A. No, sir, I did not.

XQ212. Did you tell him he should not sell them as Waterman's? A. No, sir, I did not give him any instructions because he handled our pens a number of years. I don't remember whether he handled anybody's else or not but he was very enthusiastic over our line.

XQ213. Do you know how he sells the pens to the public; did you ever inquire from any dealer how he sells the pens to the public? A. No, sir, it is none of our business.

XQ214. You never gave him any instruction as to how he should sell the pens to the public? A. New customers, yes.

XQ215. When were you last in Decatur, Ill.? A. I don't know whether it was in November; I think it was.

XQ216. November, 1910? A. Yes.

XQ217. Whom did you call on in Decatur? A. All the dealers there mostly.

XQ218. Can you name some of them? A. I recall one name, Armstrong.

XQ219. Did you sell Mr. Armstrong any pens? A. Yes, I sold him a dozen or so dollar pens with no name on except Federal.

XQ220. Did you call on Mr. Wilder? A. Where?

XQ221. In Decatur? A. Yes.

3494

XQ222. What did you say when you called on Mr. Wilder? A. I had quite a talk with Mr. Wilder about the L. E. Waterman Company and the Chicago A. A. Waterman pens and our pens.

XQ223. Did Mr. Wilder ever ask you who A. A. Waterman was? A. He did not. He seemed to be very well acquainted with the gentleman, as well as L. E. Waterman. He carries quite a nice stock of L. E. Waterman pens.

XQ224. What Mr. Wilder are you talking about? A. He is a book man, isn't he?

XQ225. No, I refer to the firm of Wallender, Wilder & Malles, printers and printers' supplies? A. I don't think I ever called on them.

XQ226. Yes you did? A. No. I don't think I ever called on anybody—I don't think I ever called on them.

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XQ227. You sold them four dozen pens? A. I did not. I never sold four dozen pens in that town in my life. I never sold anybody there only Armstrong.

XQ228. Are you the only person that was working that territory for A. A. Waterman Company of New York at that time? A. Yes. Quite a number of Chicago Waterman pens were there. May be that is the one you have in mind.

XQ229. No, these are New York pens, because I bought one of them? A. Look and see if it does not say Chicago?

XQ230. I bought it in March this year? A. That is a different proposition. You bought it out of a window where he had a sale on, didn't you?

XQ231. No. Didn't you call on a man named Williams, an optician? A. No, sir.

XQ232. Did you ever call on him? A. No, sir.

XQ233. Was he not down on your list? A. No, I had no list.

XQ234. What system do you have in reporting to your concern? A. I don't make any reports.

XQ235. Don't you tell them who you call on? A. No.

XQ236. Never report who you see? A. No.

XQ237. In any town? A. No.

XQ238. Never have any list of the A. A. Waterman & Company, New York customers in any town? A. I had a list several years ago but I never carry it with me. When I go into a
3497 town I work the town and call on everybody there that I think I can sell pens to.

XQ239. And you did not call on Mr. Williams? A. No.

XQ240. Did you call on a man named Frisson? A. I might have. I don't remember. I never sold but one man in Decatur and that was Armstrong.

XQ241. How about Bloomington, Ill.? A. I never sold a pen in Bloomington that I know of. The company might have sold some there but I never did.

XQ242. Do you say you did not make Port Huron, Mich.? A. I never was in Port Huron in my life.

XQ243. When were you last in Mattoon, Ill.? A. November, I think.

3498 XQ244. Whom did you see there? A. I saw most of the dealers there. The Mattoon News Company and a drug firm there and a jeweler.

XQ245. Did you call on a man named J. J. Smith in the Post Office Building? A. The Mattoon News Company, yes.

XQ246. Did you sell him any pens? A. I sold him a bill of pens and took up a lot of Parker pens.

XQ247. How did you introduce yourself to Smith? A. I told him my name and whom I represented.

XQ248. Did you give him a card? A. I don't remember whether I did or not. That was a couple of years ago.

XQ249. No, just this last November? A. No, it was not this last November when I sold him.

XQ250. You called on him last November? A. Yes.

XQ251. Did you give Smith any instructions as to how he should sell the pens to the public? A. No, sir, it was not necessary.

XQ252. Didn't you tell him to sell those pens as Waterman pens? A. No, I never told a man like that.

XQ253. Didn't he ask you whether you were selling those pens to the public as Waterman pens? A. No.

XQ254. Who was the jeweler that you called on in Mattoon? A. I don't remember his name. He was an old customer. He has handled our pens for years and he understands the difference between the two pens too. 3500

XQ255. Was it not a pawn broker named Welch? A. Welch is the name I think. He is a jeweler and a pawn broker; also Mayor of the city.

XQ256. How did he introduce himself to you? A. I told him my name was H. C. Bartlett of the A. A. Waterman Pen Company and I wished to place our pens. They are the best pens in the world. He would not have anything else. I sold him. I sent him a lot of pens and had them repaired and cleaned up.

XQ257. Did you tell Mr. Welch how he should sell the pens to the public? A. It was not necessary for he had been handling them for years. 3501

XQ258. Did you tell him that he should not sell these pens as Waterman pens? A. No.

XQ259. Who else did you call on there? A. I sold a druggist near the hotel there. I don't remember the name.

XQ260. Don't you have any list or memorandum of those on whom you call? A. I have no list. I am not with these people now. I turned the list back to them.

XQ261. Did you have a list? A. I had my own list.

XQ262. Have you got that? A. Probably they have. It is not my property.

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XQ263. That contained a list of the people you called on? A. A list of the customers, yes.

XQ264. Would that list refresh your recollection as to whom you called on? A. If I had it, yes.

XQ265. Could you produce it? A. No, sir, not for several days.

XQ266. Can you produce it then? A. Yes.

XQ267. Don't you remember this man's name that you called on in Mattoon? A. The druggist, no.

XQ268. It was on the corner from the hotel? A. Yes, next to the hotel, an old customer; he had handled the pens once before.

3503 XQ269. Didn't you have some conversation with him? A. Yes.

XQ270. As to who A. A. Waterman was? A. Yes.

XQ271. What did you tell him—what did you say? A. That he was not connected with this Waterman at all, that he was connected or had been with a concern in Chicago. He said he knew that; he was aware of that.

XQ272. What did you tell him as to the relationship of the L. E. Waterman Company? A. I told him they were no relation that I knew of.

XQ273. Didn't you tell him he was a brother? A. I did not; he did not ask me.

XQ274. Didn't you tell him he had quit the L. E. Waterman
3504 concern because he had difficulty with L. E. Waterman about making self-filling pens? A. No, sir. He possibly got that information from the Chicago people.

XQ275. You sold him some pens, though didn't you? A. Yes, I sold him two dozen pens.

XQ276. He still has them? A. Yes, he is very well pleased with them.

XQ277. Did you call on anybody in Shelbyville? A. Yes.

XQ278. When were you last there? A. I think November.

XQ279. Whom did you call on there? A. All the dealers there, several of them.

XQ280. Do you remember any of the names? A. I don't remember the names? I had several customers there.

Q281. Did you tell any of these people how they should sell pens? A. No, it was not necessary. I think that several of the dealers there that handled our pens handle L. E. Waterman's pens.

XQ282. When were you last in Peoria? A. I never was in Peoria in my life.

XQ283. In Springfield, Ill.? A. About a year ago.

XQ284. Whom did you call on in Springfield? A. All the dealers there.

Mr. Bacon: I object to all this inquiry. It has gone far enough.

XQ285. Did you call on a druggist named Cobb in Springfield? A. A German on the corner, yes. 3506

XQ286. How did you introduce yourself to him? A. I told him who I was and whom I represented.

XQ287. How did you do it? A. I told him my name was H. C. Bartlett, A. A. Waterman Company, Modern Pen Company, New York.

XQ288. Didn't you tell him you were selling Waterman pens? A. No, only A. A. Waterman and Modern Pen Company.

XQ289. Where else did you go on that trip? A. All over that part of Illinois, into Missouri. I will state the conversation that I had with Mr. Cobb. He told me he did not think he was in the market for fountain pens, that he handled the Loughlin and the Sterling. I told him the Sterling was as good a pen 3507
as was made; that we had practically the same thing, a middle joint pen. He looked the pens over and compared them and asked me the question if I thought that my pen was as good as the Sterling I told him I thought it was but I didn't think it was any better and at that he says, "You are an honest man, I will give you an order."

XQ290. And you sold him a dozen and a half pens? A. A dozen and a half or two dozen, I don't remember which.

XQ291 Did you tell him how to sell those pens to the public? A. I showed him the working of the self-filler and the middle joint.

3508

XQ292. Did you tell him the name that they were to be sold as? A. It was not necessary.

XQ293. What did you tell him with reference to selling these pens to the public, how we should call these pens? A. I never instructed a man as to how he shall sell his own goods. That is not necessary. He knows what he buys and it is his business as to how he will sell them.

XQ294. What did he call them when he spoke of them to you? A. He said he knew it was a good pen, he had one himself.

XQ295. Didn't he call them Waterman pens in speaking to you? A. I don't remember whether he did or not. I don't

3509 think he mentioned the name at all.

XQ296. How do most of these dealers talk of the pen to you—a Waterman pen? A. They say, "Is this as good a pen"—

XQ297. Answer my question. Do they call them Waterman pens in speaking of them to you? A. Some of them call them A. A. Waterman; some call them Modern.

XQ298. Don't they call them Waterman pens? A. Once in a while, yes.

XQ299. Do they describe them? A. It is not necessary to describe them for they are Waterman pens.

XQ300. You never tell them not to sell them that way to the public do you? A. No, because they are Waterman pens, and should be sold as Waterman pens but not as L. E. Water-

3510 man pens or Ideal Waterman pens. I always tell them never to buy and sell our pens on the reputation of the L. E. Waterman pens; if they do they will starve to death.

XQ301. When were you last in Grand Rapids? A. Last summer some time; August, I believe.

XQ302. Whom did you call on in Grand Rapids? A. Several of the dealers there.

XQ303. Can you give their names? A. No, sir, I cannot.

XQ304. Don't you know your trade in Grand Rapids? A. I cannot remember a thousand or two names.

XQ305. Could you if you had a list? A. If I had a list, yes, I could tell. We will furnish you with a list if you want.

XQ306. Did you ever work St. Louis? A. No.

XQ307. When were you last in Bucyrus? A. Last August or September.

XQ308. Whom did you sell in Bucyrus? A. One or two I believe. I don't remember the names.

XQ309. Don't you remember whom you sold in Bucyrus? A. No, sir; I don't remember the names.

XQ310. You cannot remember anybody at all that you saw in Bucyrus? A. No.

XQ311. Where did you go from Bucyrus? A. I don't remember.

XQ312. Would this list refresh your recollection? A. Yes. I don't know that it is necessary, as to what towns I made after I left Bucyrus. 3512

XQ313. Did you go to Galion, Ohio? A. I did.

XQ314. Whom did you sell in Galion, Ohio? A. I don't remember the names.

XQ315. Whom did you see in Galion, Ohio? A. I saw dealers.

XQ316. How did you introduce yourself to the dealer? A. As I stated before.

XQ317. Did you leave cards in Galion, Ohio? A. I may have, yes.

XQ318. You don't remember anything at all about Galion? A. I remember I sold one or two bills there.

XQ319. You don't remember who you sold? A. No. 3513

XQ320. Do you remember any conversation that you had with anybody there? A. The usual conversation.

XQ321. When were you last in Mansfield, Ohio? A. July and August.

XQ322. Whom did you see when you were in Mansfield? A. The dealers.

XQ323. Do you remember anybody that you saw there? A. Hurst Bros. I think it was, our regular customer there. I sold him a nice bill of goods.

XQ324. Did you tell them how to sell these goods to the public? A. No, it was not necessary; they had been selling them for years.

XQ325. How did they speak of the pens to you? A. They said it was the best pen they ever saw.

XQ326. Did they call it a Waterman pen? A. I don't think they called it by any name at all.

XQ327. Don't you know they always speak of these pens as Waterman pens? A. No, I do not know.

XQ328. Didn't they speak of them in that way? A. No.

XQ329. When were you last in Shelby, Ohio? A. July or August.

XQ330. Whom did you see there? A. The dealers.

XQ331. Can't you recall any name? A. I don't remember now.

3515 XQ332. Did you see a man named Kuhn there? A. I don't remember whether I did or not.

XQ333. A druggist? A. I don't remember. I don't remember whether I sold anything in Shelby or not. I don't believe I did.

XQ334. When were you last in Fort Wayne, Ind.? A. I don't work Fort Wayne.

XQ335. Were you not in Fort Wayne last October? A. I might have been there but I don't work Fort Wayne. I think that belongs to Rightmire.

XQ336. Logansport? A. I don't work Logansport.

XQ337. Lafayette? A. I was there in October or November.

XQ338. Whom did you see in Lafayette? A. I don't work Lafayette.

3516 XQ339. When were you last in Kokomo, Ind.? A. Last October and November.

XQ340. Whom did you see in Kokomo? A. Dealers.

XQ341. Don't you remember any names? A. No.

XQ342. Did you sell anybody there? A. I don't believe I did. I am not positive; I can't remember.

XQ343. When were you last in Newcastle? A. Last October and November.

XQ344. Whom did you see in Newcastle? A. Dealers.

XQ345. Do you remember any names? A. I don't remember the names, no.

XQ346. Do you remember seeing Mr. Buhrman? A. Yes.

XQ347. What conversation did you have with him? A. As I stated before.

XQ348. What was it? A. I introduced myself in the usual way. The last time I was there—do you want the last time I was there?

XQ349. Yes? A. The last time I was there I went in and spoke to him and he remembered me. I asked him how he was getting along with A. A. Waterman self-fillers. He said not at all; he said he had two or three of them there that the caps were broken off and he wanted to know if he could send them in. I told him I would take them in or he could send them in. He said he would send them. I tried to sell them and he said no 3518
he had too much trouble with the self-fillers and he took in a line of Parkers' and L. E. Waterman's.

XQ350. Did he tell you that he had L. E. Waterman pens? A. Yes.

XQ351. Did you see any L. E. Waterman pens there? A. I believe I saw a few there. I am not positive about that. I was not looking for them.

XQ352. What did you tell him about those? A. I told him I was sorry he had trouble with the pens and we would try to rectify it; any complaints that he had we would try to make them good.

XQ353. Did you tell him how to sell these pens to the public, under what name they should be sold? A. No, it was not neces- 3519
sary.

XQ354. Did you explain to him the difference between A. A. Waterman & Company and the L. E. Waterman Company? A. I did.

XQ355. What did you say? A. As I said before, he asked me if he could get our pens from the jobber. I told him he could but he could get them from us cheaper than he could get them from the jobber. He said no; and he got McClurg's catalogue and found our pens in the catalogue and I figured the price and discount with him and convinced him that he could buy our pens for less money by buying them direct. I told him he could buy the L. E. Waterman pens from Montgomery Ward and

3520 showed him Montgomery Ward's catalogue, where they had them catalogued and the price.

XQ356. Did you tell him he could buy L. E. Waterman pens at Montgomery Ward's at a discount? A. I did not, because they sell their goods net and the net price was in their catalogue.

XQ357. Did you tell him those prices were less than the full retail price of the pen? A. No, I told him I thought they were a li[illegible] bit more. The numbers were different.

XQ358. I see you refer in your letter of March 28th, to the fact that Messrs. Thompson & Huskins of De Queen, Ark., have sent back some pens? A. Yes.

3521 XQ359. Stating that they had thought when they purchased the pens that they were buying the Waterman Ideal pen. Did you have many cases of this kind? A. Very few.

XQ360. How many have you had during your experience? A. All that have been reported to me, I guess probably a dozen, in three years.

XQ361. Can you give the names of these people? A. I cannot, no, sir.

XQ362. Do you remember any of them? A. No, except those that you have just mentioned.

XQ363. Don't you remember any others at all? A. Mr. Baker, Allegan, Michigan.

XQ364. Do you remember any other? A. I don't think I can remember any others. I don't pay any attention to those things.

3522 It is not my part of the business.

XQ365. Have you any memoranda of those cases? A. No, sir, I don't keep any memoranda at all.

XQ366. Are they not contained in this list you have? A. No.

XQ367. Are they not mentioned in the correspondence which you have with the company? A. They always notify me, yes, but I have not that correspondence.

XQ368. Did you ever go to see these people again? A. Yes, and I have sold some of them.

XQ369. In this case of Thompson & Huskins did you explain to them the difference between these pens? A. I did.

XQ370. What did you say to them? A. I showed them the pen, explained to them the workings of it, in the usual way and sold them as far as I remember about three dozen pens and gave them the exclusive agency of the town.

XQ371. What did you explain to them about A. A. Waterman & Company? A. I told them that was the company I represented and they were located in New York.

XQ372. Didn't they ask you whether that was a genuine Waterman pen? A. Yes.

XQ373. What did you tell them? A. I told them it was a genuine A. A. Waterman, yes.

XQ374. Did you tell them it was a genuine Waterman pen? 3524
A. Yes. It is.

XQ373. And they purchased the pens? A. I told them they were A. A. Waterman pens and they bought them, but not an L. E. Waterman pen.

XQ376. Did you explain the difference between the two pens to them? A. They asked if we did any advertising. I told no, sir, that we sold our pens on their merit and not on the reputation of the L. E. Waterman pen, but that the L. E. Waterman pen was a good pen and gave satisfaction.

XQ377. Don't you find among the dealers that they all know the name of Waterman in connection with fountain pens? A. Quite a good many of them, yes.

XQ378. Don't they all? A. Not all of them, no. I find lots 3525
of them that never heard of them.

XQ379. Then what do you do when you find a dealer who has never heard of the name Waterman in connection with fountain pens? A. I show him the pen and try to sell them.

XQ380. What do you tell him? A. I tell him I am selling A. A. Waterman pens.

XQ381. Do you explain the difference? A. No, because I am not advertising L. E. Waterman pens. I am selling A. A. Waterman pens on its merit.

XQ382. You don't tell them there is another? A. I do not unless they ask me.

XQ383. If they ask you what do you tell them? A. I tell them that it is supposed to be the largest pen factory or as-

sembler in the country, that they make that claim and that they have a good pen.

XQ384. Did you not find so much of this confusion in the minds of dealers as to the difference of A. A. Waterman & Company and the L. E. Waterman Company that you wrote this letter of March 4, 1909? A. I did, yes.

XQ385. You find that confusion wherever you go don't you? A. Not every place, no.

XQ386. Almost every place? A. We find very little confusion. A majority of the dealers know the difference.

XQ387. You yourself did not know the difference when you wrote this letter of April 4th? A. I knew there were two firms.

3527 XQ388. What did you write this letter for? A. Because I did not know their connection. I asked in the letter what relation they were. I did not know. I asked for the information and got it.

XQ389. Did you think that the A. A. Waterman & Company was a subsidiary company or connection of the L. E. Waterman? A. I did not think they were connected, no.

XQ390. But you did not know? A. I knew they were not connected in a business way but I did not know whether they were brothers or cousins or what. That is the question that I was asking. I was advised that they were not.

XQ391. Didn't you ever tell anybody that they were brothers? A. No, sir. I have been asked that question many times. Until

3528 I got the information that they were not I told them I did not know; they might be, I didn't know. After I got the information I told them they were not brothers.

XQ392. How about this case in Tulso, Oklahoma? A. I don't think that has any connection with the L. E. Waterman Company. That is A. A. Waterman of Chicago, is it not?

XQ393. No? A. I think that correspondence is all about the Chicago office. I don't think it has anything to do with the New York office at all; A. A. Waterman of Chicgao.

XQ394. You had better read that (handing witness the paper)? A. I remember that now. There is further correspondence about the Chicago Waterman, from the same man. I re-

member this gentleman writing that letter and in reply to his letter he was advised that it had no connection whatever with L. E. Waterman and then he in reply to that letter—

XQ395. Wait a moment. I don't want to get what you think is in the letter. I want the letter produced? A. Mr. Geyer will produce the letter. That is the letter he wants. That is a very important letter.

Mr. Bacon: What is the date?

Mr. Raymond: September 7, 1909.

XQ396. Don't you think it is remarkable that you should have this confusion in the minds of these dealers that you go to see as to the distinction of A. A. Waterman & Company and L. E. 3530
Waterman? A. The majority of the dealers know that there are two Watermans. Some of them claim there are three. There is an A. A. Waterman in Chicago and one in New York; and an L. E. Waterman in New York.

XQ397. And do you keep it clearly before the dealer which one you represent? A. I positively do, yes.

XQ398. Don't you ever describe yourself as selling Waterman pens? A. Nothing only A. A. Waterman.

XQ399. When you went to Allegan, Mich., and saw Mr. Baker what did you tell him about the pens that you were selling? A. I told him I was selling the A. A. Waterman pen of New York and gave him my card and showed him a catalogue. As well as I remember he got some L. E. Waterman printed 3531
matter and talked it all over.

XQ400. Did you explain to him the difference? A. I did.

XQ401. Didn't you tell him they were just the same? A. No, sir, I did not. I positively did not. I told him we did not sell our goods on the reputation of L. E. Waterman.

XQ402. Did you tell him that this concern had no connection whatsoever with L. E. Waterman? A. I positively did, yes.

XQ403. Didn't you describe these pens to him as Waterman pens? A. As A. A. Waterman pens, yes.

XQ404. Didn't you call them Waterman pens? A. I might have; I possibly did. I had a right to. They are Waterman pens.

XQ405. As a matter of fact you cannot help but call them Waterman pens when you are talking of them? A. If you don't call them Waterman pens you misrepresent them. They are Waterman pens—A. A. Waterman.

XQ406. That is the way you naturally speak of them, "Waterman pens"? A. No, sir, not always. If it is a self-filling pen we call it a Modern A. A. Waterman Company. If it is a middle joint I call it a Modern A. A. Waterman.

XQ407. Don't you call them Watermen pens when you talk about them for any length of time? A. Not always, no.

XQ408. Sometimes you do? A. Sometimes I do. I call them A. A. Waterman pens.

3533 XQ409. I mean just call them plain Waterman pens? A. I call them by their name.

XQ410. Don't you talk of them among yourselves, to your salesmen, as Waterman pens? A. We very seldom talk about pens. I don't remember talking to any salesman and calling them Waterman pens.

XQ411. Do you talk to Mr. Geyer about them as Waterman pens? A. No.

XQ412. When you were in Holland, Mich., and you called upon Mr. Brink how did you describe the pens to Mr. Brink? A. As A. A. Waterman pens.

XQ413. Didn't you call them Waterman pens, to Mr. Brink? A. No. A. A. Waterman or Modern.

3534 XQ414. Are you sure you did not talk to them about Waterman pens? A. Yes, only as before stated.

XQ415. You did not give him any instruction as to how he should sell those pens? A. He knew the pens.

XQ416. I ask you whether you gave him any instructions? A. As to how he should sell them?

XQ417. Yes? A. No, that is unnecessary.

XQ418. You called them Waterman pens didn't you when you were there? A. A. A. Waterman, yes.

XQ419. Didn't you call them Waterman alone? A. No.

XQ420. Without any initials? A. No.

XQ421. You will swear to that? A. Yes.

XQ422. There was not one time when you called them Waterman pens? A. No.

XQ423. How many times did you see Mr. Brink? A. Once.

XQ424. Is that the only time you ever saw him? A. That is the only time I ever saw him in my life.

XQ425. This time when you called on him and sold him a bill of goods did not Mr. Brink call them Waterman pens to you in speaking of them? A. I don't remember whether he did or not.

XQ426. If he did, did you correct him? A. No, sir, because he had a right to call them Waterman pens.

XQ427. And that is the position that you always take with all your dealers? A. How do you mean? 3536

XQ428. That they have a right to call them Waterman pens? A. Yes, they have a right to call them Waterman pens if they want to.

XQ429. And you do not correct them? A. If they call them Ideal Waterman I do.

XQ430. And if they call them Waterman pens you do not? A. No.

XQ431. And you leave them under the impression that that is the proper name for the pen? A. Yes, it is; A. A. Waterman, yes.

XQ432. I mean Waterman alone? A. They have the right to call them Waterman pens because it is a Waterman pen.

XQ433. And you leave them under that impression? A. Yes. 3537
That is exactly what I am selling, but not an L. E. Waterman.

XQ434. Just a Waterman? A. A. A. or Modern Pen Company.

XQ435. No, just the Waterman? A. No, I understand that they have got to inquire because if they call for a Waterman pen; they would not know what it is because there is no Waterman pen.

XQ436. Don't they call them Waterman pens? A. Possibly some of the dealers do. I don't know.

XQ437. Have they not ever called them Waterman pens to you? A. Not that I know of, no.

3538 *Harry C. Bartlett, Jr.*

XQ438. You never heard a dealer say, "I have a Waterman pen"? A. Yes, I have heard them say, "I have an Ideal Waterman."

XQ439. Did you ever hear them say, "I have a Waterman pen"? A. I don't know that I ever did, no.

XQ440. Did you ever have any talks with Mr. Chapman? A. No.

XQ441. The only one that you ever had any conversations with in the Modern Pen Company is Mr. Geyer? A. Yes, he is the only one.

XQ442. Whom did you call on in Delaware, Ohio? A. Sells Bros., I think, or one of the firm.

3539 XQ443. Is that the only concern? A. And Wells & Hardin.

XQ444. Did you have any conversation with them? Whom did you see? A. I sold Wells & Hardin.

XQ445. Whom did you see? A. I don't know the gentleman who bought them. He did not tell me his name.

XQ446. How did you introduce yourself there? A. The usual way.

XQ447. Did you say, "I am selling Waterman pens"? A. I said, "I am representing the Modern Pen Company A. A. Waterman, New York."

XQ448. Did you show your samples? A. I did.

XQ449. Under what name did you talk of the pens? A. A. A. Waterman.

3540 XQ450. Did you say "Waterman pens"? A. No.

XQ451. Didn't you use the word Waterman alone at any time during your conversation with this gentleman? A. With Mr. Wells?

XQ452. No, Mr. Hardin? A. No.

XQ453. Or Mr. Wells? A. No, sir.

XQ454. Will you swear you did not use the word Waterman alone? A. Yes.

XQ455. Did you tell them how to sell these pens, under what name to sell them? A. Yes.

XQ456. What name did you tell them to sell them under? A. The pens he bought, he bought Safety; A. A. Waterman Modern Safety.

XQ457. Did you tell him how to sell those pens, under what name? A. The name was printed of course.

XQ458. Did you tell him he should sell those pens as Waterman pens? A. Not as L. E. Waterman, no.

XQ459. As Waterman? A. He can sell them as that if he wants to but I didn't tell him that.

XQ460. Didn't he ask you that? A. No, he did not.

XQ461. Didn't he show you any proposed advertising of his? A. No.

XQ462. Did he tell you that he previously handled Moore's Safety pens? A. I think he did, also L. E. Waterman.

XQ463. Did he tell you that he handled L. E. Waterman pens? A. Yes, and they did not give satisfaction. 3542

XQ464. Did he tell you that he was a customer of L. E. Waterman Company? A. I don't remember whether he said that or not, but he told me that he had handled Moore's and had handled L. E. Waterman's and that the L. E. Waterman was not satisfactory and the Moore had given him good satisfaction.

XQ465. And he wanted a Waterman pen didn't he? A. He didn't say. I sold them to him. I assumed he did want them.

XQ466. Whom did you see over at Sells Bros.? A. Both of the brothers.

XQ467. What did you say to them when you went it? A. I introduced myself and I think I gave them a card and tried to sell them and they told me they had a large stock of Bolles pens and they could not buy any other pens until they got rid of 3543 those.

XQ468. Did you show them your sample? A. I did.

XQ469. How did you describe the pen to him? A. He asked me if this was the same pen as the L. E. Waterman Ideal Waterman and I told him it was not.

XQ470. How long had you been talking to him up to that time? A. Three or four or five minutes may be.

XQ471. Didn't you say when you went in there to see him that you were selling Waterman pens? A. A. A. Waterman, yes.

XQ472. Didn't you say you were selling Waterman pens? A. No, because there is no such pen as Waterman.

XQ473. You simply said that you were selling A. A. Waterman pens? A. Yes.

XQ474. You never use the name A. A. Waterman Company do you in selling pens? A. Most always, yes.

XQ475. You call them A. A. Waterman pens, don't you? A. Sometimes, yes.

XQ476. You never say A. A. Waterman & Company pens? A. Yes, I have said that.

XQ477. As a general thing in speaking of these pens you do, just as you have done in this testimony, call them A. A. Waterman pens? A. Yes.

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XQ478. When you go in to see a man you say, "I am selling A. A. Waterman pens"? A. Yes, Modern Pen Company, A. A. Waterman.

XQ479. You never tell them that you represent the Modern Pen Company which is making the A. A. Waterman & Company pens in selling them? A. Yes, I have done that.

XQ480. Have you ever had any instances where the dealer told you that he did not want your pens? A. Yes, many times.

XQ481. That he thought you were representing the L. E. Waterman Company? A. No.

XQ482. Never had any case of that at all? A. No.

XQ483. You will swear that you never had a case where the dealer told you that he didn't care to talk to you that he thought you represented L. E. Waterman Company when you came in? A. No, I never had a man talk that way to me in my life.

3546

XQ484. When were you last in Lima, Ohio? A. Last August or September.

XQ485. Whom did you call on there? A. All the dealers.

XQ486. Can you remember any name? A. I cannot.

XQ487. Would this list of yours show the names of the dealers? A. I don't know whether it would show the names there because I did not sell anybody there.

XQ488. Didn't you call on a man named Melville? A. I don't remember. I called on dealers there but I don't remember the names.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ489. Did you look over the stock of Sells in Delaware? A. Yes.

RDQ490. Did you not see there in the stock L. E. Waterman goods? A. I don't remember whether I did or not. I believe I did. I am not positive about it. I know I tried to trade them out of the Bolles pens.

RDQ491. After first calling on a customer and telling them that you represent the Modern Pen Company, A. A. Waterman, did you deem it necessary at all times to designate these pens again as A. A. Waterman pens? A. No, sir.

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RDQ492. Do all the dealers know all about the controversy between L. E. Waterman Company and A. A. Waterman? A. A majority of them, yes, in Ohio, Michigan, Illinois and Indiana.

RDQ493. And you knew all about this present litigation? A. Yes.

RDQ494. You were advised of the different orders as they were entered? A. Yes.

RDQ495. And had a copy sent to you at once? A. At the end of the month, yes.

RDQ496. And you knew the importance of carefully carrying out the instructions indicated in these court orders? A. Yes.

RDQ497. And you were always very careful to do it? A. I was.

3549

RDQ498. When you spoke of the difference between the A. A. Waterman and the L. E. Waterman pens did you speak of the structure of the pen or the difference between one corporation and the firm? A. The structure of the pen, the working of the pen.

RDQ499. You knew that L. E. Waterman Company was a corporation and that A. A. Waterman & Company was a firm, did you not? A. That is the way I understand it, yes.

RDQ500. And the Modern Pen Company is a corporation? A. Yes.

RDQ501. You did not sell pens exclusively? A. No.

RDQ502. This was only a side issue with you? A. Yes.

RDQ503. What were you selling specially? A. I had a line of cutlery and farm wagons.

RDQ504. And you sold nothing for the Modern Pen Company except pens? A. That is all.

RDQ505. Do you know anything about the sale of pens in Decatur, Ill., in March of last year? A. I think I sold Mr. Armstrong a dozen or so cheap pens.

RDQ506. Do you know of any special sales since then to which Mr. Armstrong may have referred? A. I have not been there since but there has been a sale on in Decatur with a publishing house or news concern there and they had a lot of our
3551 pens in the window with a lot of other pens and I think they have probably been selling them at maybe a reduced price.

RDQ507. Do you know where they got those pens? Did they get them in New York or Chicago? A. They are New York pens.

RDQ508. They did not buy them in New York? A. No, they bought them from a man named Doughty and put them in their store.

Mr. Raymond: I object to this on the ground that it is not shown that the witness has any knowledge of it; it is mere hearsay.

RDQ509. You saw Mr. Raymond on your tour in 1910, this
3552 gentleman here? A. I think I have.

RDQ510. Where did you think you met him? A. I believe I saw him in Delaware and if I am not mistaken in Newcastle. I would not be positive of that because I never met the gentleman.

RDQ511. Did you have any conversation with him? A. I had a conversation with some fellow that looks a good deal like him one time about the difference in the L. E. Waterman and the A. A. Waterman pen.

RDQ512. What did you say and what did he say? A. It came up in this way, he asked me if they were brothers and I told him no. He asked me what connection and I told him none

whatever. He asked whether the pen was as good a pen as theirs and if the trade did not think lots of times when they were buying our pens they were buying the L. E. Waterman. I told him no because we always took pains to tell them they were A. A. Waterman and were not a pen that was advertised and that we never sold our goods on the reputation of L. E. Waterman but sold them on their merit and that the L. E. Waterman was a good pen and there were lots of them being sold and used.

RDQ513. And that our pen was better than his? A. I don't know that I said it was better. I said it was as good.

RDQ514. You heard about Mr. Raymond being over that territory trying to get testimony? A. Yes. 3554

RDQ515. Very often? A. Yes, I have heard he was making a trip over there.

RDQ516. For the purpose of getting testimony? A. Yes.

RDQ517. And that was all in 1910? A. Yes.

RDQ518. Has it been the custom of the L. E. Waterman Company's representatives to follow on behind you and try to kill your orders? A. It seems so.

Objected to.

RDQ519. Have you found such instances? A. I have, yes, where they would come in and say, "Here, you have not bought a Waterman pen at all."

3555

Mr. Raymond: Objected to; there is nothing to show that the witness has any knowledge on the subject; and as hearsay.

RDQ520. That is what the dealers have told you? A. That is what the dealers have told me, a number of them; they say their man would come in and say they had not bought a genuine Waterman pen, that it was not an advertised pen and that they had no right to sell them at all; that they were going to stop them from using it under that name and I don't know what all, a lot of stuff.

Mr. Raymond: I shall want that list.

3556

Mr. Bacon: I am not sure that I have a list.

The Witness: It is a list of the people we sold to.

Mr. Bacon: Do you think you turned it over to the Modern Pen Company?

The Witness, No, I don't think I did. I have only a list of the people that I sold. I have no list of the people that I called on. This is a list of the people that I sold, customers of ours; that is all; that is the only one I have ever had.

By Mr. Raymond:

RXQ521. The list of people that you sold would all be with
3557 the Modern Pen Company, wouldn't they? A. They can give you a list off the books. There is a list in the books of the people I sold. I never keep a list of the people I call on.

RXQ522. When do you think you saw me? A. I think it was along in October or November. I don't know.

RXQ523. October or November? A. Along there I believe.

RXQ524. Would this list show when you were in Newcastle? A. Yes.

Deposition closed.

Signature waived.

3558 EUGENE FLEWITT, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct-examination by Mr. Bacon:

Q1. Please state your name, residence and occupation? A. Eugene Flewitt; residence, 533 Manhattan Avenue, New York; business, salesman.

Q2. How long have you been salesman for the Modern Pen Company? A. About four years.

Q3. What region do you cover? A. New York and viciniy.

Q4. When you first became salesman did you have any instruction as to how you should sell these goods; if so, just state

what was told you? A. Nothing except merely that I was to sell the goods as they were marked.

Q5. That is "A. A. Waterman & Co."? A. Yes, "A. A. Waterman & Co."

Q6. And "Modern Pen Company"? A. Yes.

Q7. When you went in to a new man that you had never seen before what did you do? A. I would simply tell him who I represented.

Q8. Did you have a card? A. Yes.

Q9. Did you give him your card? A. In a great many cases; sometimes I did not.

Q10. Have you one of those cards? A. Yes (producing a card). 3560

The card produced by the witness is offered in evidence and marked Defendant's Exhibit A-1.

Q11. Will you give a model conversation, of how you would usually introduce yourself and what you would say concerning the goods? A. I would simply say the firm I represented, the Modern Pen Company or the A. A. Waterman & Co. and try to interest the customer in the line of goods.

Q12. Did you ever sell these goods as "Waterman"? A. No, sir.

Q13. Without the distinguishing mark "A. A."? A. No, sir, never.

Q14. Did you ever mention the Ideal of the L. E. Waterman 3561
Company in comparison? A. Except to compare our goods on the basis of price, that is all; that the A. A. Waterman & Co. goods were a better price, and the same quality as the L. E. Waterman Company goods at a much more expensive price.

Q15. Did you ever try to knock the L. E. Waterman goods? A. No, sir, not that I remember.

Q16. That is not good salesmanship, is it? A. I should not think so.

Mr. Watson: Objected to as leading and the Court's attention is called to the improper form of most of the questions that have already been asked.

3562 *Eugene Flewitt*

Q17. Did you ever sell goods to any man without making him know that they were the manufacture of A. A. Waterman & Co.? A. No, sir.

Q18. Did you ever say anything to them about the way they ought to be sold? A. I have always told them they should sell them as A. A. Waterman & Co. goods.

Q19. Did you ever have any complaint from any of your customers that they thought they were buying L. E. Waterman Company goods when they bought of you? A. No, sir.

Q20. In any single instance? A. No, not in any single instance.

3563 Q21. How do the dealers usually designate these goods? A. They designate them as "A. A."

Q22. Did you know anything about the injunction of September 3, 1898; did anybody ever call your attention to that? A. I heard a little about it, more or less; not very much.

Q23. You never have seen it? A. No, sir, I have never seen it.

Q24. Did you know that under the terms of that decree the A. A. Waterman Company was permitted to sell goods as A. A. Waterman?

Mr. Watson: Objected to as immaterial; the decree speaks for itself, and the statement of counsel is not true.

A. Yes, I knew they were to sell goods as A. A. Waterman

3564 goods.

Q25. What class of stores generally buy of you? A. I sell wherever I can. I go to everybody.

Q26. Generally to high class people?

Objected to as leading.

Mr. Bacon: Question withdrawn. Examination ended.

CROSS-EXAMINATION by Mr. Watson:

XQ27. What territory did you say you covered? A. New York and vicinity.

3565

XQ28. Does that include New York City? A. That includes New York City, yes.

XQ29. Does it cover New Jersey? A. Part of New Jersey.

XQ30. The northern part of the State of New York? A. No, I don't go to the northern part of the State of New York.

XQ31. How far up the state do you go? A. New York City.

XQ32. Just New York City? A. New York City.

XQ33. What towns do you visit outside of New York City? A. Jersey City, Newark, Elizabeth, Plainfield, Somerville, Princeton, Rahway, and a few towns down the coast.

XQ34. What stores in New York City have you sold A. A. Waterman & Co. goods to? A. Butler Bros., Charles Broadway Rouse. Do you want a complete list of the customers?

3566

XQ35. Yes? A. Harding & Heale, Singer Bros., Leon Wilder & Sons, Bernard Feldman, A. Harris, S. Harris, J. T. Ehrenberg, Otto Herschman. I guess there are a few others but I cannot just recall them at present.

XQ36. How many of these are wholesale dealers only or jobbers? A. Quite a few of them.

XQ37. Which ones are retail dealers? A. Ehrenberg, Herschman, both the Harrises. But most of the others are jobbers. Harding & Heale is a retailer.

XQ38. Where is their place of business? A. Greenwich Street.

XQ39. Where is S. Harris' place of business? A. S. Harris is on 42nd Street.

3567

XQ40. Whereabouts on 42nd Street? A. 129 East.

XQ41. That is nearly opposite the Grand Central Station is it not? A. Yes, that is near the Grand Central Station.

XQ42. On which side of the street? A. On the north side.

XQ43. How long since you have been in Mr. Harris' store? A. I was in there last Monday.

XQ44. What did you go there for Monday? A. To sell goods.

XQ45. Did you go there to talk to him about the way his customers have testified in this case? A. No.

3568

XQ46. Did you know how customers had testified that they bought pens there in his store? A. I did not say anything about it at all.

XQ47. Nobody told you anything about it? A. Not at that time, not Monday.

XQ48. When did they tell you about it? A. There was not anything particular said about it. He told me that there was a customer came in to buy one of our pens and came back and exchanged it for another one. I don't remember that he stated anything particular about a customer buying any L. E. Waterman pen there because he does not sell them.

3569

XQ49. Mr. Geyer did not tell you anything about the way customers had testified that they had been selling A. A. Waterman Co. goods, did he, before you went up there? A. No.

XQ50. Never has told you anything about how customers said that he represented the A. A. Waterman & Co. goods; Mr. Geyer never told you anything about that? A. About what?

XQ51. Did Mr. Geyer tell you anything about how a customer of Harris' had testified in this suit as to how Harris was representing A. A. Waterman & Co. goods? A. I don't remember that he did, no, because Harris simply sells them as A. A. Waterman & Co. goods and he has a sign out marked "A. A. Waterman & Co."

XQ52. And Mr. Geyer did not say anything about it to you? A. I don't remember.

3570

Mr. Bacon: Objected to as there is no evidence of anybody ever having bought any pen of Harris, in this case.

XQ53. Did anybody connected with the Modern Pen Company tell you anything about the testimony of customers who had bought at a store on 42nd Street or near the Grand Central Depot, A. A. Waterman & Co. goods? A. No, I don't remember.

XQ54. Mr. Bacon never told you anything about it, did he? A. No.

XQ55. He did not tell you that people had testified that they had bought A. A. Waterman & Co. goods on 42nd Street near

the Grand Central Station which were represented to them as Waterman Ideal Fountain Pens?

Mr. Bacon: Objected to as there is no such evidence.

A. There are no goods there represented as Waterman Ideal Fountain Pens.

XQ56. Are you there when Mr. Harris sells to customers? A. I have been there, yes.

XQ57. You are there all the time when he sells to his customers? A. I am not all the time.

XQ58. Then you do not know how Mr. Harris represents the goods to his customers, do you? A. I know how he does it when I am there. 3572

XQ59. How much are you there? A. I have been there two hours at a time in the course of a day.

XQ60. How often? A. Probably once a week.

XQ61. Where is A. Harris' place of business? A. 425 Broadway.

XQ62. Do you know whether S. Harris on 42nd Street has been selling A. A. Waterman & Co. pens as Waterman pens or not? A. No, he does not sell them as Waterman pens. He sells them as A. A. Waterman pens.

XQ63. If he sold them as Waterman pens he would be doing something that he had not any right to, would he not?

Mr. Bacon: That is objected to. That is for the Court to decide and not the witness. 3573

A. I don't see that he would.

XQ64. He has a perfect right to sell them as Waterman pens? A. I don't know why not.

XQ65. And you refer to them when you are talking to customers as Waterman pens? A. I refer to them as A. A. Waterman pens.

XQ66. Don't you refer to them as Waterman pens? A. I invariably refer to them as A. A. Waterman.

XQ67. Have you never referred to A. A. Waterman & Co. pens as Waterman pens, to any dealer? A. No.

XQ68. You never refer to them as Waterman pens? A. No, always stipulate that it is an A. A. Waterman pen.

XQ69. You are always careful to tell a customer that he must sell these as A. A. Waterman pens? A. Yes.

XQ70. Do you tell him that he must not sell them as Waterman? A. I tell him he must sell them as A. A. Waterman.

XQ71. You do not tell him that he must not sell them as Waterman pens? A. To sell them as A. A. Waterman.

XQ72. Do you know whether A. Harris is selling these A. A. Waterman pens as Waterman pens? A. He is selling them as A. A. Waterman pens.

3575 XQ73. Does he sell them as Waterman pens? A. As far as I know he sells them as A. A. Waterman pens. I always told him to sell them as A. A. Waterman pens and I presume that he does.

XQ74. Have you ever seen the catalogue of Butler Bros.? A. Yes.

XQ75. Do you know how they advertise the A. A. Waterman & Co. goods in that catalogue? A. Yes.

XQ76. How do they advertise them? A. It is headed "A. A. Waterman." A. A. Waterman fountain pens.

XQ77. They do not advertise them as Waterman pens?

Mr. Bacon: Objected to as the advertisement is the best evidence.

3576 Mr. Watson: I am testing this witness's knowledge and recollection.

A. In Butler Bros. catalogue the pen is advertised as I remember it as A. A. Waterman Modern Self-filler; and the A. A. Waterman End Joint Pen. I don't just remember; there was a half column and I don't remember how it read.

XQ78. When they use the word A. A. Waterman they use it without "A. A. Waterman & Company" don't they? A. I don't just remember whether it was A. A. Waterman or A. A. Waterman & Co.

XQ79. Do they use them as Waterman pens alone without any initials or "& Company"? A. I think if I remember right,

some four or five months ago in the catalogue they headed it with "A. A. Waterman" and further on down they spoke of it as "Waterman."

XQ80. Then your recollection is that they were selling them as Waterman pens in that catalogue? A. They were selling them as Waterman pens—as A. A. Waterman pens.

XQ81. Do you recall that the name Waterman pens was in large black type in the catalogue?

Objected to as the catalogue is the best evidence.

A. I don't remember now, no. I think the name A. A. Waterman was in black type if I remember right because that headed the pen list. 3578

XQ82. Who gave you the instructions as to how to sell these pens? A. When I first went with the firm, Mr. Martling.

XQ83. Have you had any instructions since that? A. No further instructions.

XQ84. The instructions that you received four years ago are the only instructions that you ever received? A. That is all.

XQ85. Mr. Geyer has never instructed you how to sell these pens? A. He has never instructed me any differently how to sell them. It was always understood the way we were to sell them and no further instruction was necessary.

XQ86. Has he ever further instructed you as to how you should sell these pens? A. He has simply always told me that they were to be sold as A. A. Waterman pens. 3579

XQ87. Mr. Geyer has given you instructions then? A. Further instructions following Mr. Martling.

XQ88. When did he give you these instructions? A. I don't remember—because as a matter of fact I don't remember that he gave me any instructions, because he simply knew that I knew how to sell them.

XQ89. How did he know? A. I should think he would know.

XQ90. How would he know? A. He probably knows what Mr. Martling told me.

3580

XQ91. How? A. What would any firm tell their salesmen?

XQ92. How would Mr. Geyer know how Mr. Martling instructed you to sell these goods? A. I am sure I don't know how he would know it, but I should think he would know it.

XQ93. Do you know that he did know it at all? A. I don't see why he should not know it.

XQ94. How did he know it? A. He is around the office all the time. I should think when we talked it over with Mr. Martling he would know it.

XQ95. As far as you know he did not know anything about your instructions from Martling, did he? A. As far as my personal knowledge is concerned I don't know that he did.

3581 XQ96. And he has never given you any instruction himself? A. I don't remember that he has, any particular instruction.

XQ97. When did Mr. Martling sever his connection with A. A. Waterman & Co. or the Modern Pen Company? A. I should think it must have been two or three years ago.

XQ98. Who has been in charge since Mr. Martling left? A. Mr. Geyer.

XQ99. Who employed you as a salesman? A. Mr. Martling.

XQ100. Have you had any employment since Mr. Martling went away? A. I am still with the company.

XQ101. Any renewal of your employment? A. I am still with the company.

3582 XQ102. For how long a time did Mr. Martling employ you? A. I don't know just how long. I guess it must be about a year and a half or two years. He did not employ me personally; he engaged me for the Modern Pen Company.

XQ103. Were you employed on a salary or on a commission? A. I was employed on commission.

XQ104. No salary at all? A. No salary.

Objected to as immaterial.

XQ105. Did you carry any other line except the pens of the Modern Pen Company? A. No.

XQ106. That was your exclusive employment? A. That was my exclusive employment.

XQ107. And there has been no renewal of your employment since Mr. Martling first employed you? A. There has been no contract from year to year.

XQ108. Who did you make those arrangements with? A. The Modern Pen Company through Mr. Geyer.

XQ109. What was your business before you became a salesman for the Modern Pen Company? A. I was with Howard & Co.

XQ110. In what capacity? A. A salesman.

XQ111. What was your line of business? A. They are jewelers on Fifth Avenue.

XQ112. How long were you with them? A. About five or six years. 3584

XQ113. And prior to that what was your line of business? A. I was with the Gorham Company for about eight years.

XQ114. Just previous to Howard? A. Yes, a little previous.

XQ115. What did you do in between that; anything? A. For a few months I was with Reed & Barton Company, a silver house.

XQ116. How long have you known about Waterman Ideal Fountain Pens? A. I don't know; quite a while I should judge.

XQ117. Fifteen years? A. I guess so.

XQ118. A very well known produce on the market all that time, have they not been? A. Yes.

XQ119. Have you ever traveled any other place for the Modern Pen Company except New York and vicinity? A. 3585 Yes, I used to go a little further from New York about two or three years ago.

XQ120. What territory did you cover then? A. I covered Philadelphia, Baltimore, Washington and a few towns in Pennsylvania. I cannot just mention them all but there were quite a few of them.

XQ121. Did you go into Ohio? A. No.

XQ122. Never sold A. A. Waterman pens in Ohio? A. No. I have been as far as Ohio.

XQ123. Do you cover Brooklyn, N. Y.? A. I cover Brooklyn, yes.

XQ124. Do you know Bulwinkle's stationery store in Brooklyn near the City Hall? A. I have heard of him.

XQ125. Have you ever been in there? A. Yes.

XQ126. Do you know whether they sell Waterman Ideal Fountain Pens there or not? A. They did the last time I was in there. I have not been in Bulwinkle's for quite some time.

XQ127. What is the name of the concern very near there that has a man by the name of Masters in the firm? A. Stevenson & Masters.

XQ128. Do you know that store? A. Yes.

XQ129. Do they sell Waterman Ideal Fountain Pens in that store? A. They sell Waterman Ideal Fountain Pens and some
3587 other pens too.

XQ130. Are those the leading stores in Brooklyn in that line? A. I should judge so.

XQ131. You find the Waterman's Ideal Fountain Pen sold in most of the leading stores in New York and Brooklyn, don't you? A. Yes.

XQ132. And those pens are usually referred to as Waterman pens, are they not? A. As Waterman pens.

XQ133. Do you know the Tiffany Pen Company in this city? A. No.

XQ134. Do you know a dealer by the name of J. Sandusky in this city? A. Yes.

XQ135. Where is his place of business? A. 204 Bowery.

3588 XQ136. Have you ever sold him any A. A. Waterman & Co. fountain pens? A. Yes.

XQ137. When did you first sell him? A. I think it must be about a year ago or a year and a half.

XQ138. Is that the first time he carried A. A. Waterman pens? A. That is the first time he carried them.

XQ139. Did you give him any instructions as to how he was to sell these goods of A. A. Waterman & Co.? A. I did not give him any instructions, no.

XQ140. Do you know any concern trading under the name of Tiffany Pen Company, in New York or Brooklyn? A. No, sir, I don't know of any.

XQ141. You never heard of a Tiffany Pen Company at 22 Thames Street, New York? A. No, sir.

XQ142. Where is the Butler Bros. store? A. 185 Broadway.

XQ143. Harding and Heale's store? A. Greenwich and Liberty.

XQ144. Where is the Singer Bros. place? A. 82 Bowery.

XQ145. Where is Bernard Feldman? A. 94 Forsyth.

XQ146. New York City? A. New York City.

XQ147. Where is Otto Herschman's place? A. 125th Street just off Seventh Avenue. I don't recall the number.

XQ148. Where is Ehrenberg's place? A. 2389 Broadway.

XQ149. Near what Street? A. That is in the eighties; I should say about 88th Street. 3590

XQ150. Are these all stationery stores? A. No, they are not. Ehrenberg and Harding & Heale and Herschman are all stationery stores. The others are dealers and jobbers.

XQ151. Is A. Harris a stationery store? A. A. Harris is simply fountain pens. He don't sell anything else. S. Harris is the same.

XQ152. Do you know a Harris that does business on Nassau Street? A. I know of him, yes.

XQ153. What is his name? A. Mr. J. Harris, I think.

XQ154. Did you ever sell him any fountain pens? A. I never sold him any.

XQ155. Did you ever know of his buying any from the Modern Pen Company? A. Not to my knowledge. 3591

XQ156. Do you sell fountain pens to a man named Carey on Broadway near John Street? A. No.

XQ157. Do you know whether he carries A. A. Waterman & Co. pens? A. He handles them, yes.

XQ158. Where does he get them, do you know? A. He buys them direct.

XQ159. From the Modern Pen Company? A. From the Modern Pen Company, 22 Thames Street.

3592 *Eugene Flewitt*

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ160. What did you say to Mr. Sandusky when you sold him pens? A. I did not say anything particularly. He wrote to the house and the letter was referred to me and I went and sold him the goods.

RDQ161. Did you tell him that you represented the A. A. Waterman Company? A. I told him I represented A. A. Waterman & Company and showed them their letter that they wrote to the firm.

RDQ162. They knew the goods perfectly before you saw them then? A. Yes, they knew the goods; there is no question
3593 about that at all.

RDQ163. Did they know the difference between them and the L. E. goods? A. Yes, certainly.

RDQ164. Is there anybody that you know of in New York that does not know the difference between A. A. and L. E. goods—dealers?

Mr. Watson: Objected to as improper in form and beyond the knowledge of this witness.

A. No. sir.

RDQ165. Have you ever known of a dealer in New York City who as far as you could judge from his conversation did not know the difference between the two? A. I certainly have
3594 not, no. They certainly all know the difference.

RDQ166. That knowledge is universal? A. That knowledge is universal.

RDQ167. Had Mr. Sandusky ever sold L. E. goods? A. That I don't know. I believe he has had a few of them there on occasions. I think he showed me one or two mounted ones once or twice.

RDQ168. Do individuals who carry A. A. Waterman & Co. pens also designate them as Waterman pens? A. I guess they do, yes.

RDQ169. Have you ever heard any complaint made about L. E. Waterman pens?

3595

Mr. Watson: Objected to as not proper re-direct examination.

A. I think I have, yes.

RDQ170. What do you mean by "I think I have"? A. I have heard quite a few complaints about them.

RDQ171. What was the general complaint about L. E. pens? A. The usual complaint, pens leaking.

RDQ172. Where do they leak? A. At the joint.

RDQ173. Under the finger? A. Under the finger.

RDQ174. Did you ever hear of a complaint specially that they leaked when they were only part filled? A. I have heard that complaint, yes.

3596

RE-CROSS EXAMINATION by Mr. Watson.

RXQ175. You sell pens of the Modern Pen Company with a joint under the finger, don't you? A. Yes.

RXQ176. You sell a great many of those don't you? A. We sell quite a few.

RXQ177. They have been making and selling those all the time you have been with them? A. Yes.

RXQ178. And are doing it today? A. Still doing it today.

RXQ179. Do those pens ever leak under the joint? A. I don't think there is an end joint made that does not leak once in a while. I think probably the percentage is very largely in our favor as compared with the Ideal pens.

3597

RXQ180. All those pens with the joint under the finger are marked A. A. Waterman & Co.? A. They are all marked A. A. Waterman & Co.

RXQ181. Do you know that Sandusky sold A. A. Waterman goods as genuine Waterman pens? A. As genuine Waterman or Ideal Waterman?

RXQ182. Genuine Waterman pens? A. Sandusky sells them as A. A. Waterman & Co. pens.

RXQ183. He does not sell them as genuine Waterman pens? A. He sells them as A. A. Waterman pens.

3598 *Eugene Flewitt*

RXQ184. Do you know whether he sells them as genuine Waterman pens? A. I don't know.

RXQ185. In your contract with the trade in selling these A. A. Waterman & Co. pens, have you ever heard the term "Genuine Waterman Pen," mentioned by any customer? A. With the trade?

RXQ186. Yes? A. No, they generally discriminate in the matter; L. E. Waterman or A. A. Waterman.

RXQ187. "Genuine Waterman pen" in the trade means L. E. Waterman pens, does it not? A. Not necessarily.

RXQ188. You never heard that expression applied to a genuine Waterman pen? A. I don't see that it is a genuine Water-
3599 man pen any more than the A. A. Waterman pen.

RXQ189. I asked you if you ever heard the expression "Genuine Waterman" applied to L. E. Waterman? A. I have had it referred to as Waterman pen, too.

RXQ190. As a business, coming in contact with the trade, is it not true that the concern whose goods are first in the market are referred to by their trade name, like Faber's pencil and Roger's silver and Waterman's pen, referring to the original concern? A. I don't know that it is, no, because if you buy a Faber's pencil, you don't know whether you are getting a Johann or the other Faber. If you buy Roger's silver, you don't know whether you get Rogers 1847.

RXQ191. If my name was Howard, do you think I ought to
3600 make Howard's watches and sell them as Howard's watches? A. Why not?

RXQ192. Do you think it would be fair, in your opinion as a business man; do you think that would be fair business competition, for me to call my watch a Howard watch?

Mr. Bacon: Objected to, as this witness is not a Circuit Court Judge.

A. I don't see why it would not, if you made an entirely different watch.

RXQ193. It would be a fair business method for me to sell my watch as a Howard watch, substituting them for the genuine

Howard watch, in your opinion? A. No substitution at all; if you made a watch that was different from the Howard watch, I think you could use that name. 3601

RXQ194. If a man came in and asked for a Howard watch, I would be perfectly right in selling him my watch? A. You could tell him that you had two Howard watches and that you were an honest dealer. Any honest dealer would tell a man that.

RXQ195. If he did not tell him that he would be a dishonest dealer, wouldn't he? A. I should think he would.

RXQ196. If a man came in and asked for a Howard watch what would you expect he would get? A. I would expect he would get a Howard watch. 3602

RXQ197. Made by the original Howard Company? A. I don't know whether it was made by the original Howard or not. It so happens that there is only one Howard. You take the case of Faber, where there are three or four Fabers; if a man comes in to get a Faber pencil he will get a Faber pencil, but whether it is A. W. or what it is, he gets a Faber pencil. You would not call that unfair competition, would you—dishonest?

RXQ198. I am asking you whether you would call it dishonest?

Mr. Bacon: Objected to on the ground that neither the witness nor Mr. Watson is a Circuit Court Judge.

A. I certainly would not. 3603

RXQ199. Then I would be perfectly justified, if my name was Howard, in starting to make watches and call them Howard watches and sell them as Howard watches when a man came in and asked for a Howard watch? A. If the watch was different, not the same. If you made exactly the same watch as Howard, but if the watch was different I should think you would be justified in using the name.

RXQ200. If a man came into my store and asked for a Howard watch, I would be justified in passing out one of them as a Howard watch?

3604 *Eugene Flewitt*

Mr. Bacon: Objected to and I move to strike out the answer as the witness is not paid a salary for giving his opinion.

A. I answered that question. I cannot answer it any different.

RXQ201. You think he would be? A. If the watch was different, yes. There is no question about it in my mind.

RXQ202. Do you think that the original Howard Company would be injured by it, as a business man?

Same objections.

A. I don't know. I suppose it might take away a few of their
3605 sales, but of course, none of us can expect to have a monopoly on one particular thing.

RXQ203. If I should start to manufacture a watch under the name of Howard, it being my name—

Mr. Bacon: Objected to as incompetent, irrelevant and immaterial, and repetition upon repetition.

Mr. Watson: Counsel for complainant calls the attention of the Court to the constant interruption of defendant's counsel in the middle of plaintiff's questions and it is impossible to cross-examine this witness in view of these constant interruptions; and directs the Court's attention to the evident intent of counsel for the defendant to prompt this witness.

3606 Mr. Bacon: Counsel for defendant calls the attention of the Court to the fact that this line of cross-examination is not only irrelevant but puerile and any law student ought to know better.

RXQ204. If I should start to manufacture watches under the name of Howard, it being my name, and put them on the market, and customers came in and asked for a Howard watch and the dealer gave him my watch, would you think that was fair competition? A. I answered that question.

RXQ205. Will you answer it again? A. If the watch was different, yes; but if you made one that was exactly like the Howard watch with the idea of selling it for a Howard watch, I

think you would be wrong; but if you made a watch that was different, you could certainly use the name of Howard, I should think.

RXQ206. The same thing would be true of fountain pens, would it not? A. I should judge so.

RXQ207. You, on your direct-examination, stated that you told the trade that the A. A. Waterman & Co. pens were the same as the L. E. Waterman pens, except as to the price; is that so; is that what you testified to? A. When did I say that?

RXQ208. I am asking you if you testified to that? A. I don't remember that I did.

RXQ209. What did you say about your comparisons between the A. A. Waterman & Co. pens and the L. E. Waterman Company pens? A. They are made in the same way. All fountain pens are made in the same way, except some particular thing perhaps that we have a patent on. 3608

RXQ210. Look the same and the same quality? A. Look the same and they are the same quality; only perhaps some will be a little better made than others.

RXQ211. And that the only difference was that there was a difference in the price? A. A difference in the price, yes.

RXQ212. And that dealers get more profit out of the A. A. Waterman Company goods? A. The dealers do get more profit out of the A. A. Waterman & Co. goods.

RXQ213. Did you tell them that they looked the same? A. They look very much the same, except the imprint is different. 3609

RXQ214. The ordinary customer, in looking at the two pens, could not tell the difference, could he? A. If they look at them, they certainly could.

RXQ215. There is no difference in the pens except the imprint? A. The difference is in the imprint.

RXQ216. That is the only difference? A. That is all. If they can read they can certainly tell the difference.

RXQ217. The only difference is in the imprint? A. Yes.

RXQ218. The general appearance of the goods is the same? A. Except the gold pen may be a little different shape, something like that.

RXQ219. To the ordinary purchaser they look the same? A. I presume they would.

3610 *Eugene Flewitt*

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ220. If you were manufacturing a new Howard watch and put in big letters on the face of the watch "A. A. Howard," to distinguish it from L. E. Howard, you would think that you were selling goods properly, wouldn't you? A. I certainly would.

RDQ221. And if the customer who bought your Howard watch understood that he was buying your make and not any other make you would think you were selling the goods properly? A. I certainly would.

3611 RDQ222. Did you ever in your life sell an A. A. Waterman & Co. pen to a man who did not know the difference between L. E. Waterman and A. A. Waterman pens? A. No, sir.

RDQ223. And when you spoke of a different Howard watch you meant such a different appearance that anybody by looking at it could tell the difference? A. Yes, exactly.

RDQ224. Are not the A. A. Waterman under the finger joint pens a very cheap grade? A. They are a cheap pen, yes.

RDQ225. Your high grade pens do not have the joint under the finger where they can make the finger dirty? A. No.

RDQ226. The speciality of the higher grade goods of the Modern Pen Company is the self-filler and the middle joint? A. Yes.

RDQ227. And the L. E. Waterman people do not make any
3612 middle joint pens? A. Not now; no, sir.

RDQ228. And they do not make a self-filler like that of the Modern Pen Company? A. No.

RDQ229. What kind of a self-filler do they have? A. For the last year or so I think they have had a self-filler with a rubber sack that opens in the middle. You turn it around and press the inside.

RDQ230. A bar that presses down on the side? A. Yes.

RDQ231. And a knob that sticks out on the side of the pen? A. Yes.

RDQ232. And the specialty of the plaintiff is a pen with a joint under the finger? A. Yes.

RDQ233. Their high grade pens are made that way? A. Yes.

RDQ234. And pens have been made that way for many years? A. Yes.

RDQ235. And the specialty of the defendant is the middle joint and the self-filler? A. Yes.

RDQ236. And do the plaintiff make any pens that compare in workmanship and design with the defendant's self-filler?

Objected to as this witness has no knowledge as to the matters inquired of.

A. No, sir.

RDQ237. Have you handled a great many L. E. Waterman pens? A. I have handled quite a few; not to say a great many; I have handled quite a few of them. 3614

RDQ238. You know the difference in construction? A. I know the difference in construction. There is a difference in the construction of the self-filler.

RE-CROSS EXAMINATION by Mr. Watson:

RXQ239. You never have had anything to do with the manufacture of fountain pens? A. I have not manufactured them, no.

RXQ240. You never had anything to do with the manufacture of fountain pens? A. No, except I have seen a great many of them made, in the shop.

RXQ241. What price do the A. A. Waterman & Co. pens, the self-fillers, sell for at retail? A. $2 and up. 3615

RXQ242. What is the price of the middle joint pens of A. A. Waterman & Company at retail? A. $2 up.

RXQ243. What are the prices of the joint under the finger pens that are made by A. A. Waterman & Co.? A. $1 up.

RXQ244. Up how far? A. Up as far as $3.50 for a plain pen and $10 for a full mounted pen.

RXQ245. And they sell at $1? A. Yes.

RXQ246. What are the intermediate prices of the joint under the finger, A. A. Waterman & Co. pens? A. $1, $1.50, $2, $2.50, $3, $3.50.

3616 *Eugene Flewitt*

RXQ247. Those are all plain pens? A. Those are all plain pens.

RXQ248. The fountain pens of the A. A. Waterman Company are made of many different styles of holders? A. Quite a few different styles.

RXQ249. And the L. E. Waterman Company pens are made in a great many different styles of holders? A. Yes.

RXQ250. Do you know what the L. E. Waterman Company pens sell for retail? A. They sell from $2.50 up.

RXQ251. And that is true whether they are joint under the finger or self-fillers or safety pens? A. Yes.

3617 RXQ252. They make all those different kinds? A. I believe they do.

RXQ253. Don't you know they sell them on the market? A. A. A. Waterman & Co.?

RXQ254. Yes? A. I know they do but they sell so few of those self-fillers it is hard to tell whether they sell them or not.

RXQ255. How do you know they sell very few? A. Because I never see any around. I don't know as I have seen one that has an L. E. Waterman self-filling pen.

RXQ256. No dealer in this city that has a self-filling Waterman pen? A. I am not talking of dealers I am talking of individuals. I did not see the dealers.

RXQ257. Do you know of any dealers that carry the Waterman Ideal self-filler pen in this city? A. Assuredly.

3618 RXQ258. Most all of them carry them? A. Yes, because when they put in a case of pens they are expected to put in some self-fillers, but a great many of them do not.

RXQ259. But they are generally sold where the Waterman pens are sold; is not that a fact? A. Yes.

By Mr. Bacon:

RDQ260. The proportion of their self-fillers to the end joint pens is very small?

Objected to as without the knowledge of the witness.

A. Yes.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant. 3620

Met pursuant to notice at the office of Alexander S. Bacon, 37 Liberty Street, New York, April 13, 1911, at 10:30 A. M.

Appearances:

Samuel S. Watson and Walter B. Raymond, for Complainant.
Alexander S. Bacon, for Defendant.

Mr. Bacon: At the opening of defendant's case, the defendant repeats the offer heretofore made, designated Defendant's Exhibit A, and states that he consents that, in order to avoid the enormous expense of taking testimony and printing the case, etc., he consents that a final decree be entered in substance the same as the interlocutory decree contained in the order of December 10, 1910; and while alleging that the profits of the goods sold to Saadi and marked "Royal Ideal Pen," were far less than $21, he offers, nevertheless, to pay to the plaintiff the damages in the sum of $75. In making this offer the defendant does not admit that it has ever in any instance sold the goods as Waterman goods or Waterman's goods or Waterman Fountain Pens, but always as goods, or pens, of A. A. Waterman & Co.; and does not admit that the plaintiff is entitled rightfully to the use of the word Waterman alone without the initials, but makes this offer 3621

because the defendant has no desire to use the word Waterman alone, as it is of no value to the defendant.

FRED R. RIGHTMIRE, a witness called on behalf of the defendant, being duly sworn, testifies as follows:

Direct-examination by Mr. Bacon:

Q1. Please state your name, residence and business? A. Fred R. Rightmire; age, 24; residence, 24 Williamson Avenue, Lyons Farms, N. J.; business, salesman.

Q2. How long have you been a salesman for the Modern Pen Company? A. Going on four years.

3623 Q3. What territory do you cover? A. Outside of the New England States, New Jersey and New York State; and I go in practically all of the States of the Union, and Cuba, Mexico, Canada and Newfoundland.

Q4. State what instructions you had when you first became a salesman for the defendant, in relation to the manner in which you should present these goods to the public? A. I was instructed, as representative of the Modern Pen Company, to sell fountain pens manufactured by A. A. Waterman & Company and to represent them in no other way.

Q5. Did you have knowledge of the injunction granted in New York on September 3, 1898? A. The understanding I had was that there was an injunction granted, that in nowise affected

3624 our using the name A. A. Waterman & Company.

Q6. Did you have any instructions about using the word Waterman alone; if so, what was it? A. I was instructed to use the term A. A. Waterman and Company and when the word Waterman was used to use the initials and the *and* part.

Q7. Have you ever, in any instance, sold any A. A. Waterman & Company fountain pens to any dealer without telling them that you represented A. A. Waterman & Company? A. No, sir.

Q8. Have you ever sold to any dealer who did not know the difference between A. A. Waterman and L. E. Waterman Company's goods?

Mr. Watson: Objected to as evidently incompetent and immaterial and irrelevant.

A. No dealer has ever bought goods from me that did not know that they were A. A. Waterman & Company goods.

Q9. Will you now state your usual method of introducing A. A. Waterman goods to a new customer whom you had never met before? A. I introduced myself to the customer as Mr. Rightmire, representing the Modern Pen Company, and in the next breath, A. A. Waterman & Company.

Q10. Go on and tell us about what you would say to them? A. Of course, that would vary in accordance with what the conditions of the store or the condition of the customer's stock would be. I would attempt to get his interest along competitive lines, with whatever goods he might have in the store. If he 3626
had never handled any other goods, the goods that he was then handling on the spot would determine the line of my effort. The effort would be along giving the customer a more salable and better profit-paying proposition than the line he was handling. In some cases where I did not think there was any possible chance, I would gracefully withdraw.

Q11. Did you ever in any single instance represent yourself merely as selling Waterman pens? A. No.

Q12. Did you usually make comparisons between A. A. Waterman & Company and L. E. Waterman goods? A. Competitive value, if the question came up.

Q13. How did the dealers usually designate the A. A. Waterman & Company goods; by what name did they call them? A. Some of them would call them Modern Pen Company goods; 3627
some would call them A. A. Waterman line; some of them just "self-filling" line. Some dealers would call them Waterman line. The question would come up at times with regard to my line being a genuine Waterman line. My answer to the trade would be that it was just as much genuine as any Waterman line. It is the genuine A. A. Waterman & Company line, or original genuine A. A. Waterman & Company line.

Q14. That is to say, the L. E. Waterman pen is no more a genuine Waterman pen than the A. A. Waterman pen; they are both genuine if they are made by responsible parties? A. That is the way I always recognized it.

3628 *Fred R. Rightmire*

Q15. You have also called attention to the difference between A. A. and L. E., have you? A. I have.

Q16. Do you know how individuals, not dealers, who carry A. A. Waterman pens, usually designate them? A. In what experience I have had, running across them, there are many individuals that do not know either line, only as the Waterman line.

Q17. Have you ever had occasion to make a comparison between A. A. Waterman & Company and L. E. Waterman and other makes of goods, like Rogers' silver, and the like? A. In selling the trade the question the dealers would bring up in re-
3629 gard to a genuine Waterman line, or anything of that kind—the question of the different Rogers, in the silver business, has been brought up and the dealer, in most cases, would see the point and acknowledge that ours was a genuine Waterman line, the same as the L. E. Waterman Company line was a genuine L. E. Waterman Company line.

Q18. There are two or three firms of Rogers' Silver, are there not?

Mr. Watson: Objected to as immaterial.

A. More than that; so I understand.

Q19. How many? A. Several; I would not be able to say just the number.

Q20. That is true of Faber's pencils, is it not? A. Yes, the
3630 same situation is true with regard to three different Faber's pencils. A customer does not know which Faber's pencil he is getting in one case out of a hundred.

Q21. The trade always does know? A. The trade knows.

Q22. That is the case with pens is it? A. That is generally the case with pens.

Q23. Have you ever given any instructions to the dealers as to how they should sell your pens? A. If any cases came up in regard to advertising or putting on sale our pens, I have always urged that they surely use the initials A. A. Waterman & Company; surely using the "&" sign before the company; and I have often made the statement along this line that we wanted

them to surely use the initials A. A., because we were just as proud of our initials A. A., as the other company were of their initials.

Q24. Have you ever seen any advertisements by local dealers where they are advertising A. A. goods as mere Waterman pens? A. I have not come in contact with them.

Q25. Do you cover Cleveland, Ohio? A. I do.

Q26. Did you ever see a sign in front of Basheim's store which reads "A. A. Waterman Company"? A. I have never seen it.

Q27. In Klen's cigar store, I think it is? A. I have never seen such a sign.

3632

Q28. When were you in Cleveland last? A. In December, 1910.

Q29. How long were you there? A. Only a few hours.

Q30. Did you call on that gentleman? A. I did not.

Q31. Hexter Cigar Company; did you see them or their sign? A. I don't know them, no.

Q32. You never have seen this sign of which I have spoken? A. No.

Q33. Were you traveling in the south very shortly after Mr. Raymond made his tour through the south collecting evidence?

Mr. Watson: That is objected to on the ground that no proper foundation has been laid.

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A. I was in New Orleans along about the 23rd or 24th of January and I heard that Mr. Raymond had been in there just a few days previous.

Q34. Did you call upon Levy? A. I called upon Joseph Levy Bros. & Company.

Q35. What did they tell you about Mr. Raymond's call down there? A. A floor salesman saw Mr. Raymond in the store and he told him when he first came in, that he came in to buy a Waterman pen and the L. E. Waterman Company case was nearest to the door and he showed him an L. E. Waterman Company pen, but an Ideal pen, and then the man, who he told me was the attorney for the L. E. Waterman Company, asked

him about the A. A. Waterman & Company pens and asked him if he never got them mixed up; and the floor salesman told him he kept them in separate cases entirely; and he asked him how he would be able to get them mixed up with the A. A. Waterman & Co. imprint, against an Ideal imprint and he said there was no similarity whatever and that there was nothing like an Ideal imprint on the A. A. Waterman & Company pen; and then the report that the floor salesman gave me was that the attorney left in a sort of disgruntled condition with the statement that he thought the floor salesman had been posted ahead.

Mr. Watson: I move to strike out the answer as in-
3635 competent.

Q36. T. Haussmann & Son; did you go there? A. Yes.

Q37. Did you have any conversation there? A. I saw Mr. Haussmann, the buyer, a member of the firm, and sold him goods on that trip.

Q38. What did he have to say about Mr. Raymond's visit? A. He told me that the attorney for the L. E. Waterman Company had been there a few days before and asked what pens he was selling and Mr. Haussmann answered that he sold A. A. Waterman & Company pens, which he bought from the Modern Pen Company. After a few words between the attorney and Mr. Haussmann, Mr. Haussmann told the attorney to the effect that he did not care about any argument in regard to the matter,
3636 as he considered the incident closed.

Mr. Watson: Objected to as entirely immaterial, incompetent and hearsay and I move to strike out the answer.

Q39. Do you cover Birmingham and Meridian and all of that part of the south? A. Yes.

Q40. Are you the only salesman of the defendant that does? A. In the larger points, in the points you named, yes.

Q41. In those cities that I have named? A. Yes.

Q42. Is there any single dealer in any of those towns that you cover down there who does not know, from statements made to

3637

him by you, the difference between A. A. Waterman & Company goods and L. E. Waterman Company goods? A. Not now.

Q43. Have you ever sold goods to any dealer in any one of those towns named, where you did not explain to them carefully that you were selling A. A. Waterman & Co. goods? A. I have not in any case, where there was the least possible doubt but what the man thoroughly knew that he was buying A. A. Waterman & Company goods from me.

Q44. If he was an old customer I presume you made no remark about it at all? A. No, other than my introduction and my card and a copy of the order that I always gave them, which absolutely stated that it was A. A. Waterman & Company.

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Q45. Whenever you made a sale you always gave the dealer a copy of the order? A. I did.

Q46. On a printed blank furnished by the defendant? A. Yes.

Q47. And those printed blanks all contained in large letters at the bottom "Modern Pen Company, sole selling agents for A. A. Waterman & Company"?

Mr. Watson: Objected to on the ground that the order is the best evidence.

A. Yes.

Mr. Bacon: Several of such orders are now already in evidence.

3639

Mr. Watson: Counsel for plaintiff states that there is no evidence here to show what copies of orders this witness left.

Q48. The printed blanks for orders are the same to all salesmen?

Mr. Watson: Objected to as this witness cannot possibly know that; and the orders themselves are the best evidence.

A. I have never seen any other order or blank or any other form of order different from the ones that I have had.

3640 *Fred R. Rightmire*

Q49. You were brought up in Rochester? A. I was born and brought up in Monroe County ten miles out of Rochester and in my early days was in Rochester a good deal—Rochester, N. Y.

Q50. You are familiar with the firm of Scranton & Wetmore? A. I am, I have heard of them from childhood.

Q51. What is their standing? A. The largest and best stationers, not only in Rochester but in Western New York. They are known the country over.

Q52. Do they handle A. A. Waterman & Co. goods? A. They do.

3641 Q53. Do you know the firm of Butler Bros., St. Louis? A. I do.

Q54. Blackwell Wielandy? A. I do.

Q55. Are they retailers or jobbers of pens? A. Both are jobbers.

Q56. Do not retail at all? A. No.

Q57. Could Mr. Raymond or any other man go into that firm and buy a single pen without representing himself as a dealer?

Mr. Watson: Objected to as entirely incompetent and merely calling for the opinion of the witness, a matter of which he can have no personal knowledge.

A. I don't think he could. To the best of my knowledge and belief they would not sell any at retail.

3642 Q58. You are familiar with the pens made by the L. E. Waterman Company? A. I am.

Q59. And also with the pens made by the A. A. Waterman & Co., of course? A. I am.

Q60. Do you know what the comparative value of each is as compared with the prices? A. I do.

Q61. Do you hear any complaint about the L. E. Waterman pens; if so, state what they are? A. The complaint is general, that the end joint pens made by the L. E. Waterman Company have a leaky joint.

Q62. Is that a general complaint or an occasional complaint? A. General.

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Q63. Have you ever seen any such pens with leaky joints? A. I have.

Q64. How many—many or few?

Mr. Watson: Objected to as indefinite and improper in form.

A. Many, in comparison with those that I have seen or examined.

Q65. Can a self-filling A. A. Waterman & Co. pen leak at the lower joint? A. It would be impossible; there is no lower joint. It is shellacked solid and tight.

Q66. And the middle joint pen has no joint under the fingers? A. No.

3644

Q67. Do you know the discount that A. A. Waterman & Co. give the retailers?

Mr. Watson: Objected to as immaterial.

A. I do.

Q68. From the published retail prices?

Mr. Watson: Objected to as entirely immaterial to any issue in this case.

A. I do.

Q69. What are they? A. On the self-filling line, from forty to fifty per cent; on the end joint line from fifty to fifty and fifteen.

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Q70. What makes the difference in discount—the quantity sold?

Mr. Watson: The same objection.

A. The quantity of the order, considered with the quantity of goods in stock.

Q71. Do you know the discounts given by the L. E. Waterman people?

Mr. Watson: Objected to as entirely immaterial to any issue in this case.

3646 *Fred R. Rightmire*

A. I have that information from the trade.

Q72. What are those discounts from the retail price?

Mr. Watson: The same objections and as hearsay.

A. The trade informs me that their discount is forty per cent from the published list price.

CROSS-EXAMINATION by Mr. Watson:

XQ73. You speak about Butler Bros. of St. Louis. Did you ever see their catalogue? A. No, sir.

3647 XQ74. Do you know whether in their catalogue they advertise the A. A. Waterman & Co. pens as Waterman pens? A. I do not.

XQ75. Have you seen Butler Bros., Chicago, catalogue? A. I have not.

XQ76. Do you know whether they advertise A. A. Waterman & Co. line of goods as Waterman pens? A. I do not.

XQ77. Do you know whether Mr. Raymond could have purchased two dozen A. A. Waterman & Company pens from Butler Bros., St. Louis, or not? A. The understanding that I have is that it must be a dealer to buy any goods from Butler Bros., St. Louis.

XQ78. Do you know whether Mr. Raymond could have purchased two dozen pens, of A. A. Waterman & Company, New

3648 York, from Butler Bros.? A. I do not, without he represented himself as a dealer.

XQ79. Do you know whether or not Mr. Raymond could have bought two dozen or more pens from Blackwell Wielandy? A. Not unless he represented himself as a dealer.

XQ80. Do you mean to say that he could not unless he did? A. I don't believe that he could.

XQ81. You don't know anything about it as a matter of fact? A. Only to jobbers.

XQ82. You don't know whether either one of these concerns would have sold two dozen to Mr. Raymond or not, do you?

A. I could not tell. The understanding that I have is that both jobbers sell only to dealers.

XQ83. Do you know E. C. Simmons, of St. Louis? A. I don't know any such firm.

XQ84. E. C. Simmons Hardware Company? A. I know the Simmons Hardware Company.

XQ85. Do you know whether Mr. Raymond could have bought two dozen pens from them or not marked A. A. Waterman & Co., New York? A. The same thing would apply with them.

XQ86. You don't know? A. It is my belief that nobody could buy from any one of the three houses unless they were dealers. 3650

XQ87. You don't know anything about it? A. That is my belief.

XQ88. When you visited Cleveland did you look for a sign in front of Basheim's? A. No, I don't know the man. I don't know his store.

XQ89. The Superior News Company is another name of the concern? A. I don't know the concern. I don't know where the concern is.

XQ90. Their store is located at 24 Public Square West. Do you know that locality? A. I know where Public Square is. I have been all around Public Square.

XQ91. You do not know the Superior News Company or Basheim in that location? A. No. 3651

XQ92. Do you know any store in that location that carries A. A. Waterman & Company, New York, pens? A. I do not.

XQ93. What stores in Cleveland do handle A. A. Waterman & Co., New York, pens? A. The only account in Cleveland that I have been selling is Bert Ramsey.

XQ94. Where is their place of business? A. He formerly had two stores. He is now located in the Colonial Arcade.

XQ95. Where were his stores? A. The other store was at the corner of Erie and Euclid; it is discontinued.

XQ96. When did he discontinue it? A. I think he discontinued that store in 1900.

3658

XQ135. Did he have any A. A. Waterman & Co. pens when you sold him this stock? A. I think he did.

XQ136. Do you know whether he did or not? A. To the best of my memory he did.

XQ137. Did you tell him how he should sell these pens? A. It was understood that they were to be sold as A. A. Waterman & Co. pens.

XQ138. Did you tell him that? A. Yes. He was handling the A. A. Waterman & Co. pens.

XQ139. Did you tell him at that time he must sell these pens as A. A. Waterman & Co. pens? A. I sold them to him as such and he was handling the line at that time.

3659

XQ140. The question is repeated? A. I cannot say that that exact wording came up at that time pro and con.

XQ141. Didn't you know at that time he was selling A. A. Waterman & Co. pens as Waterman pens? A. I did not.

XQ142. And representing them as Waterman pens? A. I did not.

XQ143. If he had been it would have been wrong, wouldn't it?

Mr. Bacon: Objected to as immaterial; that is a question for the court to decide and not the witness.

A. Yes.

XQ144. Do you know the Hexter Cigar Company in Cleve-

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land? A. I do not.

XQ145. Never have been to that store? A. No, sir.

XQ146. Never sold them any goods? A. No, sir.

XQ147. Do you know who sold Blum on Euclid Avenue, Cleveland, A. A. Waterman & Co. pens? A. I don't know the concern.

XQ148. Do you know who sold the Hexter Cigar Store? A. I don't know the concern.

XQ149. Do you know who sold them? A. No.

XQ150. You testified that there is not one customer in one hundred who knows what kind of a pencil he is getting when he asks for a Faber pencil? A. Yes, to the best of my knowledge and belief that is true.

XQ151. Is not that same thing true when he buys Waterman Ideal pens and A. A. Waterman & Co. pens? A. I think the same thing applies.

XQ152. And that is because of a similarity in the marking of the pens, is it not? A. It is because the dealers that are handling the L. E. Waterman line are handling the genuine L. E. Waterman line; and the dealers handling and selling the A. A. Waterman & Co. line, is giving his customers the genuine A. A. Waterman & Co. pen.

XQ153. Is it not true that the customers do not know because of the similarity in the marking of the pen? A. No, sir.

XQ154. How can they be substituted, one for the other, then? 3662
A. I don't know of their substitution.

XQ155. You say one in a hundred does not know the difference in the pen he is getting? A. In that he is getting a Waterman pen; the same as the man is getting a Faber pencil.

XQ156. Dealers are selling A. A. Waterman & Co. as a genuine Waterman pen? A. As a genuine A. A. Waterman pen.

XQ157. Are they not selling them as genuine Waterman pens? A. As a genuine Waterman pen?

XQ158. Yes? A. Yes, a genuine Waterman pen.

XQ159. How long have you known about the L. E. Waterman Company? A. The last four years.

XQ160. Did you ever hear of them before four years ago? A. Not to any great extent.

XQ161. When did you first hear of them at all? A. The 3663
first I remember was when I got into the pen game four years ago.

XQ162. And all this time pens stamped A. A. Waterman & Co. have been sold as genuine Waterman pens? A. No.

XQ163. All the time that you have been talking with the trade the A. A. Waterman & Co. pen has been sold as genuine Waterman? A. As a genuine Waterman pen, yes.

XQ164. What were you doing before you became salesman for the A. A. Waterman Company? I had been salesman for ten years previous.

XQ165. For whom? A. I had been with Sherwin-Williams Company.

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XQ166. Is that the only concern you have been with? A. No.

XQ167. What other one? A. Washburn, Crosby & Company.

XQ168. Any others? A. Oliver Typewriter Company.

XQ169. Give the rest of them if there are any? A. S. M. Bixby & Company; The American Chemical Manufacturing Company, which is the same as the Shinola now.

XQ170. What is the business of that last named concern? A. Shoe polishing.

XQ171. The only thing they deal in is shoe polish? A. Yes.

XQ172. What do S. M. Bixby & Company sell? A. Shoe

3665 polish.

XQ173. Sherwin-Williams Company? A. Paints and varnish.

XQ174. The Washburn & Crosby Company? A. Flour.

XQ175. And the Oliver Typewriter Company? A. Typewriters.

XQ176. Stationery supplies also? A. No.

XQ177. Nothing except typewriters? A. No.

XQ178. No ribbons? A. No.

XQ179. No accessories at all, nothing except typewriters? A. That is all.

XQ180. How long were you with them? A. Comparatively a short time.

3666 XQ181. Six months, a year, or how long? A. Less than a year.

XQ182. More than six months? A. I don't think it was.

XQ183. Did you visit the stationery trade when you were with the Oliver Typewriter Company? A. No, I was out here near my home in Elizabeth; any place that I could, around Elizabeth, locally. It was an experiment that I took up with the company to see whether it would pay for a local man in Elizabeth.

XQ184. When was this? A. Just previous to my going with the Modern Pen Company.

XQ185. That is about four or five years ago? A. Yes.

XQ186. Did you know about the Waterman Ideal Fountain Pens then? A. Not to any extent.

XQ187. You did not know they were on the market did you? A. I had heard of two Waterman lines at that time but it never interested me any.

XQ188. Did you sell these Oliver Typewriters to Wolfson Bros. of Jersey City? A. No.

XQ189. Did you sell them to any dealers in Jersey City? A. No, sir, I never called on any dealer in Jersey City.

XQ190. You have sold Wolfson Bros. A. A. Waterman & Co. fountain pens, have you not? A. No. I don't do anything in New Jersey at all.

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XQ191. Do you always leave a card when you call on customers? A. Unless I know the customer.

XQ192. Have you got one of the cards that you use? A. I have not a card with me. I left my case in my other clothes this morning.

Mr. Bacon: We will produce one of the cards.

XQ193. You say when you went to work for the A. A. Waterman & Co., and the Modern Pen Company—you consider those one concern don't you? A. Sir?

XQ194. They are one concern, the Modern Pen Company and the A. A. Waterman & Company? A. As far as I am concerned.

XQ195. Who hired you? A. Mr. Martling. 3669

XQ196. They have no separate offices; their offices are in the same place, A. A. Waterman & Co. and the Modern Pen Company? A. I don't transact any business with A. A. Waterman & Co. I don't know them.

XQ197. You don't know them at all? A. No, sir.

XQ198. You don't know where their place of business is? A. I know they have a factory.

XQ199. Where is their place of business? A. 22 Thames Street.

XQ200. Where is their office? A. The same building I suppose.

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XQ201. Don't you know it is? A. I don't have any transactions with the A. A. Waterman Company at all.

XQ202. You have never been in their offices? A. A. A. Waterman & Co.?

XQ203. Yes? A. I have been in the offices that the A. A. Waterman & Co. use.

XQ204. Where is that? A. 22 Thames Street.

XQ205. The same place as the Modern Pen Company? A. Yes.

XQ206. In the same room? A. Yes.

XQ207. And the same men do the business, don't they? A. I don't have anything to do with the A. A. Waterman & Co.

3671 business.

XQ208. Then you never have received any instructions from the A. A. Waterman Company as to how you should sell these pens? A. My instructions were from the Modern Pen Company for whom I work.

XQ209. And when you went to work you say you had knowledge of the Kellogg decree? A. I did not know what name it was under. The knowledge that I had was that there was a decree that we use only the word Waterman with the initials A. A. & Company.

XQ210. Who told you about it? A. To the best of my memory, Mr. Martling.

XQ211. Did he show you a copy? A. I don't know.

3672 XQ212. All you know is what he told you? A. I know it was impressed on my mind to that effect. The methods I could not state.

XQ213. You testified that you were instructed that you should not sell these as Waterman pens; is that right? A. Yes.

XQ214. Did he tell you why? A. The only reason that I have ever known was that the decision of the court had given us the right to sell them as A. A. Waterman & Co. pens.

XQ215. They did not tell you why except that? A. That is all I know.

XQ216. Did they tell you that they were enjoined from calling them Waterman pens? A. That was understood on my part.

XQ217. That was simply inferred on your part? A. I so understood.

XQ218. Who did you understand from? A. Mr. Martling, I presume.

XQ219. Did you have any talk with Mr. Geyer who is present here now, when you were employed? A. Yes, I met Mr. Geyer.

XQ220. At that time? A. Yes.

XQ221. Did he give you any instructions? A. No.

XQ222. You did not have any talk with him about how you should sell these pens? A. Only in a general way, that that was understood with all of us in the office in conversation. I hired to Mr. Martling.

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XQ223. Was Mr. Geyer present when you were hired? A. I don't think he was in the office at that time. I don't think he was in the office at the time I made the contract. I met him at that time in a general way.

XQ224. You never had any business relations at all with A. A. Waterman & Co.? A. No, sir.

XQ225. You are sure about that? A. Yes.

XQ226. That you were employed by the Modern Pen Company? A. Yes.

XQ227. Then why, when you introduced yourself as a salesman of A. A. Waterman & Co. goods did you say that you represented A. A. Waterman & Co.? A. The Modern Pen Company have the selling of A. A. Waterman & Co. goods.

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XQ228. You thought it necessary to use that word did you, to sell the goods? A. The goods in most cases were either handled, or known, under that name by the trade that I was calling on.

XQ229. You used the name Waterman because that helped you to sell the goods, didn't you?

Mr. Bacon: Objected to.

A. I never used the name Waterman to help sell goods. It was used where the goods were either handled or known as A. A. Waterman & Co. goods; and that is what I was there to sell them.

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XQ230. It did not make any difference whether the man knew anything about the pens or not. The first time you visited a dealer who never had handled A. A. Waterman & Company goods you found it necessary to tell them that they were A. A. Waterman & Co. goods? A. The goods were all imprinted A. A. Waterman & Co., and it was not necessary to do that. He saw it from the sample.

XQ231. Were not some of them imprinted Modern Pen Company? A. If it was it had A. A. Waterman & Co., on it.

XQ232. Always? A. Yes.

XQ233. You never saw any pens that were made by the Modern Pen Company that did not have A. A. Waterman & Co.

3677 on them? A. I have seen such pens but I did not carry them.

XQ234. You know that they were making and selling that kind of pens, don't you? A. I was not carrying them.

XQ235. Do you know whether they were making and selling that kind of pen, the Modern Pen Company and A. A. Waterman & Co.? A. Yes, I have seen such pens.

XQ236. How long have you seen them? A. I have not seen them for the last two years.

XQ237. Have you ever had any experience in the manufacture of fountain pens? A. No, sir.

XQ238. You do not know anything about the grade and quality of fountain pens as a manufacturer? A. No, sir.

XQ239. As you travel around the country have you not

3678 found that the Waterman Ideal Fountain Pens are sold in the leading stores of the country? A. In some cases.

XQ240. In most of the leading stores of the country?

Mr. Bacon: Objected to as immaterial.

A. No, they are sold any and every place.

XQ241. They are very widely sold, are they not? A. In all kinds of stores, good, bad and indifferent.

XQ242. Do you know Burrows Bros. of Cleveland? A. I know who they are.

XQ243. Do you know whether they handle Waterman Ideal Fountain pens? A. To the best of my memory they do.

XQ244. Do you consider them one of the leading stores in Cleveland? A. It is a very good store.

XQ245. A very large store? A. Yes.

XQ246. It is on one of the main streets? A. Yes.

XQ247. Do you know Vosburg, Whiting & Company of Buffalo? A. I don't go to Buffalo.

XQ248. You never have been in Buffalo? A. I have been in Buffalo, yes. I never heard of them.

XQ249. Do you know the Williamson Stationery Company of Rochester? A. I never heard of such a concern.

XQ250. You do not know that they have been in business for fifteen or twenty years? A. I never knew of the Williamson Stationery Company in Rochester. 3680

XQ251. Do you know of any Williamson Stationery Company anywhere? A. No.

XQ252. Do you know the Franklin Printing Company of Toledo? A. Yes.

XQ253. Did you ever sell him any pens marked A. A. Waterman & Co.? A. I don't think so.

XQ254. Do you know whether they ever carried them or not? A. I don't think so.

XQ255. Did you ever solicit their orders? A. I have.

XQ256. What kind of pens were they carrying when you solicited their orders? A. The Franklin Printing & Engraving Company were handling Conklin pens and had some Ideals, but were very much inclined to give the L. E. Waterman Ideal pens 3681 the worst of it and buy other pens. They told me the last time I called on their buyer that where they had been buying them in five gross lots and their orders fell something between sixty and seventy dollars for the L. E. Waterman Ideal pens.

Mr. Watson: I move to strike out the answer as not responsive and as volunteered.

Mr. Bacon: Objected to.

XQ257. When did you solicit their order? A. Within the last two or three years?

XQ258. When did you have this conversation with them last? A. I could not name the date.

XQ259. What did they say about A. A. Waterman & Co. fountain pens? A. There was no chance for any business. I had a friendly visit with the buyer and the conversation I have repeated was about all there was to it. There was no chance for us to get in. Conklin had all the business and that was the line that they were pushing at that time. There was no chance for us to get in. I had a very friendly visit with the buyer.

XQ260. Didn't they tell you that they used to carry A. A. Waterman & Co. goods? A. I don't remember any such thing.

XQ261. No conversation about that at all? A. No.

XQ262. They refused to give you an order? A. Yes. There was some talk, on what we termed imprint pens, and cheaper
3683 priced pens and they might give me an order later.

XQ263. Do you cover the City of Washington, D. C.? A. I have been there. I don't cover it now.

XQ264. When were you there? A. In 1910.

XQ265. Did you sell John Saadi some pens? A. I did not.

XQ266. Whom did you sell in Washington? A. I think the name of the concern was Franklin & Co., and one of the department stores.

XQ267. Do you know D. P. Andrews & Co. of Washington? A. I know who they are.

XQ268. On F Street? A. I remember their name.

XQ269. That is one of the leading stores in Washington, is it not? A. That is one of the leading stationers.

3684 XQ270. Do you know whether they carry Waterman Ideal Fountain Pens? A. I do not know.

XQ271. Do you know Brentano's Book Store in Washington? A. I have heard of it. I never was in that store.

XQ272. That is the leading store in Washington, is it not? A. That I do not know.

XQ273. Do you know the Stott stationery store in Washington? A. I do not.

XQ274. Did you ever sell Crowley, Milner & Company? A. Yes.

XQ275. When? A. 1910.

XQ276. Was that the first time? A. I think that is the first time, to that firm. It reorganized. I would not be positive.

XQ277. That is the first time that they had seen A. A. Waterman & Co. goods? A. Oh, no, they had handled them right along, Crowley, Milner & Company were successors to the old firm of Partridge & Blackwell.

XQ278. Did you give this concern any instruction not to sell the A. A. Waterman & Co. pens as Waterman pens? A. I don't remember that condition ever coming up.

XQ279. Did you ever mention anything about it as far as you remember? A. I know they bought the pens as A. A. Waterman & Co. pens and the girl at the pen counter knew that they were A. A. Waterman & Co. The young lady, Miss Cooney, at the pen counter knew that they were A. A. Waterman & Co. pens. 3686

XQ280. You do not come in contact with retail customers, do you? A. No, only in very exceptional cases.

XQ281. Did you sell Tillotson of Ishpeming, Michigan? A. I don't know. I don't remember being in that town.

XQ282. Do you cover Baltimore? A. I do not now. I have been there.

XQ283. When did you cover Baltimore? A. In 1910.

XQ284. Do you know Meyer & Thalheimer? A. I do.

XQ285. Do they carry fountain pens? A. Yes.

XQ286. Do you know whether they carry Waterman Ideal Fountain Pens? A. I do not know.

XQ287. It is the leading store in Baltimore is it not? A. One of the leading stores. 3687

XQ288. Do you know Lucas Bros. of Baltimore? A. No, I don't remember them.

XQ289. You don't know that Lucas Bros. is one of the leading stationery stores in Baltimore? A. I don't remember the name.

XQ290. Never called on them? A. Not to my memory.

XQ291. Did you ever sell Jensen, Herzer & Jeck of Nashville, Tennessee? A. Yes.

XQ292. When did you first sell them? A. Two or three years ago.

XQ293. Have you sold them since? A. Yes.

3688

XQ294. Did you tell them that they should not sell these A. A. Waterman & Co. goods as Waterman pens? A. That condition never came up. They knew they were A. A. Waterman pens.

XQ295. You never did tell them about it? A. It has been talked between us. They know they are A. A. Waterman & Co. goods, and they know the firm and the conditions.

XQ296. They sell these goods as geniune Waterman pens, don't they? A. I don't know that they sell them as genuine Waterman pens.

XQ297. You don't know they do not, do you? A. No, I don't know that they do not.

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Mr. Bacon: Objected to as ridiculous.

XQ298. You don't know whether Mr. Raymond saw anybody else except the floor salesman in Joe Levy's, do you? A. The floor salesman told me that he was the only one that he saw and Mr. Levy told me that he saw the floor salesman.

XQ299. You do not know whether he saw anybody else or not, you have no personal knowledge? A. I was not there. The floor salesman told me.

XQ300. You have no personal knowledge of it? A. I was not there.

XQ301. You only know what they told you? A. Yes.

XQ302. The same thing is true of what occurred at Hauss-
3690 mann's store; you have no personal knowledge? A. I was not there.

XQ303. What kind of pens do Haussmann & Company carry? A. A. A. Waterman & Co. pens.

XQ304. You have testified that you have in some cases instructed dealers to be careful to use "A. A." and "& Company;" is that so? A. Where a dealer brought up a proposition of advertising for a sale, or something of that nature, putting a big ad in the paper, I have done that.

XQ305. Those were very exceptional cases where that matter came up at all, were they not? A. I always told them that same thing wherever it came up.

XQ306. Did you sell Aloe in St. Louis? A. No, I never sold them a dollar's worth of goods.

XQ307. Did you ever see their advertisement for these goods that you were selling? A. No, I never have seen Aloe Optical Company's advertisement of fountain pens.

XQ308. Have you ever sold Scruggs, Vandevout & Barney of St. Louis? A. No.

XQ309. Have you ever seen any of their advertisements of A. A. Waterman & Co. fountain pens? A. No.

XQ310. You don't know how they advertised them? A. No.

XQ311. Have you ever seen any of the advertisements of Scruggs of Montreal, Canada? A. Scruggs or Scroggie? No, I have never seen any of their advertisements. 3692

XQ312. You do not know that they advertised A. A. Waterman & Co. fountain pens as Waterman pens? A. No, sir.

XQ313. Do you cover Philadelphia? A. Not now.

XQ314. When did you cover Philadelphia? A. I was in Philadelphia one day in 1910.

XQ315. Is that the only trip you made there? A. Yes.

XQ316. There is a large stationery store on Chestnut Street opposite the Post Office; what is the name of that store? A. I could not tell you. I do not know the trade there.

XQ317. Have you ever sold Jacoby's Pharmacy in Birmingham? A. I don't think there is a Jacoby's Pharmacy in Birmingham.

XQ318. Do you know of a Jacoby's Pharmacy anywhere? 3693
A. There is a Jacoby's Pharmacy in Tennessee.

XQ319. Did you sell them? A. No, sir.

XQ320. Did you ever sell Jacobs' Pharmacy in Birmingham? A. No, sir.

XQ321. Did you ever sell Thayer in Memphis, Tennessee? A. No.

XQ322. Did you ever visit him? A. No.

XQ323. How long since you visited Toronto, Canada? A. I was in Toronto between Christmas and New Years, 1910, the last week in December, 1910.

XQ324. How frequently have you been there in the last four years? A. On an average two or three times a year.

3694 *Fred R. Rightmire*

XQ325. Do you know O. B. Stanton? A. I know him personally.

XQ326. One of the leading stationery stores in Toronto? A. One of them.

XQ327. Does he sell Waterman's Ideal Fountain Pens? A. They used to sell them almost exclusively. He is selling a good many Swans along with them now. His loyalty to the Ideal line was somewhat shaken the last visit I had with him.

XQ328. How many Swan pens did you see in the stock? A. A few dozen.

XQ329. Three dozen? A. As I remember, it was quite a large standing case, my memory is a gross case.

3695 XQ330. If he testified that he had less than three dozen then would you believe he was telling the truth? A. He may have lowered his stock to that amount. I would not dispute Mr. Stanton's word.

XQ331. He is a man of probity, a man that you would believe? A. I would consider him such, yes.

XQ332. And if he testified that he had a very large stock of Waterman's Ideal Pens would you believe him? A. I would.

XQ333. And if he testified that he had only sold two or three Swan pens since he carried them, would you believe him? A. That might be personal with him.

XQ334. No, I mean in his store? A. I don't like to answer any question where you would doubt a man's word under oath.

3696 XQ335. Might you not have made some mistake as to the fact that he had a large case of Swan pens? A. No, sir, not at the time that I was there.

XQ336. The case that you refer to you are willing to swear was not marked Waterman's Ideal Fountain Pens? A. The case that I refer to I know was the Swan pen and we talked about it.

XQ337. I am talking about the case, the large standing case that you mentioned? A. The L. E. Waterman case was a long counter case. It is a much larger case than the Swan case.

XQ338. That was full of Waterman's Ideal Pens was it not when you were there? A. It looked like the regular stock.

XQ339. Fifteen or twenty dozen or so? A. I imagine they carried that amount.

XQ340. How long since you visited Montreal, Canada? A. I have been in Montreal in the fall of 1910.

XQ341. And you have been there frequently the last three or four years? A. Oh, yes.

XQ342. Do you know the store kept by George Foster Brown in Montreal? A. I do.

XQ343. He is one of the largest stationery and book stores in Montreal? A. In the line of being an old fogy.

Mr. Watson: I move to strike out the answer as not responsive. 3698

XQ344. (The question is repeated.) A. (Continued) I do not consider him one of the representative stationery stores of the city.

Mr. Watson: I move to strike out the answer as not responsive.

XQ345. (Question is repeated.)

Mr. Bacon: Objected to as the question is already answered.

XQ346. (Repeated.) He is one of the largest stationery and book stores in Montreal? A. My previous answer.

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Mr. Watson: I move to strike out the answer as not responsive and the question is repeated.

Mr. Bacon: Is he a large dealer or a small dealer?

Mr. Watson: That is not the question.

The Witness: What is the question?

XQ347. (Repeated.) He is one of the largest stationery and book stores in Montreal? A. One of them.

XQ348. Where is his store located? A. St. Catherine's Street, West.

XQ349. It is one of the principal retail business streets is it not? A. Yes.

3700

XQ350. You have been selling goods for the Modern Pen Company in Boston, Mass.? A. No, sir.

XQ351. Any New England points? A. No, sir.

XQ352. How long have you been traveling in the West for the Modern Pen Company? A. What part of the West?

XQ353. Say west of the Mississippi River? A. 1910 and 1911.

XQ354. Not before that? A. Not west of the Mississippi, I don't think.

XQ355. How far west did you go prior to that? A. I went just to the river, New Orleans, Memphis, Louisville.

XQ356. When did you first go to Omaha? A. 1910.

XQ357. The early part of 1910? A. Yes, in the early months.

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XQ358. And you went through to the Pacific coast at that time? A. No, I did not at that time. I did later in the year.

XQ359. On that same trip? A. No.

XQ360. What did you cover on that trip? A. I went first to Omaha. As I remember it I went as far as Denver, Colorado Springs and Pueblo.

XQ361. That was in the early part of 1910? A. Yes.

XQ362. Did you ever travel in Arkansas? A. No.

XQ363. Or Kansas? A. I went through Kansas; I never stopped. Yes, I did stop at certain points I think.

XQ364. And that was in the early part of 1910? A. Yes. It was either the early trip or the July trip. I don't remember.

XQ365. In the July trip what territory did you cover west of

3702

the Mississippi River? A. I went through to the coast. San Francisco, Los Angeles.

XQ366. Pueblo? A. Yes.

XQ367. And all the principal intermediate places? A. The largest cities.

XQ368. Who was the salesman of the Modern Pen Company that covered the western territory prior to your covering it? A. I don't know.

XQ369. Was it covered by somebody? A. I don't know.

XQ370. You don't know whether any salesman went out? A. No, I do not.

XQ371. Do you know whether they had any salesman in that territory at all? A. Not just previous to my going. I don't know that anyone was out there.

XQ372. At any time prior to your going there do you know of any salesman covering that territory for the Modern Pen Company? A. I don't know that a salesman was out there.

XQ373. They sold goods out through that territory? A. Yes.

XQ374. How long has that been?

Mr. Bacon: Objected to as immaterial and I direct the witness not to answer.

Mr. Watson: I will certify the question. 3704

XQ375. By whose instructions did you go into that territory west of the Mississippi River?

Mr. Bacon: I object and instruct the witness not to answer, as this is evidently an attempt to get evidence for another suit.

A. I am directed not to answer.

XQ376. Do you refuse to answer? A. I am directed not to answer.

XQ377. Do you refuse to answer?

Mr. Bacon: I direct him not to answer on the ground that this inquiry has nothing to do with these issues and is transparently for the purpose of gathering testimony improperly for another controversy. 3705

XQ378. Do you refuse to answer? A. Yes.

XQ379. You refuse to answer by whose instructions you made this trip, or two trips, in 1910, into the territory west of the Mississippi River? A. Yes.

XQ380. And you refuse to answer what salesman covered this territory prior to 1910, for the Modern Pen Company? A. I have told you that I did not know.

XQ381. Do you know whether the goods of the Modern Pen Company were sold in the territory west of the Mississippi River prior to 1910?

Mr. Bacon: Objected to. I direct him not to answer, for the same reasons as indicated already.

XQ382. Do you refuse to answer? A. Yes.

Mr. Watson: The examiner will certify those two questions.

XQ383. When you made these trips for the Modern Pen Company who was it gave you your instructions?

Mr. Bacon: The same direction.

A. What trips?

3707 XQ384. Any trip that you made? A. I had no instructions.

XQ385. You could go anywhere you wanted to? A. Yes.

XQ386. When you made the trip to Chattanooga, Birmingham, Nashville and other places, who gave your instructions to make those trips? A. I made out my own route.

XQ387. Did you submit it to anybody before you left on those trips? A. I talked it over with them.

XQ388. Whom did you talk with? A. With regard to what trips?

XQ389. Any trips that you have made since you have been employed by the Modern Pen Company?

Mr. Bacon: Objected to as immaterial and the witness is directed not to answer.

3708 XQ390. Do you refuse to answer? A. Yes.

Mr. Watson: The examiner will certify the question.

XQ391. Who gave you the instructions about the sale of the pens to the A. A. Waterman & Co.? A. When I first went with the company?

XQ392. At any time? A. Mr. Martling.

XQ393. Is he the only one? A. I have had instructions from Mr. Geyer.

XQ394. Mr. Martling has not been connected with the Modern Pen Company for some time, has he? A. No.

XQ395. When did he leave; do you know? A. I think it was the fall of 1909.

XQ396. And since that time who has given you your instructions with regard to the sale of A. A. Waterman & Co. pens? A. Mr. Geyer.

XQ397. Is he the only one that has given you any instructions? A. Yes.

XQ398. Do you know where Mr. Martling is now? A. I do not.

XQ399. When did you last hear of him? A. I have not heard of him since he left the office, only indirectly.

XQ400. Where did you hear of him last? A. What was his position the last time I heard? 3710

XQ401. Yes? A. He had some position I think with the National Cloak & Suit House.

XQ402. Where is that? A. New York City.

XQ403. When did you hear of him there? A. I cannot remember.

XQ404. Within a year? A. I presume so. I don't know very much about him. I have not heard.

XQ405. When Mr. Martling left, sometime in 1909, as you remember, you received your instrutcions from Mr. Geyer? A. Yes.

XQ406. When you made these trips he told you where to go didn't he? A. No, sir.

XQ407. Didn't he arrange your route list? A. No. 3711

XQ408. Did you submit your route list to him before you left? A. Yes.

XQ409. He approved it, did he? A. I don't think any approval was given. It was taken for granted.

XQ410. He did not make any objection to your route, where you were going?

Mr. Bacon: I object to this and direct the witness not to answer; it is going into matter that is wholly foreign and highly improper to this examination.

XQ411. Do you refuse to answer? A. Yes.

Mr. Bacon: I direct him not to answer.

Mr. Watson: I will certify the question.

XQ412. Did you ever make any extended trip anywhere that you did not submit your route to Mr. Geyer or somebody else in authority in the Modern Pen Company?

Mr. Bacon: The same direction.

A. I refuse to answer.

Mr. Watson: I will certify the question.

XQ413. Did you know that the Modern Pen Company had
3713 made a contract not to sell its goods west of the Mississippi River?

Mr. Bacon: Objected to and I direct the witness not to answer.

A. I refuse to answer.

Mr. Bacon: This question indicates to the court the reasons for these other highly improper questions, concerning which the L. E. Waterman Company has no interest.

XQ414. Do you know anything about these contracts that I referred to in my last question?

3714 Mr. Bacon: You can answer that.

A. I don't know anything.

XQ415. Have you ever been told anything about them by Mr. Geyer? A. I don't know what the contracts are that you refer to.

XQ416. You never heard of them? A. I have heard indefinitely.

XQ417. Whom did you hear of them from? A. More from the trade than anybody else.

XQ418. Never heard of them from Mr. Geyer? A. We talked indefinitely about them. I don't know what they are.

XQ419. Do you know any concern named A. A. Waterman & Co., Inc., of Chicago? A. Only from hearsay.

XQ420. Do you know where they sold their goods? A. I know some places.

XQ421. Where? A. They have sold a few in Duluth.

XQ422. Is that the only place? A. I suppose that I could think of some; they would be very few places; none of the larger towns that I got into.

XQ423. Did they sell any of their goods in Seattle? A. There is one stationer there that has bought their goods.

XQ424. What is the name of the concern?

Mr. Bacon: Objected to as immaterial and the wit- 3716
ness is instructed not to answer.

XQ425. Do you refuse to answer? A. Yes.

XQ426. What is the name of the concern in Duluth that you refer to?

Mr. Bacon: The same objection and instructions.

A. I refuse to answer.

Mr. Watson: I will certify these questions.

XQ427. Do you know under what name these goods are sold?

Mr. Bacon: You may answer that if you know.

A. As to who sells them, I have never seen any billhead. I 3717
don't know who sells them.

XQ428. Did you ever know of their selling any goods in Cleveland? A. No, sir.

XQ429. Did you ever know of their selling any goods east of the Mississippi River? A. I don't know.

XQ430. You never heard of it, did you? A. I heard of it indirectly.

XQ431. You don't know of any case? A. I could quote you a case.

XQ432. Do you know A. A. Waterman? A. No.

XQ433. You never knew him? A. No.

3718

XQ434. Do you know anybody connected with the concern of A. A. Waterman & Co., Incorporated of Chicago? A. I know no one personally, no, sir.

XQ435. Never talked with any of them? A. No, sir.

XQ436. Did you meet their salesman? A. No.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ437. You have seen their goods on sale east of the Mississippi have you not, the A. A. Waterman Company of Chicago? A. Noyes Bros. & Cutler of St. Paul, Minn., have their goods on sale. That is east of the Mississippi River.

3719

RDQ438. Did you strike any competition through Ohio and Indiana from the A. A. Waterman Company of Chicago? A. I heard of it but not any active competition in the larger points. A. A. Waterman & Co. goods, of Chicago—A. A. Waterman & Co., Incorporated—were sold to dealers in Zanesville, Ohio.

RDQ539. When did you see Mr. Swan of Toronto and what did he say about the Ideal goods? A. Stanton you mean?

RDQ440. What is the name of that firm of Toronto that sold the Swan pens? A. O. B. Stanton.

RDQ441. Whom did you see there? A. Mr. Stanton, himself.

RDQ442. What did he say about Ideal pens?

3720

Mr. Watson: Objected to as entirely incompetent, and hearsay, and Mr. Stanton has been examined in this case.

Mr. Bacon: The question is asked to be answered on the ground that Mr. Watson has brought it out?

A. Mr. Stanton and myself have always been very friendly although I never sold him any goods. He always invited me to come in and see him. I have always known him up to the last call or two as a strictly loyal Ideal man, an L. E. Waterman & Company booster. I should judge from the last visit that I had with him that his trade was becoming divided and he found that he had to have another pen aside from the L. E. Waterman Ideal pen.

Mr. Watson: I move to strike out the ansewr as incompetent and immaterial.

RDQ443. Is that all that he said?

Mr. Watson: The same objections.

A. That is as near as I can remember it, that he had added another line. On my previous visits he never seemed inclined to consider any other line.

RDQ444. What dealers in Toronto carry the A. A. Waterman & Company pens? A. The trade that I see in Toronto is a jobbing trade, wholesale trade. I saw Goldsmith Stock Company, Ltd., Warwick Bros. & Rutter. 3722

RDQ445. Are these firms prominent? A. They are the largest in their respective line.

RDQ446. Who do you sell in Montreal? A. I sell to Granger Freres, Librarie Bauchemin, Edward Eaves, Ltd., O. W. Barwick, A. T. Chapman, J. G. Gratton, O. St. Jean—there may be some others I sell occasionally that I do not call to mind.

RDQ447. Are they prominent in their respective lines? A. Granger Freres is by far the largest retail house on the French side; and Librarie Bauchemin come in very strong for both wholesale and retail among the French people in Montreal. The others I would consider just average trade.

RDQ448. You have been down in Mexico? A. Yes.

RDQ449. Did you find the L. E. Waterman goods down there? A. In Mexico City quite prominent; and the other points that I made in the republic, no. 3723

RDQ450. In what way were they sold down there; do you know? A. The dealers that I talked with that had L. E. Waterman Company goods told me they were on consignment.

RDQ451. Did A. A. Waterman & Co., ever sell goods on consignment? A. Not to my knowledge.

RDQ452. In your cross-examination did you make a distinction between a genuine Waterman pen and the genuine Waterman pen? You were examined along that line as I remember? A. I made the statement that I said to the trade that our pen was a genuine Waterman pen as much as any pen

was a genuine Waterman pen; ours was the genuine A. A. Waterman & Co. pen, regardless of what the other fellow had.

RE-CROSS EXAMINATION by Mr. Watson:

RXQ453. Then I take it from your re-direct examination you do make a difference between the genuine Waterman pen and a genuine Waterman pen? A. I know they use the expression a genuine Waterman pen.

RXQ454. You have talked to the trade and called the pen of the A. A. Waterman Company the genuine Waterman pen? A. No, sir.

3725 RXQ455. Or a genuine Waterman pen? A. Yes, sir.

RXQ456. Then you do make a distinction betwen a genuine Waterman pen and the genuine Waterman? A. There is no the, because there is more than one Waterman.

RXQ457. Then you have told the trade that the A. A. Waterman & Co. is a genuine Waterman pen? A. Yes.

RXQ458. That is the way you sold it to the trade? A. When the question was brought up—I have sold all the pens as A. A. Waterman & Co., pens; when the question was brought up if it was a genuine Waterman I answered it yes, and told them so.

RXQ459. These concerns that you mentioned in Toronto are all wholesalers, are they not? A. Yes.

RXQ460. Do you know a single retail store in Toronto where
3726 they sell A. A. Waterman & Co. goods? A. I never call on them.

RXQ461. What you said about the dealers in Mexico having Waterman Ideal Fountain Pens on consignment, the only thing you know about it is what you were told? A. The dealers universally told me so.

RXQ462. You don't know whether it is a fact or not? A. I saw no bill.

RXQ463. And have no personal knowledge of it at all? A. No.

RXQ464. This concern in Zanesville, Ohio, that you say had a stock of A. A. Waterman & Co., Chicago pens, what is the name of that concern?

Mr. Bacon: Objected to.

A. I cannot recall the man's name to mind right now.

RXQ465. Do you know where he bought those pens? A. I never saw any bill.

RXQ466. You have no information as to where he bought the goods? A. No, sir, not that I remember.

RXQ467. That is the only one that you know, is it not, east of Chicago? A. That is the only one that I call to mind now.

RXQ468. Did you ever run across any others? A. I have heard of others.

RXQ469. But you never saw any stock except that one? A. That is the only one I remember. 3728

RXQ470. You would remember it if you saw it wouldn't you?

Mr. Bacon: Objected to as immaterial and the witness is directed not to answer any further questions along this line as the evidence is transparently improper.

A. I refuse to answer.

Mr. Watson: I will certify the question.

RXQ471. Do you know how the Zanesville, Ohio concern that you mentioned that had a stock of A. A. Waterman & Co., Chicago pens sold those pens to the public?

Mr. Bacon: Objected to as immaterial.

3729

A. I don't know.

RXQ472. Did you cover Decatur, Illinois? A. No, sir.

RXQ473. Never have been in that town? A. No, sir, not to my memory.

By Mr. Bacon:

RDQ474. You don't recognize that L. E. Waterman Company has any right to the word genuine? A. No, sir.

3730

FRED R. RIGHTMIRE, recalled on behalf of the defendant:

By Mr. Bacon:

RDQ475. You have just been up in Canada? A. Yes.

RDQ476. And saw Mr. David Racine? A. Yes.

RDQ477. A jeweler in Quebec? A. Yes.

RDQ478. Did he say anything about his recent visit to the L. E. Waterman Company?

Mr. Watson: Objected to as immaterial and irrelevant.

A. Yes.

RDQ479. What did he say?

3731

Mr. Watson: Same objections.

A. That he had recently been in the store of L. E. Waterman Company, Limited, in Montreal and while he was in the store with two or three repairs some one in the store told him that there was no more such concern as A. A. Waterman & Co. of New York and tried to get his order for pens from him on that representation.

RDQ480. How long ago was this talk with Mr. Racine?

Mr. Watson: Same objection.

A. I saw Mr. Racine day before yesterday and his visit in Montreal was of recent date, since the first of this year.

3732 RDQ481. Did you also call on Granger Freres in Montreal? A. I did.

RDQ482. What did they say?

Mr. Watson: The same objection.

A. Granger Freres carry the A. A. Waterman & Co. line and also very few of the L. E. Waterman Co. Ideal pens and when customers come in and call for a Waterman pen, then when an Ideal is shown, the customer says, "No, that is not a Waterman pen; it is not the Waterman pen I want; I want the one that turns at the end," and in selling them that turn at the end the customer twists his hands one above the other to show how the pen works that they want.

RDQ483. Did you also see very recenly Mr. Ball, of the Ball Book Company, Pensacola, Florida? A. I saw him in the fall of 1910.

RDQ484. What did he say about this controversy?

Mr. Watson: Objected to as incompetent and immaterial.

A. Mr. Ball told me that Mr. L. E. Waterman the vice-president and traveling representative for the L. E. Waterman Company told him that by the next trip Mr. Ball would not be able to get any more pens imprinted A. A. Waterman & Co. and to back up his assertions he bet a box of cigars with Mr. Ball that he would not be able to get any more pens imprinted A. A. Waterman & Co., after the next trip. 3734

RDQ485. Did you also see Mr. O. B. Stanton of Toronto? A. Yes.

RDQ486. What did he tell you about this matter?

Mr. Watson: Objected to as immaterial.

A. Mr. O. B Stanton who has been a very loyal Ideal booster told me that a customer wanted one of our pens and it was impossible for him to sell him an Ideal in its place and he had to mail an order in to us for one of our A. A. Waterman & Co. pens, which he did.

Mr. Watson: I move to strike out all the testimony of this witness as immaterial and incompetent. 3735

CROSS-EXAMINATION by Mr. Watson:

RXQ487. Did you tell Mr. Ball of Pensacola that you were looking for a better job? A. No, sir, I did not.

RXQ488. Did you tell L. E. Waterman recently when you met him that you were looking for a better job? A. I did not.

RXQ489. At the time of this conversation with Mr. Ball the defendant was under an injunction not to use the name A. A. Waterman & Co., weren't they? A. Sir?

RXQ490. At the time of this conversation with Mr. Ball, the defendant, the Modern Pen Company, were under injunction not to use the name A. A. Waterman & Co., were they not? A. Not to my knowledge, no.

RXQ491. You never heard of that did you; you never heard that there was an injunction issued against the Modern Pen Company? A. I heard that there was, with an immediate stay.

RXQ492. You did hear then that there was an injunction issued? A. Yes.

By Mr. Bacon:

3737 RDQ493. You also heard that the Circuit Court of Appeals reversed that injunction and permitted the use of A. A. Waterman & Co.? A. I did.

Mr. Watson: I move to strike out the question and answer as not in accordance with the facts.

Deposition closed.
Signature waived.

HOBART W. GEYER, a witness called on behalf of the defendant, being duly sworn, testified as follows:

3738 *Direct-examination by Mr. Bacon:*

Q1. Please state your name, residence and occupation? A. Hobart W. Geyer; Ridgewood, N. J.; treasurer of the Modern Pen Company and manager for A. A. Waterman & Co. of New York.

Q2. When did you first know A. A. Waterman? A. The latter part of 1900. It is possible that I got acquainted with him in 1899. I began doing business with him in 1899, but whether I met him at that time or not I do not remember.

Q3. In what business were you at that time? A. I was treasurer of the Frazer & Geyer Company, manufacturers of fountain pens.

Q4. When did you first begin to manufacture fountain pens? A. In 1897 I formed a copartnership with William G. Frazer under the firm name of Wm. G. Frazer & Co. We ran along under that name until August, 1899, when we incorporated as the Frazer & Geyer Company, under the laws of the State of New York.

Q5. How long did you continue? Tell us the history of the Frazer & Geyer Company? A. We incorporated in the first place with a capital of $20,000—$6,000 common stock and $14,000 preferred. Then business kept growing so fast that we outgrew our capital and in February, 1901, we increased the capital stock to $60,000. Business kept growing so rapidly that in 1902 we again increased the capital stock to $300,000. 3740

Q6. How much of it was actually issued? A. The largest amount that was issued was about $135,000, early in 1904 or the latter part of 1903.

Q7. Go on and tell all about the Frazer & Geyer Company? A. Our business was the manufacturing of fountain pen holders and gold pens, making a complete fountain pen. When I first went with Mr. Frazer we made nothing but the holders. We had our factory in Hinsdale Street, East New York. About six months after I went with him we put in a complete gold pen plant and from that time on we made the complete holder and gold pen.

Q8. What was the date when you first began making the complete gold pen? A. It was in May, 1898. Along in August, 3741
1899, the Frazer & Geyer Company began selling gold pens to A. A. Waterman of Boston and we sold him up to the 6th of November, 1899. His address then was 38 Bromfield Street, Boston, Mass. From the 13th of August, 1899, to the 15th of October, we made and sold gold pens for A. A. Waterman & Co. in Howard Street, West Somerville, Mass.

Q9. Do you know who was the "company"? A. I don't think I ever knew. I never gave it any attention. These bills were mostly settled by drafts on the Colonial Pen Company of Boston, which was the selling agent for A. A. Waterman & Co.

Q10. That is, the A. A. Waterman & Co. purported to manufacture and the Colonial Pen Company were their sole selling agents? A. They did manufacture holders and bought gold pens and assembled them in their factory at West Somerville. Their account was settled some time in December, 1900. The last bill that we sold to A. A. Waterman & Co., on the 15th of October, 1900, was finally settled in December, 1900. Then I heard that Mr. Waterman had had a disagreement with the Colonial Pen Company over some matters and he had decided to disband the firm or go out of business or whatever it was but he negotiated with Mr. Frazer, or Mr. Frazer negotiated with him, I am not sure which, and we formed a partnership, A. A.
3743 Waterman, Mr. Frazer and myself, on the 9th day of January, 1901,—the firm of A. A. Waterman & Co. of New York. This firm had the Frazer & Geyer Company manufacture all their goods for them and eventually they sold the larger part of our output; the customers that the Frazer & Geyer Company sold to direct being mostly so-called manufacturers or parties who had pens made with their own imprint.

Q11. That is to say, after the organization of A. A. Waterman & Co., Frazer & Geyer Company manufactured pens for them to sell and turned over all of their customers, except certain customers, who were known as manufacturers; is that it? A. That is correct.

Q12. And that is the relation that existed at that time be-
3744 tween A. A. Waterman & Co. and Frazer & Geyer Company? A. That was the status.

Q13. About what per cent of the product of the Frazer & Geyer Company was sold by the A. A. Waterman & Co.; do you know? A. I should say offhand from 80 to 90 per cent.

Q14. What happened after that? A. The business went along until June, 1905, early in June. In April or May of that year the directors of the Frazer & Geyer Company thought that Mr. Frazer, who was general manager, should have his salary reduced and have a contingent salary to offset the reduction, the contingent of course depending upon the profits of the Frazer & Geyer Company. Mr. Frazer seriously objected to this, and

it made more or less of a clash between Mr. Isaac E. Chapman who was president of the company and Mr. Frazer.

Q15. When the stock of the Frazer & Geyer Company was $60,000 were they making money? A. Yes, they were.

Q16. How much were they paying on the stock?

Mr. Watson: Objected to as immaterial.

A. We were paying 10 per cent. The preferred called for 10 per cent and on the common we were making from 25 to 30 per cent, is my recollection, and paying 10. We were piling up quite a substantial surplus.

Q17. Before that, when it was $20,000 how much had you made? 3746

Same objections.

A. Our profits at that time were larger in proportion. I think we were realizing possibly 50 or 60 per cent on the common stock besides paying 10 per cent on the preferred.

Q18. When was it that you increased your capital stock to $300,000? A. About February, 1902.

Q19. Did you move your factory at that time? A. Yes, about that time.

Q20. And changed your methods? A. Frazer & Gever Company had already moved from East New York to 36 Gold Street, about 1899, I think it was, and we stayed at Gold Street two or three years when our business was so large we were 3747 crowded out of there, and we could not get any additional space and we then moved to our present location at the corner of Thames and Greenwich. There we took a large floor.

Q21. About 1902, when you extended your capital stock to 300,000, of which about $135,000 was eventually issued, did you make money or lose money? A. Along in 1903 we began to lose money. Our expenses had increased and the cost of manufacturing had increased.

Q22. What happened after you began to lose money? What was supposed to be the cause of the changed conditions?

Mr. Watson: Objected to as immaterial to any issue in the case.

A. I think the additional expense that we took on there. I think they put on more help then they needed to make the quantity of goods that they were making. That made the cost of the goods run up more than it should.

Q23. Who was manager? A. Mr. Frazer.

Q24. Is it not a fact that he declared a dividend at one time when he ought not to?

Objected to as immaterial.

A. It was true that he furnished a false statement on which a dividend was declared by the directors.

3749 Q25. Did not that lead to the friction which finally led to the dissolution of the company?

Same objections.

A. Yes, that is what led to it.

Q26. Now tell us about the Chapman's connection with the Frazer & Geyer Company; when did they first come into the problem? A. They came in—Mr. Isaac E. Chapman came in a few weeks after we formed the partnership with Mr. Waterman. We had agreed to furnish capital or credit for the firm of A. A. Waterman & Co. up to $25,000 and Mr. Frazer said he had a party who would get us, or take stock enough, or get us money in some way, with which to furnish the necessary credit; and it seems to me it was only a few weeks later that he intro-
3750 duced me to Mr. Chapman and Mr. Chapman bought five or ten shares of stock, I have forgotten which, but a short time after that he bought considerable more and he kept buying stock. As we needed more capital, either he or his family or friends would buy more stock in the company. At the same time Mr. Frazer and myself were selling some stock to our friends, but nothing like the quantity that Mr. Chapman was interesting his friends.

Q27. Then Mr. Chapman was the man who put up substantially all of the money or credit that was promised when you went into partnership with Mr. Waterman; is that right? A. Practically, yes.

& Geyer Company money besides stock holdings? A. They

Q28. Did Mr. Chapman and his friends also loan Frazer

loaned $30,000 on chattel mortgage. That was in 1904, I think—1903 or 1904.

Q29. And that was renewed from year to year? A. Yes.

Q30. And was finally assumed by the Modern Pen Company? A. Assumed by the Modern Pen Company and a new mortgage given by them after the reorganization. This was also signed by A. A. Waterman & Company to my recollection; either signed or guaranteed by them.

Q31. Was A. A. Waterman & Co., also responsible on the debt secured by the chattel mortgage? A. It is my recollection that they were.

Q32. I show you a note of $10,000, dated May 2, 1904, payable on demand to the order of the estate of William L. Chapman Incorporated, signed by Frazer & Geyer Company, William G. Frazer, secretary and general manager and Hobart W. Geyer, treasurer, and endorsed A. A. Waterman & Company. In whose handwriting is the endorsement A. A. Waterman & Co.? 3752

Mr. Watson: Objected to as immaterial to the issue.

A. Mine.

Q33. Was this a part of the debt secured by the chattel mortgage? A. Yes.

Q34. And was the whole of the debt secured by notes similarly signed and endorsed? A. Yes, there was one for $20,000 to the order of Isaac E. Chapman, a similar note. 3753

Q35. When the Frazer & Geyer Company was finally organized into the Modern Pen Company what were the stock holdings proportionately; that is so say, about what proportion was held by Mr. Chapman and his friends, what proportion by you and your friends and what proportion by Mr. Frazer and his friends?

Mr. Watson: Objected to as entirely immaterial to any issue in this case, and expressly objected to as without proper foundation.

A. Mr. Chapman and his relatives and friends had about 65 or 70 per cent of the stock in addition to the loan just spoken of.

3754

Mr. Frazer had about 11 or 12 per cent; and I had about 25 per cent, in that neighborhood, myself and friends.

Q36. And Mr. Frazer and his friends? A. Mr. Frazer and his friends had about 12 per cent.

Q37. Then when did the reorganization occur?

Mr. Watson: The same objections.

A. The early part of June, 1905.

Q38. For how many months did the discussion of this reorganization continue?

Same objections.

3755 A. As far as my recollection goes it was between two and three months. I am not just sure on the length of time.

Q39. Was there a judgment obtained by Mr. Chapman against William G. Frazer? A. Yes, there was, the latter part of May or early in June, 1905.

Mr. Bacon: If you so desire I will put in evidence the certificate showing the judgment and the return of the execution unsatisfied; or I will simply read what is necessary into the record.

Mr. Watson: Read what you want to put in. It is objected to as entirely immaterial and irrelevant to any issue in this case. I think if you are going to put anything in about it, you should put in the judgment roll.

3756 Mr. Bacon: I offer in evidence the certificate in the action of Isaac E. Chapman against William G. Frazer, showing damages and costs $1677.58, filed May 31, 1905; execution returned unsatisfied by the sheriff's return filed June 3, 1905.

Mr. Watson: Objected to as entirely immaterial to any issue in this case.

Q40. I show you a paper and ask you if this was served upon you and if so by whom (handing witness a paper)? A. Yes, that was served upon me by Gratz Nathan, June 8, 1905.

3757

Q41. Was there a receiver of Mr. Frazer appointed in supplementary proceedings in this action referred to in Exhibit A-2 on June 7, 1905?

Mr. Watson: Objected to as entirely immaterial to any issue in this action and if anything is to be shown the judgment roll should be produced.

A. Yes.

Q42. And was Mr. Gratz Nathan that receiver?

Same objections and evidently this witness cannot know anything about it; and the order is the best evidence.

3758

A. Yes.

Mr. Bacon: We offer in evidence this notice and copy of an order appointing Gratz Nathan receiver in the action in the City Court of New York entitled Isaac Chapman against William G. Frazer.

Mr. Watson: Objected to as irrelevant and immaterial to any issue in this case.

Marked Defendant's Exhibit A-3.

Mr. Bacon: I offer in evidence in chronological order the various agreements between A. A. Waterman, Mr. Frazer, Mr. Geyer, Frazer & Geyer Company, A. A. Waterman & Company and the Modern Pen Company.

3759

Articles of agreement found on page 616 of the printed record on appeal in the matter of the preliminary injunction in this action, dated January 9, 1901, between Arthur A. Waterman, William G. Frazer and Hobart W. Geyer.

Objected to as immaterial and irrelevant.

Marked Exhibit A-4.

Endorsement on the same copartnership agreement, dated December 12, 1901, extending the copartnership 40 years.

Same objections.

Marked Exhibit A-5.

3760 *Hobart W. Geyer*

Memorandum of agreement found on page 636 of the record, dated August 27, 1901, between Frazer and Geyer Company, party of the first part and William G. Frazer and Hobart W. Geyer, parties of the second part.

Same objections.

Marked Exhibit A-6.

Agreement dated December 12, 1901, between Frazer & Geyer Company and A. A. Waterman.

Same objections.

Marked Exhibit A-7.

Agreement dated December 12, 1901, between Frazer & Geyer Company and A. A. Waterman & Co.

3761

Same objections.

Marked Exhibit A-8.

Agreement dated June 11th, 1904 (not in the printed book) between A. A. Waterman, William G. Frazer and Hobart W. Geyer, being a modification of the copartnership agreement of January 9th, 1901.

Same objections.

Marked Exhibit A-9.

Agreement dated February 11th, 1905, between A. A. Waterman, William G. Frazer and Hobart W. Geyer being the order of modification of said copartnership agreement.

Same objections.

3762

Marked Exhibit A-10.

Agreement dated February 11th, 1905, between Frazer & Geyer Company and Arthur A. Waterman.

Same objections.

Marked Exhibit A-11.

Temporary agreement dated May 27th, 1905, between Arthur A. Waterman and Isaac E. Chapman.

Same objections.

Marked Exhibit A-12.

Articles of copartnership, dated June 12, 1905, between Arthur A. Waterman, Isaac E. Chapman and William L. Chapman.

Same objections.

Marked Exhibit A-13.

Agreement dated July 5, 1905, between the Modern Pen Company and Arthur A. Waterman.

Same objections.

Marked Exhibit A-14.

Q43. Have you in your possession any books relating to A. A. Waterman & Company preceding January 9, 1901, if so, state what they are?

Mr. Watson: Objected to as immaterial to any issue in this case and that the books are the best evidence and the testimony of the persons that kept them and it is incompetent to prove them in the way counsel is proceeding. 3764

A. We have the books of Frazer & Company which show that we sold A. A. Waterman of 38 Bromfield Street, Boston, goods from the 18th of August, 1899, to the 6th of November, 1899, and that we sold A. A. Waterman & Company of Howard Street, West Somerville, Mass., goods from the 13th of August, 1899, to the 15th of October, 1900. These books were kept by me so that I know the entries are correct. And we also have a memorandum cash book of A. A. Waterman & Co., of West Somerville, which was brought here by A. A. Waterman at the time we formed the copartnership with him, among other books and property which he brought at that time. 3765

Mr. Watson: I wish to strike out all the witness' answer relating to the books said to have been in the Somerville concern as incompetent and immaterial.

Mr. Bacon: I offer in evidence a circular found at page 655 of the printed record.

Marked Exhibit A-15.

Q44. On the reorganization of the Frazer & Geyer Company as the Modern Pen Company did the Modern Pen Company take over the assets and assume all the liabilities of the corporation of Frazer & Geyer Company?

3766

Mr. Watson: Objected to as entirely immaterial and incompetent.

A. They did.

Q45. Do you know of your own knowledge that they paid all of the debts and took over all the assets?

Mr. Watson: The same objections and that the evidence is incompetent to prove the fact.

A. They did.

Q46. What became of the $30,000 chattel mortgage on the property, held by Mr. Chapman and the Chapman estate?

3767

Same objections.

A. That was assumed by the Modern Pen Company and has in part been paid off since.

Q47. Was a new chattel mortgage executed?

Same objections.

A. A new chattel mortgage was executed, yes.

Q48. Were the debts of the old firm of A. A. Waterman & Co. paid off?

Same objections.

A. They were paid by the Modern Pen Company.

Q49. And the assets of the old company taken over by the

3768 Modern Pen Company? A. Yes, by the Modern Pen Company.

Q50. And then a new firm of A. A. Waterman & Company was organized as indicated by the exhibits? A. Yes.

Q51. Composed of Mr. Waterman, Mr. Isaac E. Chapman and William L. Chapman? A. Yes.

Q52. And did they continue to do business at the same place? A. They did.

Q53. Then A. A. Waterman & Company manufactured the goods since the reorganization?

Mr. Watson: The same objections also that the question is leading.

3769

A. Instead of the Modern Pen Company doing the manufacturing and A. A. Waterman & Company selling, as had been the method under the former agreement between the Frazer & Geyer Company and A. A. Waterman & Company, under the new organization, the new firm, A. A. Waterman & Company, do the manufacturing and the Modern Pen Company act as selling agents for their products.

Q54. Was there any assessment made on the stock of the Frazer & Geyer Company on the reorganization; if so, state what it was.

Same objections.

3770

A. There was an assessment of $20 a share, every holder of stock in the Frazer & Geyer Company having the same option of having an equal number of shares of stock in the Modern Pen Company on depositing their certificates in Frazer & Geyer Company and $20 assessment for each share.

Q55. How long have you been the manager of A. A. Waterman & Company? A. About two years and a half, I think. I think it was in October, 1908, that I was made manager.

Q56. Have you at any time since the organization of the Modern Pen Company and the present firm of A. A. Waterman & Company manufactured or sold any goods of any description whatever bearing the name of Waterman except it was printed A. A. Waterman & Co., New York? A. I have not.

3771

Q57. Has there been even the slightest exception to that? A. No, sir.

Q58. Explain to us the John Saadi transaction? A. John Saadi had been buying our goods for a year or two when, about a year and a half ago, he came to the office and stated, and showed me a certificate showing that he had registered the trade-mark "Royal Ideal Pen" and a license had been granted by the United States Patent Office. He wanted me to make up some pens with this imprint; and as it is part of our business to make pens with imprint for customers, with their special or private imprints, and not having any idea that the Patent Office would issue a trade-mark license that was not good, we agreed to make them

3772 *Hobart W. Geyer*

up for him and did. Subsequently he gave us two more orders, which we made up.

Q59. There were three shipments in all, were there not? A. There were three shipments in all, yes.

Q60. Have you prepared a statement of the cost and profits of the shipments of the pens which were imprinted "Royal Ideal Pen"? A. Yes, I have.

Q61. Is this it (showing witness the paper). A. Yes, that is it.

Q62. Is that a correct statement of the exact number of pens sold him and the exact cost and profit?

3737 Same objections.

A. It is.

Mr. Watson: I object to that on the ground that it is not the proper way to show the profits.

Mr. Bacon: I offer the paper in evidence.

Objected to as immaterial and incompetent.

Marked Exhibit A-16.

Q63. How were the pen points marked on these fountain pens that were imprinted "Royal Ideal Pen"? A. In the No. 11 and No. 14 they were imprinted warranted 14 karat. In the No. 12 and No. 15 they were imprinted "A. A. Waterman & Co., New York." The imprint "Royal Ideal Pen" was on the holder only
3774 and not on the gold pen.

Q64. And in this statement you have not taken into account the fact that a large proportion of these holders had this imprint destroyed by Mr. Saadi before they were sold? A. No, sir, I have not.

Q65. The reason for that is because you do not know exactly how many he destroyed? A. I do not know. He gave testimony that he destroyed most of them.

Q66. All but about a gross, did he not? A. That was his testimony and I have no personal knowledge how many were destroyed.

Q67. The last shipment was December 4, 1909? A. Yes.

Q68. And the injunction was December 17th, was it not? A. Yes, about those dates.

Q69. Did he return a good many of the gold pens imprinted A. A. Waterman & Co.? A. He returned something over a gross, about fifteen dozen, I think.

Q70. Did he return more than the last shipment? A. Yes.

Q71. Did you have any idea when you were selling these pens to Mr. Saadi that you were infringing the plaintiff's trade-mark "Ideal"?

Objected to as immaterial.

A. Not the slightest.

3776

Q72. Have you at all times recognized the right of the plaintiff to its trade-mark "Ideal"? A. Yes, I have.

Q73. And have never knowingly infringed it? A. This is the only time that I have ever imprinted it and that was certainly through ignorance.

Q74. At all times during this litigation and in the preceding litigation, in the New York State Court in the action of Chapman against the L. E. Waterman Company, did you know that in open court and in counsel's brief they had admitted and alleged the validity of the plaintiff's trade-mark Ideal? A. Yes.

Q75. Before the beginning of this action? A. Yes.

Q76. Did Mr. Saadi pay for these goods?

Objected to as immaterial.

3777

A. He paid for the first two lots but not for the last lot.

Q77. And he still owes you something? A. Something over $200; about $230 I think.

Q78. You have written him for it a large number of times as indicated by the letters in evidence? A. I have written him and also the bookkeeper has written him regularly.

Q79. And drew on him once?

Mr. Watson: Objected to as immaterial and an intent to pad the record.

A. Yes.

3778 *Hobart W. Geyer*

Q80. Has the defendant at any time ever advertised its products as Waterman pens or Waterman's pens without the initials A. A. & Co.? A. No, sir, they always use the full firm name of A. A. Waterman & Company.

Q81. Tell us about the Wolfson pen advertisement, which is already in evidence; was there ever more than one issue of that advertisement? A. There was one issue, in two papers of even date. This ad was put in the paper without our knowledge, and until they got a letter from the L. E. Waterman Company and then a copy of the ad to us, we knew nothing about it. They requested us to pay half of the cost of the ad and I wrote them that if they would advertise the pens as our pens made by
3779 A. A. Waterman & Co. we would be glad to pay them half of it, and I understood from our salesman that they were to put it in the paper the following week.

Mr. Watson: I object to it and I move to strike out the last part of the answer an entirely hearsay.

A. (Continued.) When their bill came for the ad I took it for granted that it was for the ad in the second week's paper and allowed it.

Q82. You wrote them very emphatically that they had done wrong, didn't you? A. Yes.

Q83. As indicated in the letters in evidence? A. Yes.

Q84. Did you ever sell any goods to the Standard Drug Com-
3780 pany at Cleveland? A. No, sir, never.

Q85. Did you ever hear of them until they were sued by the L. E. Waterman Company? A. No.

Q86. You do sell to Mr. Teller? A. Sol Teller, yes.

Q87. What relation had he to the Standard Drug Company?

Mr. Watson: Objected to as not within the knowledge of this witness and as incompetent.

A. He stated to me that he was a tenant.

Mr. Watson: I move to strike out the answer as incompetent.

Mr. Bacon: I offer in evidence the correspondence between Mr. Teller, the Standard Drug Company and the Modern Pen Company with relation to the Cleveland litigation, found beginning at page 481 of the printed record.

Mr. Watson: I ask for the originals or copies.

Mr. Bacon: We have them here. The first is from S. Teller to H. Geyer, dated Cleveland, Ohio, November 10, 1909.

Objected to as immaterial and irrelevant to any issue in this case.

Marked Exhibit A-18.

Modern Pen Company to S. Teller, November 12, 1909. 3782

Same objections.

Marked Exhibit A-19.

Standard Drug Company to Modern Pen Company, November 12, 1909.

Same objections.

Marked Exhibit A-20.

Modern Pen Company to Standard Drug Company, November 18, 1909.

Same objections.

Marked Exhibit A-21.

Standard Drug Company to Modern Pen Company, November 19, 1909. 3783

Same objections.

Marked Exhibit A-22.

S. Teller to H. Geyer, November 19, 1909.

Same objections.

Marked Exhibit A-23.

Modern Pen Company to S. Teller, November 23, 1909.

Same objections.

Marked Exhibit A-24.

Modern Pen Company to Standard Drug Company, November 23, 1909.

Same objections.

Marked Exhibit A-25.

S. Teller to H. Geyer, December 15, 1909.

Same objections.

Marked Exhibit A-26.

Modern Pen Company to S. Teller, December 17, 1909.

Same objections.

Marked Exhibit A-27.

Mr. Watson: Counsel for plaintiff calls for the production of all the letters addressed to the Standard Drug Company or to its attorney T. H. Bushnell, in reference to this controversy.

3785 Mr. Bacon: We will produce everything. I offer in evidence the Cleveland complaint the action of L. E. Waterman Company against Standard Drug Company, dated October 9th, 1909.

Objected to as immaterial to any issues in this case and unnecessarily padding the record.

Marked Exhibit A-28.

Mr. Bacon: I offer in evidence the permanent injunction issued in the Cleveland litigation, L. E. Waterman Company against Standard Drug Company, found on page 117 of the record and entered on the 14th day of December, 1909.

Marked Exhibit A-29.

3786 Q88. Did you receive a copy of this decree printed with the notice thereon from any of your customers? A. Yes.

Mr. Bacon: I offer in evidence printed notice attached to the printed copy of the Cleveland decree, found on page 14 of the printed record in Chapman against L. E. Waterman Company.

Mr. Watson: I object to the notice as immaterial to any issue in this case.

Marked Exhibit A-30.

Adjourned to Friday April 14, 1911, at 10:30 A. M.

Hobart W. Geyer 3787

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant. 3788

Met pursuant to adjournment at the office of Alexander S. Bacon, 37 Liberty Street, New York, April 14, 1911, at 10:30 A. M.

Appearances:

Samuel S. Watson and Walter B. Raymond, for Complainant.

Alexander S. Bacon, for Defendant.

HOBART W. GEYER, resumes the stand.

Direct-examination continued by Mr. Bacon:

Mr. Bacon: I offer in evidence certificate of continued use of the firm name, found on page 567 of the printed record. 3789

Mr. Watson: Objected to as immaterial, irrelevant and incompetent and in that it was filed too late.

Marked Exhibit A-31.

Q89. This certificate A-31 was duly published according to law? A. Yes, sir.

Q90. At about the date of the certificate? A. Yes.

Mr. Bacon: This certificate was filed February 21, 1910, and publication began on March 11, 1910, and concluded April 1, 1910, as indicated in Mr. Watson's affidavit at page 567 and page 606 of the printed record.

I produce some additional letters in the matter of the Cleveland litigation. One letter is from Standard Drug Company to the Modern Pen Company, dated November 18, 1909.

Objected to as immaterial and having nothing to do with the issues in the case.

Marked Exhibit A-32.

Letter from T. H. Bushnell to Modern Pen Company, December 1, 1909.

Same objections.

Marked Exhibit A-33.

Modern Pen Company to Bushnell, December 2, 1909.

3791 Same objections.

Marked Exhibit A-34.

Q91. How did it happen that these did not get into the printed record?

Same objections.

A. These were filed under the Standard Drug Company instead of the Teller file and were not found until too late to go in the printed record.

Mr. Bacon: I offer in evidence a letter from L. E. Waterman Company to Arthur J. Ryan, dated January 13, 1910, found at page 491 of the record.

3792 Same objections.

Marked Exhibit A-35.

Letter from L. E. Waterman Company to George M. Hammell, dated February 1, 1910.

Same objections.

Marked Exhibit A-36.

Also a letter from C. H. Dungan to A. A. Waterman & Company, dated June 22, 1910.

Same objections.

Marked Exhibit A-37.

The reply thereto, Modern Pen Company to C. H. Dungan, June 25, 1910.

Same objections.

Marked Exhibit A-38.

Mr. Bacon: It is understood that everything is objected to.

Q92. Have you prepared a memorandum of the different styles of L. E. Waterman pens and A. A. Waterman pens, with their corresponding retail prices and discounts? A. I have.

Q93. Are these they (handing witness the paper)?

Mr. Watson: Objected to as immaterial and irrelevant and nothing to do with the issues in this case?

A. Yes. 3794

Q94. Do these truthfully state the corresponding styles of pens, their true retail prices and their respective discounts?

Same objections, also as incompetent.

A. They do, in the pens from the cheapest up to the highest, in the plain pen, without any mountings or anything of that sort.

The memorandum above referred to is offered in evidence and marked Exhibit A-39.

Mr. Watson: Objected to as immaterial, irrelevant and incompetent to any issue in this case.

Mr. Bacon: I offer in evidence a letter from Mr. A. C. Tucker to D. C. Percival & Co., April 4, 1910.

Objected to as incompetent, immaterial and irrelevant and not the best evidence. 3795

Marked Exhibit A-40.

Q95. I show you what purports to be a circular addressed to the re-organization committee of the Frazer & Geyer Company, dated April 26, 1905, and ask you if that circular was sent out (handing witness the paper)?

Same objections.

A. Yes.

Q96. Was the re-organization finally carried through under the scheme of this circular?

Same objections.

A. No, it was not. It was changed in that they assessed the stock at $20 instead of $15 per share.

The circular referred to is offered in evidence and marked Exhibit A-41.

Same objections.

Q97. I call your attention to the testimony given by Mr. Charles E. Trory of Crestline, Ohio, and ask you if you have prepared a memorandum of his entire account and if this is it (handing witness the paper)?

3797 Objected to as incompetent, irrelevant and immaterial.

A. Yes, that is it.

Q98. Did he ever send back any pens for repair from among those that he bought of you, as far as you can determine?

Same objections.

A. We cannot tell from our records that he ever sent back any of our pens for repairs and we have no record whatever of his having sent any back for credit; and what few pens came back to be repaired we charged for, which shows on the face that the trouble was caused by an accident or it was a pen not of our make.

3798 Mr. Watson: I move to strike out the speech of this witness as volunteered and not responsive.

The memorandum above referred to is offered in evidence and marked Exhibit A-42.

Objected to as immaterial and irrelevant.

Q99. I call your attention to Exhibit No. 9, being a notice of the Modern Pen Company, dated April 1, 1908, and ask you to state the circumstances under which that notice was issued?

Mr. Watson: Objected to as immaterial and irrelevant to any issue in this case. The circular speaks for itself.

A. About that time Mr. Martling, who was manager for the Modern Pen Company, thought he would drop the name A. A. Waterman & Co. from the self-filling and middle joint line and use it on our cheaper line of pens, which we imprinted "The Lincoln." At that same time we got out a new sheet or list of the proposed new imprinting of the Lincoln pen.

Q100. Is this it (handing witness the paper)? A. That is it.

Mr. Bacon: I offer it in evidence, being a notice containing a picture of seven Lincoln pens imprinted as follows: "Lincoln Fountain Pen made by A. A. Waterman & Co., New York. Patented October 11, 1904."

Objected to as immaterial, irrelevant and incompetent. 3800

Marked Exhibit A-43.

Q101. Was Exhibit 43 sent out with the same catalogues as Exhibit 9? A. Yes, every catalogue that had Exhibit 9 in had Exhibit 43 in it.

Q102. Was there ever a time when you abandoned the use of the name A. A. Waterman & Co. on Modern pens?

Same objections, and also that the notice speaks for itself.

A. No, sir.

Q103. For how long a period were these notices, Exhibit 9, sent out in circulars? A. I should think not over two or three months on the outside. 3801

Q104. And you continued all that time to imprint Modern Pens "A. A. Waterman & Co."? A. Yes.

Q105. And this scheme of Mr. Martling's was abandoned and never carried into execution? A. Yes.

Q106. You know Granger Freres of Montreal? A. Yes.

Q107. They sell A. A. Waterman goods? A. They are one of our customers and sell our goods, yes.

Q108. Do they also sell L. E. Waterman goods? A. I understand that they do.

Mr. Watson: I move to strike out the answer as incompetent.

Q109. Do they hold any relation to you whatever different from that of any other purchaser of your goods? A. They do not; they are simply a customer of ours.

Q110. Is that true of Warwick Brothers & Rutter, Toronto? A. It is.

Q111. They hold the same relation to the defendant that Granger Freres do? A. Yes.

Q112. An advertisement has been put in evidence from St. John, New Brunswick; did you ever see that advertisement or know anything about it? A. I did not until I saw it here when it was put in evidence.

3803 Q113. Do you sell pens in New Brunswick at St. Johns? A. Yes.

Q114. To what firm do you sell there? A. We sold several, but the one that I remember particularly now is Barnes & Co., who had the ad in the paper.

Q115. As one of your customers? A. As one of our customers.

Q116. This advertisement of Barnes & Co. was the advertisement of one of your customers? A. Yes.

Q117. And you knew nothing about it until you saw it in evidence? A. I did not; no, sir.

Q118. I will ask you who it is that gives instructions to salesmen nowadays in the Modern Pen Company affairs? A. I do.

Q119. Anybody else? A. No, sir.

3804 Q120. The Chapmans do not have anything to do with the manufacture of pens by A. A. Waterman & Co.? A. No.

Q121. Or the practical business affairs of the Modern Pen Company? A. No; they look after the financing; that is all.

Q122. And they are actively engaged as members of the corporation of the Merritt & Chapman Derrick & Wrecking Company? A. Yes.

Q123. And they very rarely pay any attention to the Modern Pen Company or A. A. Waterman & Company? A. Yes.

Q124. During the time that you have been manager what instructions have you given to salesmen in relation to the sale of pens? A. I have always instructed them to sell our pens as pens

3805

made by A. A. Waterman & Co., and to instruct their customers to sell them the same way. Those who were with us before I took charge I have notified of the injunction, I think it is September 3, 1898, which distinctly stated that we had that right.

Mr. Watson: I object to that statement as the injunction speaks for itself and contains no such right.

Mr. Bacon: These are the instructions that he gave the agents.

The Witness: And I have always impressed it upon them that our pens were so much better than the pens made by L. E. Waterman Company, that we certainly did not want anyone to have the slightest chance of getting them mixed up with the Waterman Ideal pens.

3806

Q125. And the defendant advertises its wares largely? A. They do, yes.

Q126. And always as A. A. Waterman & Co. goods? A. Yes.

Q127. Have you ever in any single instance advertised as merely Waterman goods? A. We have not.

Q128. Such an advertisement would be advertising L. E. Waterman goods as much as your own? A. That is my opinion of it and the way I have always looked at it. In advertising we want to advertise our own and not the other party.

Q129. Have you ever, either directly or indirectly, sanctioned an advertisement by any customer of yours other than A. A. Waterman goods? A. No.

3807

Q130. Did you ever see or hear or know of any advertisement made by Warwick Bros. & Rutter of Toronto? A. No, sir.

Q131. The first that you knew of their advertisement was when it was found in the evidence? A. Yes. I don't think that a copy of the ad was put in. I don't remember it.

Q132. You have not seen it? A. I don't remember having seen it at all. I see very few of the ads that our customers put in. I do not make it a practice to follow them up at all.

Q133. Did you have any complaint from any customer that they bought A. A. Waterman & Co. goods under a misapprehension that they were L. E. Waterman goods? A. I don't remember any now.

Q134. Don't you remember one or two in the correspondence of Mr. Bartlett where he said that some L. E. Waterman agent had been around there? A. I think there was, yes. There was such a mass of correspondence there that I have forgotten just what was in it.

Q135. And outside of that one or possibly two letters in the Bartlett correspondence, you have no recollection of ever having known a customer who even claimed that he had been deceived?
3809 A. No.

Q136. You were with me in Boston on the day the testimony was taken? A. Yes.

Q137. You heard Mr. Chaplin testify? A. Yes.

Q138. And you were with me when we went around to the store of the plaintiff at 8 School Street? A. Yes.

Q139. State what happened when we went in there? A. At the hearing Mr. Chaplin had testified on cross-examination that they had quantities of plain pens marked Waterman without the word "Ideal" on them; so at recess we went around and talked to the saleslady, Miss Wood, who also testified at the hearing. I told her that we would like to purchase a Waterman pen with just the imprint Waterman on it. She stated that they did not
3810 have any such pens in the store and she took one out of the case and she said, "Every pen that we have is imprinted Ideal, the same as this one." We asked her two or three times if she was sure that she had no pens with just the imprint Waterman, and she reiterated that they were all imprinted Ideal.

Mr. Watson: I move to strike out the answer as incompetent and immaterial and not the best evidence; and further that Miss Wood mentioned by the witness, and Mr. Chaplin, who were examined and testified in this case, produced pens from the stock at 8 School Street, showing the marking of Waterman alone on the pen of the plaintiff's company.

Q140. Were the pens so produced plain pens or all covered with metal?

Objected to as immaterial and irrelevant.

A. I did not see them, but I understood from the testimony that they were all covered with metal.

Mr. Watson: I move to strike out the answer as incompetent.

Q141. And you were not present in the afternoon when they were reproduced to be examined again? A. No, I did not go back to the afternoon hearing.

Q142. Did the young lady say she never had seen or heard of 3812
pens marked Waterman only?

Mr. Watson: Objected to as incompetent, irrelevant and immaterial and further on the ground that the witness was produced and examined in this case.

A. Yes, she did.

Q143. Did Miss Wood seem to be flustered when we went in to see her?

Objected to as immaterial and irrelevant.

A. She seemed to be rather surprised to see us so shortly after having left us at the commissioner's.

Q144. Did she smile and seem to be glad to see us? A. She 3813
did, yes.

Q145. For how long do you warrant the rubber sacks of the self-filling pens?

Objected to as immaterial and irrelevant.

A. We guarantee them for two years, but our experience has been that they last anywhere from four to seven or eight years.

Q146. Are many of them ever returned as defective or leaking? A. A very small percentage of what we sell.

Q147. Very rarely? A. Yes.

Mr. Bacon: I offer in evidence a translation of the Italian complaint found at page 385 of the printed record.

3814 *Hobart W. Geyer*

Mr. Watson: Objected to as immaterial, irrelevant and incompetent.

Marked Exhibit A-44.

Q148. Has A. A. Waterman & Co. of Chicago anything to do with A. A. Waterman & Co., of New York? A. No, sir.

Q149. Do you sell goods to Mr. Basheim of Cleveland? A. We have sold him; not within the last month or two, but up to that we sold h[illegible] regularly.

Q150. Do you know anything about his having a sign out as the agent of "The A. A. Waterman Company"? A. No, sir, I never heard of it, until it was stated in the testimony in this suit.

3815 Q151. Did you have anything to do with the attempted purchase of A. A. Waterman & Company by the L. E. Waterman Company in 1907 and 1908?

Mr. Watson: Objected to as incompetent, irrelevant and immaterial.

A. As a director of the Modern Pen Company this matter was brought up at our directors' meetings and discussed quite fully and then one Sunday morning it was arranged for Mr. Frank D. Waterman and Mr. Ferris to meet us at the factory so that they could examine our plant. I met them. There was present Mr. Frank D. Waterman, Mr. Ferris, Mr. William L. Chapman, Mr. Martling and myself.

3816 Mr. Watson: I move to strike out the answer as incompetent, irrelevant and immaterial and having no connection with the issues in this case.

Q152. What was said and done at that time? A. Mr. Ferris seemed to be the one who paid most attention to the plant, but he did not go into it very carefully. He said it was the same as most any pen plant. Of course, it was not running, so that they could only get an idea of just what machines we had on the floor. There was nothing to show what dies we had or special tools or anything of that sort. There was no conclusion come to then. They left and as I remember, it now were to let Mr. Chapman hear from them later on.

3817

Mr. Watson: I move to strike out the answer as incompetent, irrelevant and immaterial to any issue in this case.

Q153. Was anything said during that examination of the machinery as to who was to buy it?

Objected to as incompetent, irrelevant and immaterial to any issue in this case.

A. I don't remember whether that was brought up or not; the understanding was so clear that it was the L. E. Waterman Company that was figuring on it, that there was nothing special to draw to my particular attention, to impress it on my memory.

3818

Q154. Was anything said at that time or at any time about the Aiken-Lambert Company buying it? A. No.

Q155. Did you ever see the two draft agreements that were prepared by Mr. Watson, the attorney for the plaintiff in that negotiation.

Objected to as incompetent, irrelevant and immaterial.

A. Yes, they were used at the meetings of the directors of the Modern Pen Company.

Mr. Watson: I move to strike out the answer as immaterial and irrelevant and having no connection with the issues in this case.

3819

Mr. Bacon: I will offer in evidence in chronological order the correspondence in relation to this purchase and the infringement of the patent, found at page 439 *et seq.*, of the record. Letter from Robert Elliott to Samuel S. Watson, dated March 5, 1908.

Objected to as incompetent, irrelevant and immaterial, having no connection with the issues in this case.

Marked Exhibit A-45.

Letter from Samuel S. Watson to W. L. Chapman, dated March 7, 1908.

Same objections.

Marked Exhibit A-46.

3820 William L. Chapman to Samuel S. Watson, March 19, 1908.

Same objections.

Marked Exhibit A-47.

William L. Chapman to Samuel S. Watson, March 28, 1908.

Same objections.

Marked Exhibit A-48.

Watson & Raymond to William L. Chapman, March 30, 1908.

Same objections.

Marked Exhibit A-49.

3821 Alexander S. Bacon to L. E. Waterman Company, April 29, 1908.

Same objections.

Marked Exhibit A-50.

L. E. Waterman Company to Alexander S. Bacon, April 30, 1908.

Same objections.

Marked Exhibit A-51.

William L. Chapman to Samuel S. Watson, May 7, 1908.

Same objections.

Marked Exhibit A-52.

Samuel S. Watson to William L. Chapman, May 8,

3822 1908.

Same objections.

Marked Exhibit A-53.

William L. Chapman to Samuel S. Watson, May 11, 1908.

Same objections.

Marked Exhibit A-54.

Alexander S. Bacon to L. E. Waterman Company May 19, 1908.

Same objections.

Marked Exhibit A-55.

L. E. Waterman Company to Alexander S. Bacon, May 21, 1908.

Same objections.

Marked Exhibit A-56.

Alexander S. Bacon to L. E. Waterman Company, May 26, 1908.

Same objections.

Marked Exhibit A-57.

Mr. Bacon: I offer in evidence the two draft contracts found at pages 427 and 444 of the printed record.

Contract of the Modern Pen Company and others with Aiken-Lambert Company, dated (blank) December, 1907, on page 44. 3824

Same objections.

Marked Exhibit A-58.

Modern Pen Company and others with the Modern Pen Company of New York, dated (blank) December, 1907.

Same objections.

Marked Exhibit A-59.

Mr. Bacon (to witness): Will you search and see if you can find any other letters in relation to this attempted purchase, especially during the year 1907?

Q156. In the Saadi litigation the complaint and decree were in all substantial respects similar to that of the Cleveland decree, were they not? 3825

Mr. Watson: Objected to as immaterial; the complaints speak for themselves; and as not the best evidence.

A. Yes.

Q157. Do you know anything about this I. Waterman that has been mentioned? A. No, sir. The report went through the trade that the party named was not Waterman at all, but had some kind of a Hebrew name, as his real name.

Mr. Watson: I move to strike out the answer as incompetent and irrelevant.

Q158. Do you know anything about the pens that he made?

3826

Same objections.

A. My recollection is that it was a cheap holder with a brass pen in it.

Q159. What do you know about this Butler catalogue concerning which there has been some testimony? A. I never saw it. Mr. Davies, the buyer for Butler Bros., telephoned me that their St. Louis house had received a letter from the attorney of L. E. Waterman Company in regard to the way they advertised our pens and he said it was done through some carelessness of some employee of Butler Bros. of St. Louis and that the catalogue would be destroyed and they would advertise them cor-

3827 rectly under the name of A. A. Waterman & Company.

Q160. It only appeared in one issue in St. Louis?

Mr. Watson: Objected to as leading and highly improper in form and not the best evidence and I move to strike out the answer, as this witness has no personal knowledge whatever.

A. As far as I know.

Q161. Do you remember the sale of pens by the defendant to the plaintiff? A. Yes.

Q162. What do you know about that? A. My recollection is that this was in November or December, 1907; Mr. William L. Chapman wanted to know if we were in such shape that we could

3828 make up something like fifteen hundred pens for the L. E. Waterman Company, for if we could do it he could get the order from them.

Mr. Watson: I move to strike out the answer as incompetent and not the best evidence.

A. (Continued.) We told him that we could and in a day or two the L. E. Waterman Company sent down a sample pen and wanted us to figure on what price we could make it for in a quantity of fifteen hundred. I took the pen to Mr. Van Valer, the superintendent of our shop, and he examined it carefully and we weighed the pen and we decided that we could make them to sell for something like, my recollection is, $36 per gross, about

25c apiece. Mr. Van Valer examined the pen carefully to see what kind of iridium it had on the point, as of course, this makes quite some difference in the cost.

Mr. Watson: I move to strike out the answer as incompetent and immaterial, and not the best evidence.

A. (Continued) And this pen had manufactured iridium.

Mr. Watson: I move to strike out the answer as it is not shown that this witness had any knowledge of such matters and it is not the best evidence.

A. (Continued.) We returned the sample with the price and in a few days Mr. Chapman received an order. My recollection is, 3830 the order itself was signed by Aiken-Lambert & Company and they sent down another gold pen in the place of the one which we had returned. This second sample had native iridium on it, but as we had given the price on the samples with manufactured iridium, we made the pens up with manufactured iridium. The pens were delivered and eventually they were paid for by the personal check of Mr. Ferris.

Q163. They never made any complaint about them? A. No.

Mr. Watson: I move to strike out the answer of the witness as incompetent, irrelevant and immaterial to any issues in this case.

Q164. How many patents are now owned or controlled by the 3831 defendant in the manufacture of pens? A. I am not exactly positive, but I would say from ten to fifteen. We have quite a big bundle of them there in the safe.

Q165. Have you been actively engaged in the manufacture of pens personally, the superintendence of the factory? A. Yes, I have.

Q166. For how many years have you been manufacturing pens? A. About thirteen years.

Q167. The Modern Pen Company makes the entire pen, does it? A. The Waterman Company make the pens.

3832

Q168. A. A. Waterman & Co.? A. Yes.

Q169. They do the manufacturing? A. Yes.

Q170. And they make pen points? A. Yes, the pen point and the holder and all parts complete except for fancy pens, we do not make the mountings; we buy them and put them on ourselves.

Q171. Will you give us in as few words as possible a description of the manufacture of the pen point?

Mr. Watson: Objected to as immaterial to any issue in this case.

3833

A. In making gold pens we buy fine gold bearing the stamp of the United States Assay Office, fine silver and pure copper, and then alloy it to 14 karats. After it is alloyed and melted down—where we have new gold like that we have to melt it twice so as to have the parts thoroughly mixed, have it thoroughly alloyed—then we roll it into a ribbon. A small blank quite thick is cut out of the ribbon. Then the next process is having the iridium melted right into this gold.

Q172. Where did you get your iridium? A. We have several sources of supply. Part of it through the American Platinum Works; some from Baker & Company. We have two or three other people who import direct and we buy it from them.

Q173. Do you use all that you buy? A. No, part will run 10 per cent waste and some of it will run perhaps 60 per cent

3834

waste. It is only the best of it that we can use on our pens.

Q174. Can anybody make this selection from the iridium of commerce or does it require specially skilled workmen?

Mr. Watson: I object to this line of testimony as entirely immaterial and irrelevant to any issue in this case.

A. It takes a man who has been educated up to it through years of having handled it and knowing the grade. It needs probably the best expert in the business to select proper iridium.

Q175. How many men do you have to perform that one duty; more than one? A. In buying it, our superintendent, Van Valer is the expert who attends to that.

Q176. In selecting the proper points to be used? A. In selecting the proper iridium for use and putting it on the blank; we have one man who does nothing but that work.

Q177. And he is a high priced expert? A. He is a high priced expert, a man who has given practically all his life to it and has the reputation of being the best pointer in the business.

Q178. After it is pointed what is done? A. Those small blanks are put through rolling mills and rolled out to the necessary size and thickness, when they are cut out with a cutting-out die to the requisite shape, while they are in the flat. The next process, as I remember it, is imprinting the name and piercing the pen. After that they are put into another press with 3836
special tools that we call the raising tools, to raise to the proper oval shape. They are then slit.

Q179. Do you have any special or exclusive process in slitting? A. In slitting our pens we have a special machine which starts the slit from the pierce towards the point, so that when the pen reaches the slitter he has a guide to meet this slit where it is started from the pierce hole instead of having to go way up to the pierce hole before he stops slitting, as is done in other shops.

Q180. Is this method exclusive to your shop? A. It is and the necessity for a straight slit is shown in the fact that if a pen is not slit straight or properly one point is liable to override the other, thereby producing a constant clicking when the pen is in 3837
use. After being slit the pen goes to the setter-up and from the setter-up they go to the grinders. Expert grinders can grind from sixty to seventy pens a day. From the grinders they go to the polishers and are then practically complete. After they come from the grinders they are subjected to inspection to see that they are right and then they are inspected finally, after they are finally polished.

Q181. There are about fifteen different processes are there not in the manufacture of the gold point.

Same objections.

A. I think there are at least that.

Q182. And how many different machines? A. Something like twelve or fourteen.

Q183. You have been, in your connection with Frazer & Geyer Company and A. A. Waterman & Company, manufacturing pens continuously for how many years? A. Thirteen or fourteen years.

Q184. Then are you willing to say as to how your pens, as so manufactured, and as just described, compare with other pens on the market, price for price?

Objected to as immaterial.

3839 A. Our pens are the best pens that can be made. There are none better and few of them that are anywhere near as good as ours.

Q185. Have you any exclusive machines that are used by you and not by any other pen makers? A. We have several. One is the slitting machine that I referred to. We also have a hydraulic press for tempering our gold pens which nobody else uses. In describing the process of manufacture I omitted tempering. The pens are tempered the first thing after the small blank is rolled out to the required thickness. The pens tempered by this process are patented and we are the only ones that have this patent, it having been taken out by ourselves and used by us exclusively.

Q186. In the present state of the art is it possible to make a
3840 better pen than that manufactured by A. A. Waterman & Co.?

Mr. Watson: Objected to as entirely incompetent and not within the knowledge of this witness.

A. No.

Q187. And you are familiar with all the pens manufactured in this country? A. Practically, yes.

Q188. Hundreds come in every week for repairs? A. Yes.

Q189. And they are all under your supervision? A. Yes.

Q190. Kindly describe the manufacture of the holders, stating first how long you have been manufacturing pen holders? A. I have been manufacturing pen holders since I first went into the business in 1897.

Q191. Give us briefly the process of manufacturing the holders. What do you begin with?

Mr. Watson: I object to all this line of testimony as immaterial to any issue in the case.

A. In making rubber holders the different parts are made by different workmen, practically working all at the same time. One turner will be turning caps, another will be turning barrels and another will be making the feeds.

Q192. To begin with what is your raw material? Do you manufacture the rubber or do you buy manufactured rubber? A. We buy vulcanized rubber, what we call rough stock. It is simply vulcanized into something near the shape that we require it for the different styles of holders. 3842

Q193. From whom do you buy? A. We buy mostly from the American Hard Rubber Company.

Q194. Can any better rubber be produced in the United States? A. No, the stock we buy from them is made in Akron and is considered the best quality of rubber stock that can be made.

Q195. In the different processes of manufacturing the holder do you use expert workmen? A. Yes.

Q196. The best that can be obtained? A. Yes, we pay the highest wages of any shop in the business.

Mr. Watson: I move to strike out all this discussion as entirely immaterial and incompetent. 3843

Q197. Take an ordinary under-the-finger-joint pen such as is the leading line of Ideal pens. It consists does it not, of the barrel, the section, the feed and the point? A. And the cap, five parts.

Q198. When you manufacture these holders do you manufacture a lot of barrels and a lot of the sections and then put them together or are they made individually one after the other?

Mr. Watson: I object to all this testimony as immaterial and move to strike it out.

3844 *Hobart W. Geyer*

A. The barrels are all turned and then each barrel has a section fitted to it individually.

Q199. The section is the part into which the feed goes? A. Into which the feed and pen go.

Q200. Then are the feeds manufactured separately? A. Yes.

Q201. Are they put into the sections as individual feeds or will one go into any of its class? A. They are fitted indidually.

Q202. That is to say that in every instance the holder after having been manufactured has an individual section fitted into it; and the section has an individual feed fitted into it? A. Yes.

3845 Q203. And although other feeds or sections might fit it is not intended that it should? A. Yes.

Q204. Does it take any machinery to assemble the pens after these parts are made? A. No, that is hand work.

Q205. Is it considered a very important part of the manufacture? A. Yes, we have to be particular that they are fitted fitted together as they should be. It requires expert labor to do that right.

Q206. Do you employ any labor except expert labor in the manufacture of any part of your pen; if so, state what part is not expert? A. No, they are all expert. We have to put on help at times and break them in and make experts of them. A green man doing that work, it has to be gone over by an expert

3846 before it passes.

Q207. Then generally speaking your entire force in the active manufacture of the pens and holders is composed of experts? A. Yes, most of our factory help have been with us anywhere from five to twelve years.

Q208. Have you picked out a few letters of commendation, and the like, of recent date? A. Yes.

Q209. And are these they (showing the witness papers)? A. Yes.

Mr. Bacon: We offer in evidence a few letters of commendation of the pens made by A. A. Waterman & Co.

Q210. Did you ever solicit any of these? A. I did not.

Q211. Did you ever have any puzzle device or offer any reward for commendation? A. No, sir.

Mr. Bacon: I offer thirty-nine letters of commendation.

Objected to as incompetent.

Marked Exhibit A-60.

Mr. Bacon: I also produce nineteen letters of denunciation of the plaintiff's pens.

Objected to as incompetent and not the best evidence.

Marked Exhibit A-61.

Each letter in this exhibit relates to Ideal pens, 3848
whether it so states in the letter or not.

Q212. What do you know about the alleged trouble with the mail up in Montreal? A. I don't know anything about that.

Q213. When dealers call for your pens what do they call for? A. As a general thing they call for self-fillers or middle joints or end joints. Nine times out of ten however they order them by the number without designating.

Q214. Have you ever had any trouble with middle joint pens leaking? A. Not that I know of. We have had very few complaints of them that reached me.

Q215. And if it does leak at the middle it does not get on your fingers; is that it? A. Yes.

Q216. Have you had any special trouble with the head coming off on the self-filler? A. Four or five years back, in the old concern, there used to be more or less, because they were not made as heavy or as strong as they should be, but in the last two or three years that has been overcome almost entirely. 3849

Q217. You make a larger head? A. Make a larger and heavier head.

Q218. How is the head connected with the sack? A. There is what we call a screw-plug that one end of the sack is fastened to and the head is fastened on to the other end of that screw-plug.

Q219. And the sack is fastened on to the screw-plug? A. Yes.

3850

Q220. How is it fastened? A. It is cemented on and tied with white silk.

Q221. Then you are continually improving the quality of your pens? A. Yes, we are always experimenting and improving all along the line.

Q22. And you endeavor to make each pen better than the last one? A. Yes.

Q223. Do you have any complaints that pens manufactured by A. A. Waterman & Co. are, as Mr. Kernan said, weak in construction and do not write? A. No, sir, we do not, only once in awhile people will get hold of a gold pen that does not just suit their style of writing and when they get a pen that does

3851 suit them in place of it, the trouble is entirely overcome. It is not a structural fault or a fault of the pen in any manner. It is simply that they have not had a gold pen that suited their hand.

Q224. And they frequently come to exchange the pen so as to have it suited to their individuality? A. Quite a number of times, yes.

Q225. Do you know whether the Day factory at Seymour, Connecticut is devoted exclusively to the manufacture of rubber pen holders? A. I have not been there myself but from those who have been there, one man, who is a relative of the Days, who at one time worked for us, states that their principal business is making Ocean cables.

3852 Mr. Watson: I move to strike out the answer as incompetent.

A. (Continued.) I think their business in pen holders has increased though considerably since I have known anything about them, in the last ten or twelve years.

Q226. That is only a small part of their business? A. I do not know anything about the proportion of it.

Q237. Do you remember Exhibit 10 and Exhibit 7? Exhibit 10 being the L. E. Waterman pen which sells for $2.50. Do you remember how much Exhibit 7 sells for? A. I don't remember what Exhibit 7 is. (The witness examines Exhibit 7.) Exhibit 7 retails for $2.50.

Q228. It is an A. A. Waterman is it? A. No, that is an L. E. Waterman Ideal.

Q229. I must have got them mixed up then. Exhibit 10; is that an Ideal too (showing witness exhibit)? A. No, this is an A. A. Waterman pen that retails at $1.

Q230. They are both under the finger joint pens? A. Yes.

Q231. And are they of the same grade?

Same objections.

A. Practically. The No. 10 has a somewhat smaller gold pen in it than Exhibit No. 7.

Q232. The holder is practically the same?

3854

Objected to as the holders speak for themselves.

A. The holder is practically the same.

Q233. Do you sell to J. H. Ailman & Co. of Boston? A. Yes.

Q234. Where is their place of business? A. 10 Bromfield Street.

Q235. Do you know whether they were there before L. E. Waterman went to 8 School Street? A. I am not sure. I think they were there considerably many years before the L. E. Waterman Company moved to 8 School Street.

Mr. Watson: I move to strike out the answer as incompetent and immaterial.

3855

Q236. Do you sell to Lazarus of Macon, Ga.? A. Yes.

Q237. How long have you been selling to him? A. Eight or nine years. The old concern sold before the reorganization. That is my recollection.

Q238. There is no question about his knowing all about the difference between the plaintiff and the defendant? A. Not the slightest.

Q239. Is the pen manufactured under the new management following July 1, 1905, the same pen as was manufactured in 1898 and the earlier stages of this enterprise?

3856

Objected to as immaterial and without proper foundation.

A. The end joint pens are practically the same except the shape of the holder has been changed somewhat. In 1898 we made what we called a straight holder. After that they changed it to an over-cap style.

Q240. Are the present pens manufactured under different patents from what they were in those times? A. Yes.

Q241. When did you begin making this sack, the self-filler? A. I think our present form of sack pen, we began making them in 1903 to the best of my recollection.

3857 Q242. Do you know who manufactured the pen sold by A. A. Waterman & Co. back in 1898 at the time of the decree of September 3, 1898? A. No, sir, I do not.

Q243. They were not manufactured by Frazer & Geyer Company? A. Not at that time, no.

Q244. Is it a fact that from 1901 up to July 1, 1906, Mr. A. A. Waterman was continuously without interruption a member of some firm of A. A. Waterman & Co. with which you were connected?

Objected to as immaterial.

A. Yes.

It is admitted that Lewis E. Waterman, Sr., died in

3858 1901.

It is admitted that Lewis E. Waterman, Jr., is now Vice-President of the L. E. Waterman Company.

It is admitted that Gibson died August 14, 1899.

Direct-examination closed.

Mr. Watson: The witness is called on to produce all communications, letters and telegrams of any kind, that he has sent to or received from Sol Teller of Cleveland, Ohio; Standard Drug Company, Cleveland, Ohio; T. H. Bushnell, of Cleveland, Ohio; Chamberlain, the attorney

for Sol Teller, Cleveland, Ohio, or any firm of which Chamberlain is a member.

CROSS-EXAMINATION by Mr. Watson:

XQ245. What was your business prior to your association with Mr. Frazer in the fountain pen business? A. Just previous to that I was with Yates & Porterfield.

XQ246. Where was their place of business? A. I think at that time they were at 19 William Street, New York.

XQ247. What was their business? A. They were ship owners and merchants in the African business.

3860

XQ248. What were your duties there? A. My duties were general. We had rather a small force down there and I had to take part in everything that was going on.

XQ249. How did you happen to become associated with Mr. Frazer in the fountain pen business? A. I came to Brooklyn from Boston in 1885 and Mr. Porterfield of the firm of Yates & Porterfield, with whom I went afterwards—he was a large real estate owner in Brooklyn and he had a vacant store at the corner of Tompkins Avenue and urged me to come on and start a drygoods business there. My brother was a partner of Mr. Porterfield in the firm of Yates & Porterfield; and Mr. Frazer had a shoe store next door to the store that I opened. He was also a tenant of Mr. Porterfield. We were along side of each other for three years or more and in that way got acquainted.

3861

Mr. Frazer afterwards gave up the shoe business, or he took up the fountain pen business along with his shoe business, he having moved to Barclay Street, I think it was, in New York, and he was making the Lincoln fountain pen. I had used fountain pens for a good many years but never found one that was satisfactory; they all being leaky; always leaking at the joints, so that they would always soil my clothes and so I tried one of his pens and it was so satisfactory that I used a good many of them. Along in 1897 I used to see him quite frequently. I jokingly said to him, "Don't you want a partner?" His reply was, "Yes." I think it was only a few weeks later that we formed the partnership of William G. Frazer & Co.

3862

XQ250. Where was Mr. Frazer carrying on the business of fountain pens when you went with him? A. His office was at 108 Fulton Street, New York, and the factory was in Hinsdale Street, East New York.

XQ251. Where were you—at the office or factory? A. Both. I was living out at Ozone Park at that time and I would stop at the factory in the morning anywhere from one to two or three hours and go back there in the afternoon, and I was in the office part of the time and I was also with Yates & Porterfield. I used to go down to Yates & Porterfield at 10 or half past 10 and leave there early.

3863

XQ252. Your business with Mr. Frazer was mainly keeping the books was it not? A. No, I had charge of the factory as long as it was in East New York and kept the books too.

XQ253. How long was the factory at East New York? A. I think it was about a year and a half after I went with him.

XQ254. Where was it moved then? A. 36 Gold Street.

XQ255. That was about 1899? A. I think so.

XQ256. Was it before you incorporated the Frazer & Geyer Company? A. It was after. I don't know; it was either the May before or the May after; I don't know.

XQ257. What interest did you have in the partnership with Mr. Frazer? A. We were equal partners.

XQ258. And what was the name of that partnership? A. William G. Frazer & Co.

3864

XQ259. Did you ever have a partnership by the name of Frazer & Geyer? A. No, that was a corporation.

XQ260. You never had any partnership by the name of Frazer & Geyer? A. No. The corporation of Frazer & Geyer Company, the control of its affairs was in the common stock. Mr. Frazer and myself had that common stock, divided equally between us except that a friend of his took a share and my brother took five shares so that we could qualify for directors; so that Mr. Frazer and myself had full control of the affairs of Frazer & Geyer Company.

XQ261. The preferred stock had no voting power? A. No, it had not.

XQ262. Did you pay anything for that common stock in the Frazer & Geyer Company? A. We turned over our assets in William G. Frazer & Co. for it. The actual assets amounted to the amount of our common stock. There was no watering of stock at all of any kind.

XQ263. Who put in the $14,000 represented by the preferred stock? A. That was not all issued at the time. Whatever preferred stock was issued was paid for 100 cents on the dollar, $100 a share in cash.

XQ264. You testified that you first knew A. A. Waterman in 1900; is that right? A. I think I testified that my recollection was the first I had met him was late in 1900 but I was not 3866
sure that I had not met him in 1899 when we first began doing business with him.

XQ265. Where did you meet him? A. I must have been at the office in New York—at our office in New York.

XQ266. Were you ever in his place of business in Boston? A. No, not to my recollection.

XQ267. At no time? A. I don't remember ever having been there.

XQ268. When you first met him he was doing business in his own name, was he not? A. When I first knew of him, he was; he did business in his own name for four or six months, something like that, as far as I knew.

XQ269. The only thing that you know about that is hear- 3867
say? A. I know that we had orders from him right along as A. A. Waterman; from August to November, 1899, we had orders from him in his own name. After that the orders came signed A. A. Waterman & Co. and the bills were charged to A. A. Waterman & Co.

XQ270. All those accounts of goods sent to Boston were paid for by the Colonial Pen Company, were they not? A. No, they were paid for by drafts of A. A. Waterman & Co. on the Colonial Pen Company, which came to us accepted by the Colonial Pen Company.

XQ271. Did you know any of the people at that time in the Colonial Pen Company? A. I did not.

3868 *Hobart W. Geyer*

XQ272. Did you know at that time that A. A. Waterman was connected with the Colonial Pen Company? A. I may have known it but if I did I don't remember the circumstances.

XQ273. You know nothing about A. A. Waterman's business prior to the time you first began to sell him goods? A. No.

XQ274. You never knew Gibson? A. No, sir.

XQ275. Never met him? A. I have no recollection of ever having met him.

XQ276. You would remember it wouldn't you if you met him? A. I don't know. There are so many people I meet it is impossible to remember them all.

3869 XQ277. You never were in the factory we have referred to, in Somerville, Mass.? A. No.

XQ278. You don't know anything about it? A. Not personally. One of your last witnesses, Mr. Lancaster, said that they had the factory and the name was in a large sign painted on it "A. A. Waterman & Co."

Mr. Watson: I move to strike out the answer as irresponsive and incompetent and the witness is cautioned to answer questions and not indulge in irrelevant speeches.

XQ279. Mr. Frazer was the man that made the arrangements with Mr. Arthur A. Waterman at the time you went in partnership with him in 1901, was he not? A. He was the one that

3870 attended to the details, yes.

XQ280. You had practically no talks with Mr. Waterman at all at the time you went into partnership with him? A. Very few.

XQ281. And the partnership arrangement was all arranged by Mr. Frazer? A. I went over the details with Mr. Frazer although it was a straight partnership so that it did not require much of any details.

XQ282. You had no conferences with Mr. A. A. Waterman respecting the terms of that partnership? A. I don't remember now.

XQ283. It was all done by Mr. Frazer was it not? A. I believe the bulk of them. I don't know just the details of it.

XQ284. The desirability of the partnership with A. A. Waterman was discussed between you and Mr. Frazer, was it not? A. I presume so.

XQ285. You don't remember anything about it? A. Nothing special. If it had not been desirable we probably would not have made it.

XQ286. Mr. Waterman had no money to put into that partnership, did he? A. That I don't know. He did not put any in.

XQ287. What money did you put into the partnership of A. A. Waterman & Co. in 1901? A. I believe it was $500. 3872

XQ288. Where did you get that $500?

Mr. Bacon: Objected to as immaterial.

A. I presume I took it out of my bank account. I don't know any other place to get it.

XQ289. Didn't you take it out of the Frazer & Geyer Company? A. Not to my recollection. I don't know why I should. If I did it must have belonged to me.

XQ290. Didn't you take it out of the Frazer & Geyer Company? A. I don't remember.

XQ291. Did not Mr. Frazer do the same thing? A. I don't know. I know at that time $500 didn't look very large to me anyway. 3873

XQ292. Prior to forming this partnership with Mr. Waterman in 1901 did you discuss Judge Kellogg's decree of September 3, 1898, with Mr. Frazer? A. I don't think I knew anything about it at that time.

XQ293. You did not discuss it with Mr. A. A. Waterman either did you? A. I don't think I knew anything about it. My recollection is that Mr. Frazer informed me about it after the partnership was formed.

XQ294. Did Mr. Isaac E. Chapman have anything to do with bringing about this partnership between you, Mr. Frazer and A. A. Waterman? A. I don't think he knew it was formed

until after it had been done. I don't think he knew anything about it.

XQ295. Had you arranged with Mr. Isaac E. Chapman to supply the funds for this partnership that you agreed to supply? A. Mr. Frazer said that he had a party from whom he could get the funds and he afterwards told me it was Mr. Chapman.

XQ296. You did not have anything to do with arranging the funds with Mr. Chapman at all? A. No, I did not.

XQ297. What relation is Mr. Frazer to Mr. Chapman? A. So far as I know he is not any relation.

XQ298. No relation between their wives or families? A. I don't think there is the slightest; as far as I know there is not. I
3875 never heard it mentioned.

XQ299. As far as you know, no arrangements were made with Mr. Chapman to furnish the money for the partnership between you and Frazer and Waterman prior to the formation of that partnership? A. No, when we formed that partnership and agreed to give credit for $25,000. I knew that if Mr. Frazer could not get it I could; so that it never gave me any trouble.

XQ300. But you had no arrangement with anybody at that time to furnish the money? A. I had not.

XQ301. And you don't know that Mr. Frazer did? A. I don't know.

XQ302. Was the use of the name A. A. Waterman & Co. discussed at all at the time you formed this partnership in 1901?
3876 A. I presume it was as Mr. Waterman had been doing business or the firm of A. A. Waterman & Co. in Boston had been doing business; it was simply a case of transferring it to New York. Our object was, that we had been supplying the firm of A. A. Waterman & Co. with what we presumed was a small part of their goods and we had a plant where we could turn out a whole lot more goods than we were making and we thought with the new arrangement, or we knew with the new arrangement we could supply them with all the goods and that by our method of doing business, which had shown that our business was increasing rapidly all the time, that we could also increase the business of A. A. Waterman & Co.

XQ303. Did you not know that the Colonial Pen Company owned the factory in Somerville that you refer to? A. I did not know anything about the Colonial Pen Company.

XQ304. Did you know that A. A. Waterman and the Colonial Pen Company at that time had a disagreement and were not going to do any further business? A. I know the Colonial Pen Company had been selling agents for A. A. Waterman & Co., and that for some reason or other Mr. Waterman was going to break with them or had broken with them, I don't know just which now, and then he formed the copartnership with us.

XQ305. After he came down to New York, in the partnership, you never furnished any further supplies to the Colonial Pen Company, did you? A. I think not. 3878

XQ306. And you knew that that was going to happen when he came here anyhow didn't you? A. My recollection is that it had already happened.

XQ307. Did you know Rhodes Lockwood? A. No.

XQ308. You never had any business with Rhodes Lockwood at any time? A. Not to my recollection.

XQ309. Did you have any business with the Davidson Rubber Company of Boston at any time? A. Yes, I think we bought some rubber from them.

XQ310. You never made any fountain pens for Rhodes Lockwood? A. No.

XQ311. Or the Davidson Rubber Company? A. Not that I remember. 3879

XQ312. Did you ever supply any parts of fountain pens to the Sterling Fountain Pen Company of Boston? A. No.

XQ313. Never had any business with them? A. I think not.

XQ314. Did you take over any of the debts of A. A. Waterman & Co. when he came down here to become a partner? A. Not as a firm but my recollection is that we paid some of the debts of A. A. Waterman & Co. which Mr. Waterman had assumed. The one I remember particularly is paying P. D. Collins several hundred dollars and this we charged to Mr. Waterman's account.

XQ315. Was not that an individual account of A. A. Waterman? A. We charged it to Mr. Waterman's individual account.

XQ316. Was it not an individual debt of A. A. Waterman? A. I understood it was a firm debt that he had assumed.

XQ317. When was that debt incurred? A. While they were at West Somerville.

XQ318. While he was doing business as A. A. Waterman? A. As A. A. Waterman & Co., I understood.

XQ319. You don't know anything about it personally? A. No, that was the way the information was given to me. That is all I know about it.

3881 XQ320. You paid it as a personal debt or obligation of A. A. Waterman? A. That is as I understand it; an obligation that he had assumed of the firm of A. A. Waterman & Co.

XQ321. Who told you it was a debt of A. A. Waterman & Co.? A. Either Mr. Waterman or Mr. Frazer; I am not sure which.

XQ322. You are not prepared to swear that that was not a personal debt of A. A. Waterman? A. I can only swear what I was told.

XQ323. You don't know anything about it personally at all? A. No, I do not. I know just what I was told.

XQ324. You charged it to A. A. Waterman personally? A. I charged it to his personal account.

3882 XQ325. And that was the only debt of his that you paid was it not? A. That is the only one I remember. There may have been others but I don't remember.

XQ326. Don't your books show? A. That I don't know. I presume they would.

XQ327. If you have any other debts of A. A. Waterman that you paid, or A. A. Waterman & Co., that was doing business as you say, in Boston, will you please look it up and advise us while you are giving testimony? A. Yes.

XQ328. Do you know who the partners were of that A. A. Waterman & Co. that you have been talking about, doing business in Boston? A. I do not. I don't know whether I ever knew or not.

XQ329. You did not know they had any partners? A. My impression is that somebody said his wife was his partner but it is only a hazy impression.

XQ330. Did A. A. Waterman ever tell you that? A. I don't remember. The impression is very hazy.

XQ331. All you know about it is hearsay anyhow? A. I know we sold the firm of A. A. Waterman & Co. for over a year and that A. A. Waterman & Co. paid the bills, partly in cash and partly in drafts on the Colonial Pen Co.

XQ332. What do you know about Waterman & Gibson—anything? A. Nothing; I don't remember anything.

XQ333. When A. A. Waterman came down here to New York did he bring anything from the concern of Waterman & Gibson? 3884
A. Yes, I know he brought several books and he brought some patterns and some tools and things of that sort. We had a big bunch of stuff around there for years that he brought on.

XQ334. Do you know where he got it? A. I don't know where he got it. He claimed that it was what he had left from the old firm of A. A. Waterman & Co.

XQ335. Don't you know that Rhodes Lockwood took over everything that he had in the shape of tools, merchandise, patterns and everything else and all the assets of Waterman & Gibson? A. If he took them over he must have handed them back to him because Mr. Waterman brought them on with him.

XQ336. You know that he took them all over, don't you? A. I don't know anything about it. 3885

XQ337. You don't know whether these things came from the Colonial Pen Company or from Waterman & Gibson that were brought on? A. I don't know anything about it. All I know is that Mr. Waterman brought them saying that they were what he had in the old firm of A. A. Waterman & Co.; that was what he had left. And he turned them in as per the copartnership articles.

XQ338. What did they consist of? A. Tools and patterns and books and things of that kind.

XQ339. Did you ever use any of them? A. I don't remember whether they were used or not. I never used any personally to my recollection. They were used in the factory, yes.

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XQ340. Did not A. A. Waterman take them away with him after that? A. No.

XQ341. Are they still there? A. I think when we changed our factory around most of them were thrown out.

XQ342. And you never used them at all in the business? A. Some of them were used but I don't remember just which ones. I know I did not use them myself.

XQ343. You never had much to do with the manufacturing part of the Frazer & Geyer business, did you? A. I did for the first few months; after that I did not, giving my time more to other business.

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XQ344. What were you doing after that? A. I was engaged with Yates & Porterfield.

XQ345. That was after you had formed the partnership of A. A. Waterman & Co. and the Frazer & Geyer Company? A. I went with Yates & Porterfield in 1888, and did not leave them until 1905, when the reorganization of the Frazer & Geyer Company and A. A. Waterman & Co. took effect.

Recess.

XQ346. As we suspended for lunch you stated that from 1888 to 1905, you were with Yates & Porterfield? A. The last few years of that connection it was a corporation, the Yates & Porterfield Trading Company.

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XQ347. And during that time your connection with the fountain pen business was merely nominal? A. It was far from nominal. I probably put in four or five hours a day in the fountain pen place during all that period.

XQ348. And all you know about the few tools and old books that you got from A. A. Waterman at the time the partnership was formed in 1901, was what A. A. Waterman told you—where they came from? A. As far as I remember.

XQ349. You had no other information about that? A. No, no other information.

XQ350. Did he not tell you those books were his personal books? A. No, sir, because the books were marked A. A. Waterman & Co.

XQ351. Don't you know that the money you paid for A. A. Waterman was for borrowed money, that A. A. Waterman borrowed personally? A. I never was so informed. I never heard of any such thing before.

XQ352. When you formed the partnership in 1901, was not the desirability of using the name Waterman, a well-known name in the fountain pen business, discussed? A. I presume it was.

XQ353. You discussed it? A. I presume so.

XQ354. With whom? A. It must have been with Mr. Frazer.

XQ355. What was said about it? A. I do not remember any conversation at all.

XQ356. That is the reason you took the name, was it not? A. The reason we took the name was that the firm of A. A. Waterman & Co. had been doing business; they had more or less of an established business and we had been making a part of the goods for them and we thought—we not only thought but we knew that if we formed a partnership with Mr. Waterman we would then have all of the business and then we could increase that business by our own methods. 3890

XQ357. Don't you know that the concern of Waterman & Gibson became insolvent and had no good will or business at all? A. I do not.

XQ358. Don't you know that Rhodes Lockwood took over everything they had to satisfy his claim against him? A. I do not.

XQ359. Don't you know that about the time that A. A. Waterman became separated from the Colonial Pen Company that that concern was practically insolvent? A. I don't know but I heard a year or so later it was sold out. 3891

XQ360. Don't you know that within a few months afterwards it was sold in bankruptcy? A. No, sir, I do not know it.

XQ361. A very few months afterwards? A. I do not know it. I know Mr. Lancaster told me that he bought all the assets.

XQ362. Don't you know that that was another concern that Lancaster bought? A. I do not.

XQ363. The Colonial Pen Company went into insolvency right after Waterman left it? A. I never heard of such a thing.

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XQ364. And it was insolvent at the time he left it and that is the reason he left it? A. I never heard it.

XQ365. Do you remember discussing with Frazer about having Chaplin come over to New York with Waterman because the business was going to stop over there? A. I don't remember it. When I was in Boston Mr. Chaplin said that he had met me before but I have not the slightest recollection of having met him. I do not say that I had not met him but I have no recollection whatever of ever having met Mr. Chaplin until I met him in Boston the 31st day of March this year.

XQ366. When was it that you moved the factory to 22 Thames Street? A. I think it was about nine year ago. I am

3893 not positive on that.

XQ367. It has been there ever since? A. It has.

XQ366. What is the size of the factory you have at Thames Street? A. At present I think we have between four thousand and five thousand square feet of space.

XQ369. You pay about $125 a month rent?

Objected to as immaterial.

A. I think our rent and power together amounts to about $200.

XQ370. And the rent is about $125 a month? A. I think that is right.

XQ371. And that includes your factory and office and all

3894 the outfit you have in New York? A. Yes, at present. When we first went there we paid $275 a month for the whole floor.

XQ372. How long have you had your present quarters? A. Two years. We have leased more space now from the first of May.

XQ373. How much more space? A. I think about fifteen hundred or eighteen hundred feet.

XQ374. How much more rent do you pay?

Mr. Bacon: That is objected to and I direct the witness not to answer.

XQ375. Have you doubled your space?

Mr. Bacon: I direct the witness not to answer.

Mr. Watson: The Court's attention is called to the interference of defendant's counsel with this examination, on points directly covered in the direct-examination.

XQ376. Do you refuse to answer?

Mr. Bacon: No question was asked on direct-examination about the amount of space occupied.

Mr. Watson: Counsel calls the Court's attention to the testimony going over this matter at length by defendant's counsel; stating about the machines and processes and all about the methods used in factories and how extensive it was and all that kind of business. Plaintiff's counsel wants to show that this is an insignificant factory in the upper story of a factory building used as a factory and office. 3896

XQ377. How much space do you have under your new arrangement?

Mr. Bacon: The same objection and same direction.

XQ378. Do you refuse to answer? A. Yes, under the direction of counsel.

XQ379. Will an answer to the question tend to incriminate you or degrade you or subject you to any forfeiture? A. It will not. 3897

XQ380. (Question is repeated.)

Mr. Bacon: The same direction.

Mr. Watson: I will certify the question.

XQ381. How many employees have you in your New York factory? A. Between forty and fifty.

XQ382. Were there as many as forty or fifty employed during the last year all the time? A. It has varied. It has been up and down.

XQ383. Have you had as many as forty every day during the business year? A. For the last year?

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XQ384. Yes? A. I would not say that. We have had very close on to it but as I say there are changes every now and then. Sometimes there are more and sometimes there are less.

XQ385. That includes your office force in the factory? A. You asked for factory. That includes the factory force.

XQ386. That does not include you office force? A. It does not.

XQ387. Was any credit ever furnished by Isaac E. Chapman outside of the cash he put into the business? A. Furnished whom?

XQ388. To the Frazer & Geyer Company or to A. A. Waterman & Co. or the Modern Pen Company? A. Not to my

3899 knowledge.

XQ389. Why could you not have answered that in the first place then? A. It was a general question. I wanted to know what I was answering. I am trying to give you correct answers but I want to know that I am answering the questions that you are trying to find out about.

Mr. Bacon: I ask plaintiff's attorney to explain what he means by giving credit outside of cash?

Mr. Watson: That is the exact question you asked?

Mr. Bacon: Since when?

Mr. Watson: It is in the testimony.

Mr. Bacon: Oh, no.

3900 The Witness: I have not heard any such question before.

XQ390. When was the receiver appointed for William G. Frazer?

Mr. Bacon: Objected to; the exhibit in evidence shows for itself.

A. If you will give me the exhibit I can tell.

Mr. Raymond: June 7th, 1905.

The Witness: June 7, 1905, Exhibit A-2.

XQ391. This notice Exhibit A-2 was served on you on June 8th, 1905? A. Yes.

XQ392. Did the firm of A. A. Waterman & Co., composed of yourself, Frazer and A. A. Waterman, go into the hands of a receiver? A. We did not.

XQ393. No receiver was ever appointed for them? A. I don't remember that there was.

XQ394. You don't remember anything about any receivership proceedings at all for A. A. Waterman & Co. composed of yourself, William G. Frazer and A. A. Waterman? A. My recollection is that my attorney explained to me that this other execution, or whatever you call it, dissolved the firm. I did not go into it any further than that.

XQ395. You never made any affidavit in that proceeding did you? A. Not that I remember. 3902

XQ396. You don't remember that any receiver was ever appointed for the firm of A. A. Waterman & Co., composed of yourself, Frazer and Arthur A. Waterman? A. I don't remember it now, no, sir. There were so many actions at that time I could not remember them all.

XQ397. Did you ever turn over any assets to Gratz Nathan, receiver for William G. Frazer? A. I did not have anything belonging to William G. Frazer to turn over, so I could not.

XQ398. You did not have an interest in the firm of A. A. Waterman & Co.; composed of yourself, Frazer and Arthur A. Waterman? A. That firm was in debt so it owed more than its assets; the liabilities were larger than its assets.

XQ399. Did they have any good will? A. They certainly did. 3903

XQ400. What did you do with that? A. That went with the new firm, I presume.

XQ401. How did it go to the new firm? A. My recollection is that the sheriff sold out everything connected with the Frazer & Geyer Company and A. A. Waterman & Company. I am not positive that that was so, and it was bought in by the Chapman interests and turned over to the Modern Pen Company when that was formed.

XQ402. What was sold by the sheriff? A. I have not a copy of what was sold. I think it was all the right, title and interest and everything connected with the business.

XQ403. Was there any sale by the sheriff of the assets of A. A. Waterman & Co.? A. I don't remember. I was not at that sale and I don't remember what was sold.

XQ404. You don't remember anything about the proceeding at all, do you? A. I know that there was a proceeding but just what the details were I don't remember.

XQ405. You remember that proceeding now? A. Yes.

XQ406. Did you keep the books of A. A. Waterman & Co. at that time? A. I did up to—I think the latter part of May. No, I did not keep the books, I kept part of them. I entered the cash in the cash book; that is all.

3905 XQ407. Were not the books kept under your direction? A. Part of them were.

XQ408. Who else kept books besides you? A. I think at that time a man named Marsh was the head bookkeeper. We had several bookkeepers and I think a man named Marsh was the head bookkeeper.

XQ409. Do you remember bringing an action against Arthur A. Waterman—you and Frazer individually against Arthur A. Waterman asking for the appointment of a receiver? A. I started an action of some sort. I have forgotten now just what it was.

XQ410. You asked for an injunction in that action to enjoin A. A. Waterman from interferring with the assets of A. A. Waterman & Co.? A. I don't remember. There was quite a

3906 volume of papers and I have forgotten now.

XQ411. Did you swear at that time that A. A. Waterman was a man of no financial responsibility? A. I may have. As I have just told you, the firm of A. A. Waterman & Co. was in debt much more than it had any assets to cover but that was all I knew Mr. Waterman had, his interest in the firm. I may have sworn to that.

XQ412. He never had any money in the firm at any time, did he? A. I don't think that he did. I don't think that he had anything to his credit.

XQ413. He never put any money into the firm? A. No.

XQ414. At any time? A. It would only be that he left some of his profits in there but I don't think that he did that.

XQ415. Do you know whether Arthur A. Waterman at that time was working with the Chapmans to oust you and Frazer from the business? A. I did not know it at that time. I judged so afterwards.

XQ416. You did not make an affidavit to that effect in that action? A. I think not.

XQ417. You would remember it would you not if you made any such affidavit? A. I just told you I could not remember what was in that, it is so long ago and there were so many different things happening that I could not keep track of the details. I have not seen the papers since that time or given them a thought.

3908

XQ418. Do you recall that the Chapmans at that time were trying to oust you and Frazer from this business? A. The Chapmans—

XQ419. Answer the question yes or no, whether you remember? A. The Chapmans had tried to get Mr. Frazer to accept a lower salary than he had been having, as I testified, and Mr. Frazer would not agree to it and it caused friction between them and as the outcome from it I judge that the Chapmans had decided to oust Mr. Frazer.

XQ420. They were trying to oust Mr. Frazer in 1905? A. Otherwise they would not have called the loan that they had on his stock.

XQ421. Did you make an affidavit at that time that Waterman was working with Chapman to oust Frazer and get control of the business? A. Possibly I did, I don't remember.

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XQ422. Don't you remember that you joined Frazer in that action? A. I remember that I did join Mr. Frazer, because he had misled me in regard to his dealings with the Chapmans and I stayed with him until he told me that he was going to wreck the concern so that they would not have a dollar left, so that the Chapmans would lose all that they had in it. I told him he ought to do what he could to protect his friends and I did not intend to do anything to make my friends lose all the money they had put in the business through their friendship for me and I said, "If that is your attitude I shall not work with you

any longer" and I left him and went down and told Chapman that if there was anything I could do to help protect the interest of all the stockholders in the Frazer & Geyer Company I would do whatever I could.

Mr. Watson: Counsel calls the attention of the Court to the impossibility of getting responsive answers from this witness and the question is repeated.

XQ423. (Question repeated.) A. I joined him in some action. I have forgotten now just what it was.

XQ424. Didn't you ask that a receiver be appointed for A. A. Waterman & Co.? A. I don't remember.

3911 XQ425. Didn't you make an affidavit to the effect that the Chapmans were trying by fair means or unfair means to get control of the firm of A. A. Waterman & Co. of which you were a member? A. I have told you I don't remember what was in the affidavit. I have not seen it or given it a thought since. It was made six years ago and I don't know what was in it.

XQ426. After you made that affidavit didn't you switch to the other side and make an affidavit for the Chapmans? A. I don't remember having done anything of the sort.

XQ427. I show you a certified copy of an affidavit verified the 14th day of June, 1905, and ask you if you made that affidavit (handing witness the paper)? A. I must have signed it.

3912 The paper identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 127.

XQ428. This is a copy of the complaint in that action is it not, that I now show you (showing witness the paper)?

Objected to as immaterial.

A. I think so.

The complaint is offered in evidence and marked Exhibit 128.

Objected to as immaterial.

XQ429. And here is another affidavit that you made in that same action, that I now hand you (handing witness the paper)? A. I signed that affidavit.

XQ430. That is directly opposite from the one that you made, Plaintiff's Exhibit 127, is it not? A. Yes, it states that I had got further information.

XQ431. What did you get for switching from one side to the other in that litigation? A. I didn't get anything.

XQ432. What were you promised? A. Nothing.

XQ433. Did not Isaac E. Chapman protect your stock in the Frazer & Geyer Company because you did switch? A. No more so than anybody's else stock.

XQ434. Did he protect Mr. Frazer's stock? A. That I don't know anything about except that I understood that Mr. Frazer's stock was sold out because he did not pay his loan on it.

3914

XQ435. Didn't you take a loan on your stock? A. I did not.

XQ436. At any time? A. Not from Mr. Chapman. I never borrowed a dollar from Mr. Chapman or any one connected with him.

XQ437. Do you consider Mr. Chapman a man of veracity, who would tell the truth? A. As far as I know, he is.

XQ438. Is this statement true: "Mr. Frazer was given the management of the Frazer & Geyer Company and of A. A. Waterman & Co."? A. That is true.

XQ439. "At first this management was given to Mr. Frazer and Mr. Geyer jointly but Mr. Geyer is a bookkeeper and wholly incompetent." Is that true? A. No, it is not. Mr. Chapman was very much prejudiced against me by Mr. Frazer, as I have since found out.

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XQ440. Mr. Chapman had known you in connection with this business for a number of years prior to 1905 hadn't he? A. I met Mr. Chapman very little except at the directors' meetings.

XQ441. Mr. Chapman makes affidavit that the firm of A. A. Waterman & Company, consisting of yourself, Mr. Frazer and Mr. Waterman was organized without capital except $1,000, which they loaned from the Frazer & Geyer Company. Is that so?

Mr. Bacon: I object to reading from any affidavit that is not in evidence.

A. I don't remember that.

XQ442. Did you and Mr. Frazer take out of the funds of the Frazer & Geyer Company without consent and in violation of the duties of the officers and trustees of that company the sum of $1,000? A. Not to my recollection. I never took anything that did not belong to me.

XQ443. And did you put that money into the A. A. Waterman Company, that $1,000, that you and Frazer put in at the time it was organized? A. I put $500 into the firm of A. A. Waterman & Co.

XQ444. Did you get that from Frazer & Geyer? A. I don't remember where I got it. At that time I could just as well have
3917 paid $5,000 or $10,000. I had it.

XQ445. Do you know whether Mr. Frazer got his money, $500 from the treasury of the Frazer & Geyer Company? A. I don't know.

XQ446. Did Mr. Chapman, as soon as he found out that you had taken this money from the Frazer & Geyer Company compel you to pay it back to them? A. It is possible that it is a matter of bookkeeping so that it showed on the Frazer & Geyer books but if it was and Mr. Chapman called for it, why, we immediately replaced it. I don't remember those details. It was a long time ago.

XQ447. Did Chapman loan you the money that you put back? A. Mr. Chapman never loaned me a penny, Mr. Chapman or
3918 any of his friends. As I told you before, Mr. Chapman was very much prejudiced against me by Mr. Frazer and it is only within the last two or three years that that prejudice has been overcome.

XQ448. Was it a fact that Frazer & Geyer Company lost money from the beginning but that it was concealed on the books of the company? A. From the beginning of what?

XQ449. From its incorporation? A. No. It made money for several years.

XQ450. Did you declare a stock dividend which was not properly declared? A. No, sir.

XQ451. Did the Chapmans force you and Frazer to turn back into the company a stock dividend which they claimed had been improperly paid over to you? A. No, sir.

XQ452. You never returned any stock to the treasury of the Frazer & Geyer Company? A. No.

XQ453. Was there a large deficit of Frazer & Geyer Company covered up by transferring it to good will on the books of the Frazer & Geyer Company? A. I don't think so. I don't remember any such.

XQ454. Did you keep the books? A. I did not. I kept part of them.

XQ455. Didn't you have charge of the accounts and books of the Frazer & Geyer Company? A. We had a bookkeeper 3920
named Marsh and we had two or three bookkeepers before him. I have forgotten who they were; but Marsh was the bookkeeper. I don't remember the others.

XQ456. What officer of the company were you? A. I was Treasurer.

XQ457. All the time were you not? A. All the time.

XQ458. If there was money taken out of the treasury of the Frazer & Geyer Company you ought to know it? A. We were taking money out and putting it in all the time. There was hundreds of thousands of dollars handled every year. I cannot remember every transaction.

XQ459. Is it true that you were cashier of the Frazer & Geyer Company? A. I don't know what you call cashier. We 3921
did not have any such officer as cashier. I was treasurer.

XQ460. And for your services there you were paid by the hour were you not? A. For a time.

XQ461. In 1905 and for some time previous to that you were paid by the hour, were you not? A. I think so for a few months.

XQ462. Your salary did not exceed fifteen or twenty dollars a week? A. Something like that. I gave only four or five hours a day to it.

XQ463. You did not have anything to do with the management of the Frazer & Geyer Company at that time at all did you? A. No, Mr. Frazer was the manager then.

XQ464. You had nothing to do with the factory at that time did you? A. Nothing. I used to go into the factory right along and see how things were going.

XQ465. How long did that continue? A. I should say perhaps for two or three years. All this time I was treasurer of the Yates & Porterfield Trading Company, which was a good position.

XQ466. As a result of this proceeding, of which I have shown you the complaint, Exhibit No. 128, a receiver was appointed for the A. A. Waterman Company was there not? A. I think not. I think the matter was dropped.

3923 XQ467. I show you a certified copy of an order of the Supreme Court of New York County, State of New York, and ask you if that does not appoint a receiver? A. Yes, I think that the man was appointed receiver but he never qualified. I think I remember the circumstance now. He was appointed receiver but he never qualified.

XQ468. You do not know that Mr. Alexander D. Henderson did qualify as receiver do you, under the order I have just shown you? A. My recollection is Mr. Henderson called on me and showed me that order and he found out the shape things were in and could not see that he could get back his fee for qualifying and he dropped it.

XQ469. You don't know whether he qualified or not do you? A. I never heard of his qualifying.

3924 XQ470. You would be surprised to know that he did qualify and filed a bond, which was approved by the Court, would you? A. I am not surprised at anything.

XQ471. Did you turn over any property to Alexander D. Henderson? A. I did not have any to turn over.

XQ472. Will you please answer the question? A. No, I did not.

A certified copy of order is offered in evidence and marked Plaintiff's Exhibit No. 130.

Mr. Bacon: Objected to as immaterial.

XQ473. Has that order ever been modified or set aside in any way? A. I never heard anything about the order from

that time until this. This is the first time that I have seen anything ever since Mr. Henderson called on me.

Mr. Bacon: Was there any bond that went with that order?

Mr. Watson: You will find one there.

Mr. Bacon: Do you produce any bond?

Mr. Watson: I have a copy of it.

XQ474. On the 14th day of June, 1905, at the time you verified the complaint, Plaintiff's Exhibit 128, were the facts stated in that complaint true that you stated on your personal knowledge? A. Those that I stated on my personal knowledge are true, yes. 3926

XQ475. Were the facts which you stated in the affidavit Plaintiff's Exhibit 127, true? A. The facts that I stated on my positive knowledge are true.

XQ476. Has there ever to your knowledge been any sale by the sheriff or anybody else of the assets of the A. A. Waterman & Company composed of yourself, Mr. Frazer and Mr. Waterman? A. I don't know whether those were sold at the time the Frazer & Geyer assets were or not. If not, I have not any knowledge of it at all.

XQ477. Did you ever turn over any proceeds of such sales to Gratz Nathan, the receiver for Mr. Frazer? A. I did not.

XQ478. After this order, Plaintiff's Exhibit 130, was entered you did not undertake to act in any capacity for the firm 3927 of A. A. Waterman & Co. composed of yourself, Mr. Frazer and Mr. Waterman? A. I did not.

XQ479. Nothing was done by you in relation to the affairs of the firm after that order was entered? A. I think not. I don't remember anything.

XQ480. Did you ever at any time make any transfer or assignment of the assets or property or good will of that partnership composed of yourself, Mr. Frazer and Mr. Waterman? A. I don't remember having done anything of the sort.

XQ481. Can't you answer that question yes or no? A. I cannot answer it. I don't remember.

Mr. Bacon: He did, I have the documents.

Mr. Watson: I want it to appear on the record that counsel for defendant has told the witness that he did and that he has the documents.

Mr. Bacon: I did not tell the witness; I told you.

Mr. Watson: And the statement is made before the witness. Counsel for defendant is asked to produce the document which shows any such assignment.

Mr. Bacon: I will produce it in due time on the redirect examination.

XQ482. You knew about Defendant's Exhibit A-12 at the
3929 time it was made, didn't you? A. I did not. I don't remember ever having seen it. I don't think I ever did see it.

XQ483. About the time of this suit, in June, 1905, another action was begun against the Frazer & Geyer Company by the Chapman interests, was there not? A. Yes, the estate of Chapman, and Isaac E. Chapman started a suit to foreclose their mortgage, is my recollection.

XQ484. Those were in May and June, 1905, were they not? A. I think they were in June.

XQ485. 1905? A. Yes, 1905.

XQ486. They were on notes, were they not? A. They were notes along with a chattel mortgage; notes secured by a chattel mortgage.

3930 XQ487. Did you defend those actions? A. I think not.

XQ488. Did the Frazer & Geyer Company defend those actions? A. I don't remember.

XQ489. The Frazer & Geyer Company at that time was controlled by the Chapmans, was it not? A. They had a large majority of the stock, the Chapmans and their friends. I think the control was in the common stock.

XQ490. And Isaac E. Chapman was the president of the Frazer & Geyer Company at the time this action was begun was he not? A. Yes.

XQ491. What office did William L. Chapman have in the corporation at that time? A. I think he was vice-president.

XQ492. They and their friends controlled the Frazer & Geyer Company at the time those suits were brought did they? A. No, the control was in the common stock and the common stock was in trust so that it was practically controlled by Mr. Frazer.

XQ493. Who were the officers of the Frazer & Geyer Company in May and June, 1905? A. Isaac E. Chapman was president, William L. Chapman, vice-president; Mr. Frazer was secretary and I was treasurer.

XQ494. Who was the other director? A. I think Mr. Waterman was one of the directors.

I am not positive but I think a friend of mine, Captain Henry J. Rogers; he was a director at some time but whether he was at 3932
that time I am not sure.

XQ495. How many directors were there? A. My recollection is that there were six.

XQ496. Mr. Waterman at that time was working in the interest of the Chapmans in May and June, 1905? A. I think he was working in the interest of the Frazer & Geyer Company and A. A. Waterman & Co.

XQ497. There was an action brought by the Frazer & Geyer Company against you and Mr. Frazer and Mr. Waterman at about the same time was there not? A. I think so.

XQ498. Was a judgment recovered against you in the action? A. I think not. I don't think it was ever carried out or pushed to a final settlement.

XQ499. I show you a copy of an order and ask you if you 3933
ever saw that before (handing witness the paper)? A. I never knew that there was any judgment; I never heard of any judgment being gotten against me.

XQ500. That does not refresh your recollection? A. No, I never had the slightest idea that a judgment was taken against me.

A copy of the judgment shown the witness is offered in evidence and marked Plaintiff's Exhibit No. 131.

Mr. Watson: It purports to be a judgment of Frazer & Geyer Company against William G. Frazer, Hobart W. Geyer and Arthur A. Waterman in the sum of $12,-

338.50, entered June 4th, 1908, and the action was begun by summons dated May 17th, 1905; complaint verified by Isaac E. Chapman on said date; all the defendants appeared and answered.

XQ501. You never have paid that judgment have you? A. I have not. I never knew anything about it.

XQ502. Nobody has ever asked you to pay that judgment? A. As I say, I never knew that there was any such judgment. This is the first I have ever known it.

XQ503. Did not this matter come up, this suit, when you changed from Frazer's side of that controversy to Chapman's
3935 side of that controversy? A. It did not. I have told you the reason for the change was that Frazer had said he was going to do all that he could to wreck the concern and make the Chapmans lose, and their friends, and they would practically lose everything they had in it and I tried to advise him that his friends had a lot of money in it and mine had a lot and I certainly would not do anything to make my friends lose their investment.

Mr. Watson: I move to strike out the answer as irresponsive and volunteered.

Mr. Bacon: I object to it.

XQ504. The estate of William E. Chapman, Incorporated,
3936 began a suit against you, Frazer and Mr. Waterman and the Frazer & Geyer Company in June, 1905, didn't they? A. I think so. There were so many suits started I don't know just what they were.

XQ505. There was a judgment obtained against you in that suit was there not? A. Not to my knowledge. I never heard of any judgment being obtained against me until you just showed me this.

XQ506. Didn't you make an answer in that suit? A. I don't remember. I may have answered the suit when it was first brought but I never paid any further attention to it.

XQ507. Was that because Chapman assured you that you need not worry as long as you would come over to their side?

A. They never assured me of anything. When I went with them I took a minor position, to do what I could to help to protect my friends' investment.

XQ508. You appeared in that action by Straley & Hasbrouck, didn't you? A. Mr. Frazer and myself engaged Straley & Hasbrouck and then we dropped it. They did not appear except on the start, as my recollection is; but I had nothing more to do with Straley & Hasbrouck after I left Mr. Frazer.

XQ509. You put in an answer in that case didn't you through Straley & Hasbrouck? A. I think so.

XQ510. Verified on the 5th day of June, 1905? A. Yes.

XQ511. Don't you remember that that case was tried some time in June, 1908? A. I do not know anything about it. I never heard anything more about it. I do remember that Mr. Hasbrouck sent down, and it may have been about that time, and said that there was a suit coming up and wanted to know if I wanted him to appear for me and I told him no. I never paid any attention to what the suit was. 3938

XQ512. I show you the judgment entered in that case and ask you if that is not a copy of the judgment against you by the estate of William E. Chapman, Inc.? A. Yes, that is a judgment against me. This shows that I did not appear in that suit. It shows that Waterman & Frazer were represented but I was not.

XQ513. You put in an answer in that suit which I have shown you; is not that a fact? A. Yes. 3939

XQ514. Don't you know that that constitutes an appearance? A. No, I am not a lawyer. I don't know what it amounts to.

A copy of the judgment shown the witness is offered in evidence and marked Plaintiff's Exhibit No. 132.

Objected to as immaterial.

XQ515. Did you ever pay that judgment? A. I did not. I never heard of it before.

XQ516. Do you know whether it is of record now or not? A. I don't know anything about it. The only information I have in regard to it is what you have shown me today.

XQ517. Do you know that the merchandise and stock on hand of the Frazer & Geyer Company was sold by the sheriff? A. That is what I understood. I was not at the sale.

XQ518. Do you know who bought it? A. I understood it was sold to a man named Quackenbush, a representative of the Chapmans.

XQ519. He bought it in his personal name didn't he? A. That was my understanding.

XQ520. How much did he pay for it? A. I don't know.

XQ521. Do you know what was sold? A. I think the advertisement of the sale read "All the right, title and interest" in the assets.

3941 XQ522. Did that include the factory used for the manufacture of fountain pens? A. I don't know what was included in it. At the time I was not with the concern. It was during the short time that Frazer and myself were out of there fighting the Chapmans and I don't know just what was done.

XQ523. The machinery in the factory where you made your fountain pens belonged to the Frazer & Geyer Company did it? A. Yes.

XQ524. And the stock that you had in the factory, the raw material, the partly finished goods and the finished goods that you had in the factory all belonged to the Frazer & Geyer Company didn't they? A. Yes.

XQ525. Were not those the things that were sold? A. I
3942 don't know just what was sold.

XQ526. What did Quackenbush turn over to the Modern Pen Company; do you know? A. No, I don't think I ever saw a copy of that contract or bill of sale.

XQ527. He made a written bill of sale to the Modern Pen Company, didn't he? A. I think so but I am not positive.

XQ528. Is not that among your records in your office? A. I don't remember. I did not have charge of the records at that time and I don't remember.

XQ529. What did A. A. Waterman & Company's assets consist of? A. They consisted mostly of stock and book accounts, I think.

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XQ530. Finished goods? A. Finished goods.

XQ531. And book accounts? A. Yes.

XQ532. Don't you remember that you transferred those to the Frazer & Geyer Company in liquidation of the account which A. A. Waterman & Company owed Frazer & Geyer Company? A. I think perhaps it was done. I don't remember exactly. A. A. Waterman & Co. also had whatever tools and things were necessary for assembling pens. They used to buy the holders and pens from the Frazer & Geyer Company and do the assembling themselves.

XQ533. You testified this morning that Frazer & Geyer did the entire manufacturing? A. They did the most of it but I remember now that the A. A. Waterman & Co. also assembled their own goods. Those that we sold outside to other people, to the customers that we did not send over to A. A. Waterman & Co. were made complete by Frazer & Geyer Company.

3944

XQ534. Before you became treasurer of the Modern Pen Company what was your position with that company? A. Assistant treasurer.

XQ535. What was your connection with A. A. Waterman & Co., composed of Isaac E. Chapman and William L. Chapman? A. Until Mr. Martling severed his connection I had charge of the factory. After that I was made general manager of the factory and of the business of A. A. Waterman & Co. and treasurer of the Modern Pen Company, and manager of that as well.

3945

XQ536. You have had practically the entire management of the business of the Modern Pen Company since Mr. Martling left about two years and a half ago? A. Yes.

XQ537. Prior to that you were assistant manager under him, were you not? A. Yes, under Mr. Martling.

XQ538. Do you remember making the paper which I now show you (handing witness a paper)? A. Yes.

The paper identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 133.

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XQ539. That states that it comprises all the assets of the A. A. Waterman & Company at that time; is that so? A. As far as I know, yes.

XQ540. You do not know of any other assets that it had except this? A. No.

XQ541. He says here in Exhibit 133 that the patents have heretofore been assigned to the Frazer & Geyer Company, amounting to $3,306.22. That included all the patents which A. A. Waterman & Co. had, did it? A. I think it did, yes.

XQ542. All those patents had some time before been assigned to the Frazer & Geyer Company, and credited on their books? A. Most of them belonged to the Frazer & Geyer Com-

3947 pany.

XQ543. Did you take any part in forming the copartnership between A. A. Waterman and the two Chapmans? A. I did not.

XQ544. You did not know anything about it until after it was formed, did you? A. I did not.

XQ545. You did not know anything about this preliminary agreement Exhibit A-12? A. No, sir.

XQ546. When did you first find out about Exhibit A-12? A. Today.

XQ547. How long was it before you found out about the partnership which had been formed between A. A. Waterman and the two Chapmans? A. I think along about the middle of

3948 June, 1905. They sent all the stockholders of the Frazer & Geyer Company notice of the reorganization.

XQ548. I show you the return of the sheriff on the sale of machinery and material, etc. of Frazer & Geyer Company and ask you if you know anything about the sale that occurred at about the time that that is dated (handing witness a paper)? A. This is as I understood it. They sold all the right, title and interest of the Frazer & Geyer Company and practically all of their assets.

XQ549. You do not know whether they had any other assets except these, do you? A. I do not know of any other.

3949

XQ550. Has any ever come into their possession since that you know of? A. No, sir, I don't know of any.

XQ551. The concern was defunct at that time was it not? A. It practically went out of business as far as I know.

XQ552. Never did any business since that time that you know of? A. No.

The paper identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 134.

XQ553. Those two transfers that you have identified as Plaintiff's Exhibit 134 and Plaintiff's Exhibit 133 closed out all of the assets that you knew anything about of A. A. Waterman & Co. and Frazer & Geyer? A. Yes.

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XQ554. And the good will does not appear on either one of these transfers? A. I presume "All the other personal property" covered that. I don't know.

XQ555. There was no separate transfer of any good will at any time that you know of? A. No.

XQ556. No sale by the sheriff or the receiver or anybody else of the good will that you know of? A. Nothing other than in those papers, that I know anything about.

XQ557. It was after you made this transfer that you made affidavit in the proceedings for a receiver for A. A. Waterman & Co. was it not, which I have shown you? A. If you will give me the dates.

XQ558. I show you Plaintiff's Exhibit No. 129. The affidavit on the application for receiver was the 21st day of June, 1905? A. I don't remember that.

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Mr. Bacon: I object to the question because there are several affidavits.

Mr. Watson: I have said "Exhibit No. 129"?

A. No, sir, it was three days before.

Mr. Watson: The affidavit in the proceeding for receiver, Exhibit 129, is verified the 21st day of June, 1901, and the transfer, Plaintiff's Exhibit 133, of the assets of

3952 the A. A. Waterman Company to the Frazer & Geyer Company is dated June 24, 1905.

Mr. Bacon: I ask that it appear upon the record that Exhibit 129 is a withdrawal of the witness from that suit and not a hostile affidavit. This is done in order that the Court may not be confused.

XQ559. This affidavit, Plaintiff's Exhibit 129, is in the same proceeding in which you have made the affidavit Exhibit 127, is it not? A. Yes, it is.

XQ560. And the order appointing a receiver, Plaintiff's Exhibit 130, which is dated July 10, 1905, is in the same proceeding
3953 which I last referred to, is it not? A. Yes.

Adjourned to Monday, April 17, 1911, at 10:30 A. M.

HOBART W. GEYER, resumes the stand.

Cross-examination continued by Mr. Watson:

XQ561. From your previous testimony I understand that when you first went into the fountain pen business with Mr. Frazer you and he were manufacturing and selling Lincoln fountain pens? A. Yes, that was I think the only thing we made at the start.

3954 XQ562. What did you sell those pens for? A. From $1 up.

XQ563. Up as high as $5? A. Up as high as $10—$9 or $10.

XQ564. Those had a joint under the finger? A. Yes, that was the only style of fountain pen that was made in those days I think outside of Caw's Safety Pen and Horton's Safety Pen.

XQ565. Did you know that the first fountain pen that ever had any extended sale was the so-called self-filling fountain pen? A. No, I never have gone into the ancient history of fountain pens.

XQ566. When was it you first began to make self-filling fountain pens? A. To the best of my recollection in 1898 or

1899 we made self-filling fountain pens for S. S. Crocker of Boston. We made what was called "Blow" pens. That pen, briefly, consisted of a very thin rubber sack enclosed in a rubber holder, with a hole in the end of the holder, through which you blew as hard as you could and collapsed the sack and after it was collapsed you dipped it in ink and then it filled with ink. When we first made our own self-filling pens we had a heavier sack than the Crocker and we twisted it with our fingers.

By Mr. Macon:

XQ567. How early was that? A. Soon after Mr. Waterman came with us, to my recollection.

3956

By Mr. Watson:

XQ568. That was under a patent granted to Mr. Stone was it not? A. We had a patent on the aluminum sleeve, or the sleeve that we put in to protect the sack so that when you took the section with the sack out of the barrell it had something around it to protect it, a tube. I think the patent was on that tube; that is my recollection.

XQ569. That was a patent to Mr. Stone? A. I think there was no patent on the sack. I think the original patent on the sack had expired.

XQ570. The only patent you used was the Stone patent for the purpose of protection to the sack? A. I have forgotten now. We have so many patents I cannot keep track of them 3957 and of the dates.

XQ571. When was it that you began to make self-filling pens under the type you are now making them? A. I think it was in 1903; that is my recollection.

XQ572. When Mr. Waterman came down from Boston did you begin making middle joint fountain pens at that time? A. I think right after he came with us.

XQ573. Did you know that at least three different parties claimed the right to make pens that same way? A. No, I did not know it at that time. I have heard something about it since then; within the last month or two I heard so. The other question was not brought to my attention until within a month.

3958 *Hobart W. Geyer*

XQ574. Do you know that the Boston Safety Fountain Pen Company claimed to own the middle joint patent or at least had an interest in it?

Objected to.

A. It may be. I have had not heard it. I understood it was the Sterling Fountain Pen or the Davidson Rubber Company that claimed to have an interest in it.

XQ575. They claim to own all of it don't they? A. I don't think so. I run across some papers the other day that made me think they claimed it equally with Waterman and agreed to use it between them, or something of that kind.

3959 XQ576. When you began to make fountain pens the Waterman Ideal Fountain Pens were well known on the market, were they not? A. Yes.

XQ577. How long had you known about the Waterman pen at that time? A. I don't know that I was in any way at all acquainted with them until after I got into the business, because I had not paid much attention to it. I used the Lincoln pen made by Frazer. I had been using the Mercantile pen made by Aiken-Lambert Company.

XQ578. When you began to make the Lincoln pen you were in business as I recollect it from your testimony, about three or four years before you formed this partnership with Mr. Waterman? A. About four years; between three and four I think.

3960 XQ579. During that time did you become familiar with the Waterman's Ideal Fountain Pens on the market? A. I knew they were making practically the same kind of pen as we were.

XQ580. You knew they were making and selling fountain pens on the market did you not at that time? A. Yes.

XQ581. A well known concern at that time, on the market, weren't they? A. It was not any better known than our Lincoln pens.

XQ582. How long have you been making the Lincoln pen? A. Mr. Frazer had been making it for several years before I went with him. I don't remember how many.

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XQ583. Is it not a fact that he had been making them only a couple of years when you went with him? A. It may be two years; it may be five; I don't know.

XQ584. Don't you know that the Waterman Ideal Fountain Pen had been on the market ten or fifteen years at the time you first began to make fountain pens? A. No, I did not know that at that time.

XQ585. Don't you know it now? A. I know now that they started some time around 1884. I did not get into it until 1897, thirteen years later. Mr. Frazer had been in several years before that but at that time the fountain pen business was not anything like what it is at present; it was comparatively in its infancy. I think at that time the three principal fountain pens were the L. E. Waterman Company, the Wirt and ourselves.

3962

XQ586. How many of these notices, Plaintiff's Exhibit No. 9, were sent out? A. There were 9,000 printed. I don't know whether all of them were sent out or not.

XQ587. All of them as far as you know were sent out were they not? A. Practically all, I think. We had 9,000 catalogues at that time of the old catalogues left and we had just the quantity that we required for those catalogues. That is my recollection.

XQ588. Since the last hearing on Friday have you found out whether the judgment against you evidenced by Plaintiff's Exhibit 131 has been satisfied or not? A. I have not; I have not thought of it since.

3963

XQ589. Have you any information as to whether the judgment evidenced by Plaintiff's Exhibit 132 has been satisfied or not? A. I have not thought of either one of them since the hearing. I have had so many other things to occupy my time and attention.

XQ590. The fact that you find out, according to your testimony, for the first time, that you had a judgment against you for the sum of $25,000 does not interest you? A. It will interest me enough when I have the opportunity to take it up. Between this suit and my business it is keeping me hustling to find time to do anything.

XQ591. When this property of the Frazer & Geyer Company was sold by the sheriff for $4,900 was that sold subject to the chattel mortgage to which you referred in your direct-examination? A. That is my recollection of it, that it was.

XQ592. How much did those mortgages amount to? A. $30,000.

XQ593. And did the $30,000 include the $10,000 in the note which you said was a usurious note? A. What note is that? I don't remember that. I don't remember having seen any such note.

XQ594. You were shown a note on your direct-examination; it was not shown to plaintiff's counsel. Was that note included
3965 in the chattel mortgages of $30,000 which you have just referred to? A. I think that is one of them, yes. There was a mortgage for $20,000 and one for $10,000.

XQ595. Is this a copy of the note which was shown you on your direct-examination (showing witness the paper)? A. I don't remember. I don't remember the date of that, but I don't think it was that. It is possible that it was but I don't remember.

XQ596. Was the note, a copy of which I have just shown you, included in the chattel mortgages which you have referred to? A. I don't remember. No, that note could not, because the chattel mortgage is good for only a year and that note is dated more than a year previous to the time of the reorganiza-
3966 tion.

XQ597. Don't you know that it is sufficient to keep a chattel mortgage alive to re-file it? A. I don't know what the law is. I know something has to be done within a year.

XQ598. Is this note, a copy of which I show you, dated May 2, 1904, included in the $30,000 mortgages? A. I don't know whether it was the note or whether we had given a new note.

XQ599. Did they have other obligations besides the $30,000? A. There was one note for $10,000 and one for $20,000.

XQ600. Those are the ones that you refer to as part of the mortgage? A. I don't remember the date of those notes, no.

XQ601. I am not asking as to this particular note. I want to know if there are additional notes or obligations outside of the $30,000 mortgages which you have referred to? A. Notes—

XQ602. Notes of A. A. Waterman & Co. or Frazer & Geyer Company? A. I don't quite catch your question. That I referred to in what?

XQ603. In your direct-examination, you referred to a chattel mortgage? A. There are only two notes on that chattel mortgage, one for $10,000 and one for $20,000.

XQ604. I ask if the property sold as indicated, under Plaintiff's Exhibit 134, was subject to the note and mortgage which was shown you on your direct-examination? A. I don't know. I presume that was not the note. I don't remember. I have looked over that, and I have forgotten the date that was on it. 3968

XQ605. Do you know what obligations there were in the shape of notes and chattel mortgages of the Frazer & Geyer Company in June, 1901? A. There were two mortgages, two chattel mortgages, one for $10,000 and one for $20,000.

XQ606. Was there any additional note outstanding at that time except these two? A. We had loans from two or three banks and we had out some merchandise notes.

XQ607. Were there any notes to Chapman? A. No, there were no other notes to the Chapmans, to my recollection. I don't think we had borrowed anything else from the Chapmans.

XQ608. Since the examination Friday have you learned whether Mr. Henderson, the receiver appointed for the firm of A. A. Waterman & Co. by Mr. Justice Giegerich, filed his bond or not? A. I have not. I have not given it a thought. 3969

XQ609. Who was Mr. T. J. Quackenbush, 17 Battery Place? A. I think he is an employee of the Merritt & Chapman Company, the Derrick & Wrecking Company.

XQ610. When did Isaac E. Chapman become an officer of the Frazer & Geyer Company? A. Either late in 1901 or early in 1902 I think.

XQ611. What office did he take when he first became an officer in that company? A. I think he was vice president at first.

3970 *Hobart W. Geyer*

XQ612. How long did he continue vice president? A. I think something like a year or two.

XQ613. Then what office did he have? A. President.

XQ614. In 1903 or 1904 he became president? A. I think so, yes.

XQ615. Can you give the exact year when he became president? A. No, I don't remember the exact year.

XQ616. How early was he a member of the Board of Directors of the Frazer & Geyer Company? A. At the same time that he was made vice-president I think.

XQ617. After he became vice president he was a director and officer of the Frazer & Geyer Company at all times up to the
3971 dissolution of the company? A. Up to the sale of its assets. I don't know that the company has ever been dissolved.

XQ618. He continued up to the sale of its assets? A. Yes.

XQ619. And it has done no business since that time as far as you know? A. Not that I know of.

XQ620. When did William L. Chapman become a director of the Frazer & Geyer Company? A. I think a year or two after Mr. Isaac E.; I don't know positively.

XQ621. Did he have an office at that time? A. I think not until a short time before the reorganization. Then I think he was made vice president.

XQ622. Was he not made vice-president at the time Mr. Isaac E. Chapman was made president? A. No, not at first; I think
3972 not.

XQ623. He first became a director, you think, in 1902 or 1903? A. I think it was probably in 1904.

XQ624. That he became a director? A. Yes. I am hazy on that.

XQ625. When he became a director did he become an officer at the same time? A. I think so; that is my recollection but I am not sure of that.

XQ626. What office did you hold in the Frazer & Geyer Company? A. Treasurer.

XQ627. At all times? A. At all times.

XQ628. From its organization? A. From its organization

XQ629. What office did Mr. Frazer hold? A. Mr. Frazer was vice-president for a while and then afterwards he was made secretary and general manager.

XQ630. When these judgments which I have called to your attention were entered against the Frazer & Geyer Company, in June, 1905, as assets sold by the sheriff, who were the officers of the Frazer & Geyer Company at that time? A. Isaac E. Chapman was president; William L. Chapman, vice-president; William G. Frazer, secretary and general manager and I was treasurer.

XQ631. The first judgment in those litigations that were carried on at that time was against the Frazer & Geyer Company? A. I think so, yes. 3974

XQ632. Do you remember the amount of the judgment? A. No, I do not.

XQ633. As I recall, you testified that Frazer & Geyer Company sold A. A. Waterman fountain pens from August to November, 1899? A. From the 18th of August to the 6th of November, 1899, yes.

XQ634. How were those pens marked? A. I think they were marked "A. A. Waterman, Maker, Boston."

XQ635. The Frazer & Geyer Company made pens marked A. A. Waterman & Co. for the first time in August, 1899? A. I think along about November.

XQ636. November, 1899? A. Yes, that they were imprinted A. A. Waterman & Co. 3975

XQ637. Those were some that you sent to Boston, weren't they? A. They went to West Somerville.

XQ638. Were they not as a matter of fact shipped to the Colonial Pen Company in Boston? A. No, our dealings were entirely with A. A. Waterman & Co. of Howard Street, West Somerville.

XQ639. Do you know whether that circular was sent out or not (handing witness a paper)? A. I am quite sure that I received one of those.

The circular identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 135.

XQ640. The Frazer & Geyer Company was a New York corporation, was it not? A. Yes.

XQ641. And all of the stock that was issued in that company was full paid and non-assessable, was it not? A. Yes.

XQ642. The Modern Pen Company is a West Virginia corporation? A. Yes.

XQ643. As a matter of fact did not the Modern Pen Company which was organized by Mr. Chapman and his friends offer to issue its stock for $20 in cash and one share of Frazer & Geyer Company stock for each share of the Modern Pen Company stock? A. Yes.

3977 XQ644. What stock was issued to Mr. Quackenbush in exchange for the plant and property which he purchased under the sheriff's sale? A. I don't remember. The whole of the stock was issued to three or four parties, enough to form the corporation, and then it was re-issued to the various stockholders of the Frazer & Geyer Company, when they surrendered their stock in the Frazer & Geyer Company and paid $20 cash for the stock in the Modern Pen Company. The stock was bought in, or the assets or the right, title and interest, or whatever was sold at auction was bought in by Mr. Quackenbush in the interest of all the stockholders of the Frazer & Geyer Company and of the mortgagor.

XQ645. The stockholders of the Frazer & Geyer Company would not have any interest in Mr. Quackenbush's purchase un-

3978 less they put up their proportionate $20, would they, per share? A. No. They could have sold their stock; there was a market value for their stock and there was no trouble in selling it to parties who would pay them for it and then pay the $20 on each share to the new company. That is the only reorganization that I ever heard of where they did not try to freeze out some of the stockholders.

XQ646. In connection with Plaintiff's Exhibit No. 127, you mention in that affidavit a letter of Col. Alexander S. Bacon. Is this a copy of the letter which you referred to in that affidavit (showing witness the paper)? A. Yes, I think that is the one.

The copy of letter identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 136.

XQ647. You did not appear to think that the proposed reorganization was fair in 1905, did you? A. I thought it was fair to the stockholders but I did not think it was fair to me.

XQ648. Have the stockholders at any time ever realized anything from their stockholdings since the reorganization?

Objected to as immaterial.

A. Do you mean in the line of dividends?

XQ649. In any way. A. Not that I know of.

XQ650. In 1905, Mr. Isaac E. Chapman says that the formation of the firm of A. A. Waterman & Co. was nominal; that the firm was organized without capital, with this exception, that Frazer and Geyer took out of the funds of the Frazer & Geyer Company without consent and in violation of their duties as officers and trustees, the sum of $1,000 which they called a loan and credited it to A. A. Waterman & Co. as capital, $500 to each. Mr. Waterman put in no cash and Geyer and Frazer put in nothing except the forced loan from the Frazer & Geyer Company. Is this statement correct? A. As I understand copartnership laws, this was not a limited partnership and Mr. Frazer was worth several thousand dollars and I was worth anywhere from $10,000 to $12,000 at that time so that I cannot see that the firm of A. A. Waterman & Co. did not have considerable capital. That is the way I always looked at it. I knew that I was responsible for that much. 3980 3981

XQ651. Was it a fact that you only agreed to put in $500 each, you and Frazer, into the firm? A. That is all the working capital that we put in at that time, yes.

XQ652. Then Mr. Waterman put in no cash? A. He did not put in any cash, no.

XQ653. And is it true that this $500 each that you and Frazer put in was a loan from the Frazer & Geyer Company? A. I don't know that. I don't remember. I don't think so.

XQ654. You do not deny that that statement is true do you? A. I don't remember it. It is possible there may have been

some kind of book entry or transfer or something but I don't remember now.

XQ655. Do you remember that Isaac E. Chapman when he learned of that loan required you to pay it back? A. No. You asked me that last week. I don't remember. I did not have time to look it up.

XQ656. Do you remember anything about Mr. Chapman loaning Mr. Frazer $500 in order to pay his part of the loan back? A. No, I don't know anything about Mr. Frazer's financial affairs at all.

XQ657. All the profits of this partnership after paying 10
3983 per cent on this $1,000 was turned over to the Frazer & Geyer Company was it not, from the start? A. No, there was a modification of the co-partnership articles.

XQ658. When was all the profit turned over to the Frazer & Geyer Company? A. I don't remember the date. It is possible that it was all done but when we formed the partnership there was no such intention.

XQ659. The fact is that never at any time any one of you partners ever received anything from the A. A. Waterman & Company except what you got through the Frazer & Geyer Company; is that correct? A. I don't remember that.

XQ660. Are you prepared to say that is not so? A. No, I would not say it was not so. I don't remember just when that modification was made.

3984 XQ661. Did not you and Mr. Frazer make the assignment first, and then afterwards did not A. A. Waterman make an assignment of all that interest in the firm of Waterman & Co. to the Frazer & Geyer Company—all the profits? A. A. A. Waterman could not assign our profits.

XQ662. You and Frazer first assigned your individual interests in the firm of A. A. Waterman & Co. to the Frazer & Geyer Company? A. We did, but I don't remember just the date.

XQ663. It was soon after this firm was formed was it not? A. It was within a year.

XQ664. Was it not within a few months after it was formed? A. I don't remember. It may be.

3985

XQ665. Very shortly after you and Frazer assigned all your interests in the firm of A. A. Waterman & Co. to the Frazer & Geyer Company, A. A. Waterman also assigned his interest in the firm of A. A. Waterman & Co. to the Frazer & Geyer Company, did he not?

Mr. Bacon: Objected to; the assignment is the best evidence, and is already in evidence and indicates on its face just what Mr. Waterman retained for himself.

XQ666. The assignment of your interest and that of Mr. Frazer, in the firm of A. A. Waterman & Co. to the firm of Frazer & Geyer Company was made on the 27th day of August, 1901, was it not? A. Yes.

3986

XQ667. And the assignment of A. A. Waterman of his interest in the firm of A. A. Waterman & Co. to the Frazer & Geyer Company was made December 12, 1901, was it not? A. Yes.

Recess.

Mr. Watson: Plaintiff offers in evidence certified copy of affidavit of Isaac E. Chapman verified June 20th, 1905, in the action entitled Hobart W. Geyer and William G. Frazer against A. A. Waterman and Gratz Nathan, receiver.

Same objections.

Marked Exhibit No. 137.

3987

Mr. Watson: Plaintiff offers in evidence an affidavit in the same proceeding of Alexander D. Henderson verified the 8th day of July, 1908.

Mr. Bacon: Objected to as irrelevant and immaterial.

Marked Exhibit 138.

Mr. Watson: Counsel for plaintiff states upon the record that Mr. Henderson's bond as receiver of the firm of A. A. Waterman & Co. was approved and filed July 14th, 1905; and the order discharging the receiver and canceling the bond was entered and filed on the 15th day of July, 1908.

XQ668. Mr. Chapman in his affidavit verified June 20, 1905, states that on June 16th, 1905, all the property of the Frazer & Geyer Company was sold at auction and bid in by Mr. T. J. Quackenbush; is that so? A. It was about that date as I understand.

XQ669. The date is correct no doubt but is the rest of it correct? A. I was not at the sale but I understood that he bought it in. That is my recollection.

XQ670. He also says that Mr. Geyer was a person of no means, that he is not a practical penman but is a bookkeeper and accountant only. Is that correct? A. No.

3989 XQ67. "Frazer & Geyer Company is now divested of all its assets of every name and nature whatsoever"—referring to this sale. That is so? A. As far as I know it is.

XQ672. When these assets were bought in by Quackenbush he bought them subject to the chattel mortgage of $30,000 which you have referred to? A. That is my understanding, yes.

XQ673. When he turned this property over to the Modern Pen Company he turned it over subject to the two mortgages? A. Yes.

XQ674. And the company afterwards made a new mortgage and cancelled the old one? A. Yes.

XQ675. Mr. Chapman in that same affidavit verified June 20th, 1905, stated that the firm of A. A. Waterman & Co. (referring to the partnership of Waterman, Frazer & Geyer)
3990 "is insolvent; and owes far more than its assets." Was that true? A. I think it was at that time, yes.

XQ676. Mr. Chapman also says in the affidavit verified June 20th, 1905, that Mr. Frazer received a salary from the Frazer & Geyer Company of $50 per week; he took nothing from the partnership; is that correct? A. He had his 10 per cent on the capital invested.

XQ677. Ten per cent on the $500? A. Yes. The profits that we had made were turned back to the Frazer & Geyer Company as per agreement.

XQ678. Did you ever at any time receive any profits whatsoever from the firm of A. A. Waterman & Co. composed of

yourself, Mr. Frazer and Mr. Waterman except the 10 per cent on the $500? A. I think not; I am quite sure not.

XQ679. But you are not prepared to say that that $500 was not borrowed from the Frazer & Geyer Company as Mr. Chapman states? A. No, I don't remember the details of that.

XQ680. And you are not prepared to say that the $500 Mr. Frazer put into the company was not also borrowed from the Frazer & Geyer Company?

Mr. Bacon: Objected to as immaterial.

A. If mine was borrowed his certainly was.

XQ681. You are not prepared to say that they were not borrowed? A. No, sir; I don't remember just the circumstances now. 3992

XQ682. Were not the accounts of the Frazer & Geyer Company and A. A. Waterman & Co. carried together as one account? A. No, sir; entirely separate.

XQ683. All these statements which you have produced here regarding the organization and the company, all show the accounts together, carried as one account. Was not that the way they were carried on the books? A. What statement is that? This (referring to paper) is the liabilities of the Frazer & Geyer Company.

XQ684. Did not that include all the assets of the partnership of A. A. Waterman & Co. also? A. I think not. I did not make up those figures. 3993

XQ685. You are not prepared to say they did not? A. While we used to make up a statement showing them combined, they were simply adding the two sets together for convenience sake.

XQ686. I show you what purports to be a statement of the Frazer & Geyer Company of December 31, 1902, and I ask you if that is not a statement of the combined assets of the firm and the Frazer & Geyer Company? A. No, this must be the statement of Frazer & Geyer Company.

XQ687. Does that include all of the assets of the firm of A. A. Waterman & Company at that time? A. It cannot.

3994

XQ688. You are prepared to say that did not include all the assets of the firm of A. A. Waterman & Co. at that time? A. The assets of the A. A. Waterman Company could not show on the statement of Frazer & Geyer Company. They were kept entirely separate. We always used to get out a statement of the Frazer & Geyer Company and a statement of A. A. Waterman & Company and then we would get out another one combining those so as to get them in a condensed form as to how both concerns stood.

XQ689. As a matter of fact did not all the assets of the partnership belong to the Frazer & Geyer Company? A. No. We were in debt to the Frazer & Geyer Company for the goods
3995 that we bought from them and had not paid for.

XQ690. As a matter of fact all of the profits of the partnership had been assigned to the Frazer & Geyer Company hadn't they?

Mr. Bacon: Objected to as the assignment in evidence shows the contrary.

A. No, Mr. Frazer and I assigned ours. As to Mr. Waterman, I have forgotten just now. He sold quite an interest, and took some stock in the Frazer & Geyer Company for his royalty. I have forgotten what he did with his profits.

XQ691. Didn't he as a matter of fact turn all of the profits in the partnership to the Frazer & Geyer Company?

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Mr. Bacon: Objected to as the exhibits speak for themselves.

A. I have forgotten.

XQ692. Will you look at the exhibit and see what it says? A. Is it in here (referring to book)?

XQ693. Yes, at page 639? A. Mr. Frazer and myself got 10 per cent on our investment, for our share of the profits and Mr. Waterman got $100 for every one per cent of profits of the Frazer & Geyer Company in addition to the 50 shares of stock of the Frazer & Geyer Company that was paid him. Mr. Waterman also had his salary. I think it was $2,000 a year. That is my recollection.

XQ694. Will you please look at the assignment again and tell me if the $100 and the one per cent that you have referred to was to come from the Frazer & Geyer Company or from the partnership? A. Mr. Waterman got his salary and expenses from A. A. Waterman & Company, and he got stock from Frazer & Geyer Company and also the $100 for 1 per cent of profits.

XQ695. He got the one hundred dollars from the Frazer & Geyer Company? A. Yes.

XQ696. And $100 for every one per cent of profits he got from the Frazer & Geyer Company? A. Yes, and his salary and expenses from A. A. Waterman & Company.

XQ697. And the salary and expenses which he was to receive 3998
was as a matter of fact actually paid by the Frazer & Geyer Company was it not? A. No, it was paid by A. A. Waterman & Co.

XQ698. Is the statement correct made in the affidavit of Frazer in the suit of Geyer and Frazer against Waterman and Nathan, verified June 22, 1905, that the claim which Frazer & Geyer Company made against the partnership of A. A. Waterman & Co. was largely a matter of bookkeeping? A. I don't remember what that affidavit is.

XQ699. Was the claim that Frazer & Geyer Company made against the partnership of A. A. Waterman & Co. largely a matter of bookkeeping? A. I have forgotten what the claim was. There was a claim of $10,000 or $12,000, something like 3999
that, that was correct.

XQ700. You testified on your direct-examination that there was an assessment made on the stock of the Frazer & Geyer Company on the reorganization. You could not legally assess that stock at all could you? A. I don't know that I said that.

XQ701. I will read it to you: "Q254. Was there any assessment made on the stock? A. There was an assessment of $20 a share." A. There was no assessment made on the stock of Frazer & Geyer Company.

XQ702. You could not make any assessment on that stock, could you? A. No, sir.

XQ703. The stock was unassessable? A. It was non-assessable. To get stock in the Modern Pen Company in the reorganization it was necessary to pay $20 a share and put in a share of Frazer & Geyer Company's stock.

XQ704. You testified that you have made 1188 pens for John Saadi which were marked "Royal Ideal" pens. Is that so? A. "Royal Ideal" pens on the holder.

XQ705. Those were fountain pens complete that you furnished to John Saadi weren't they? A. Yes.

XQ706. Why did you try to make it appear in the affidavit that they were merely the holder? A. I said that the holders were imprinted "Royal Ideal" but not the pen point.

4001 XQ707. You say "Saadi requested deponent to sell him certain penholders marked Royal Ideal pens and deponent thinking that of course he had a right to use that trade-mark duly authorized by the Government, had made for him a small order of penholders with that name stamped on them." As a matter of fact they were complete fountain pens weren't they? A. The imprint was on the holder only; it was not on the pen. The Waterman people put "Ideal" on the holder and pen both. This was put on the holder only.

XQ708. You have seen the certificate of Mr. John Saadi, the paper which you call a trade-mark, have you not? A. I saw it in Washington.

XQ709. A copy of it is in evidence in this suit, is it not? A.

4002 Yes.

XQ710. It is not a trade-mark at all, is it? A. That is what I understood, that it was a trade-mark.

XQ711 Have you not seen it? A. I simply saw it as he passed it over there at Washington. As I understand it, it was a trade-mark granted by the United States Patent Office.

XQ712. You do not know it is a label, do you? A. No, I understood it was a trade-mark. I think it is.

XQ713. Do you know that the man Saadi had no trade-mark of the word "Ideal" for fountain pens and could not have any registered trade-mark for the word "Ideal" for the reason that the L. E. Waterman Company had already registered that trade-mark? A. I understood that was a trade-mark.

XQ714. The statement is correct that you made 1188 of these pens bearing this mark "Royal Ideal Pens"? A. Yes, Royal Ideal pens.

XQ715. Which ones of the fountain pens bore the name A. A. Waterman & Co.?

Mr. Bacon: I object to that question as none of the fountain pens bore that name—only the pen point.

XQ716. You testified that these were complete fountain pens? A. The imprint on the holders only. That was my testimony. The gold pens Nos. 12 and 15 had pen points imprinted A. A. Waterman & Co.

4004

XQ717. 792 of these gold pens that you furnished Saadi bore the name A. A. Waterman & Co.? A. No, 468 had pens with the imprint A. A. Waterman & Co. and he afterwards returned 179 of those pen points.

XQ718. All of the pens you furnished John Saadi were fountain pens complete, finished goods, ready for sale, were they not? A. Yes.

XQ719. And there were 1188 of them? A. Yes.

XQ720. And of these the Nos. 12 and 14 bore the name A. A. Waterman & Co. didn't they? A. 12 and 15 I think it was.

XQ721. Are you sure which numbers it was? A. No. 12 and No. 15. Yes, I am sure.

4005

Mr. Bacon: I object to that question on the ground that it has already been brought out with great clearness that A. A. Waterman & Co. was on the pen point only.

XQ722. When did you first see the complaint which the Waterman Company filed against John Saadi? A. I will have to have that correspondence.

XQ723. Didn't he notify you right away after the case was filed? A. Yes, it strikes me that it was early in December, 1909. That is my recollection. It was within a couple of weeks after we sent in the last lot of goods, the third lot. We sent him the last lot December 4, 1909, and it seems to me it was

within ten days or two weeks after that to the best of my recollection that he wrote me or telegraphed me. His correspondence is all here in evidence. I cannot remember the dates.

XQ724. You first heard of this case in December, 1909. Right after that you heard of it for the next month or so several times, didn't you? Did not Mr. Saadi see you several times, or two or three times? A. No, he did not see me over once.

XQ725. And that was very shortly after the suit was begun? A. I have forgotten now. I have no way to fix that date.

XQ726. Did he come here to New York and see you about
4007 that suit very shortly after it was begun, within a month? A. I think not but I am not positive. I have not any way of telling when he was here. He has not seen me in New York over twice since the suit was begun and I have seen him once in Washington. That was when we went on there, when he was examined in this suit. Those are the only times I have seen him.

XQ727. You read the complaint in the case of Isaac E. Chapman and William L. Chapman against the L. E. Waterman Company filed in the Supreme Court, State of New York? A. I think so but I would not be sure.

XQ728. You don't remember anything about it now? A. It is a long time ago.

XQ729. It was filed some time in February, 1910, was it not?
4008 A. About that time.

XQ730. Do you remember the statement that was contained in the complaint, "That no pen manufactured by the plaintiff bear or ever has born the name Ideal"? A. Yes.

XQ731. That is a positive absolute statement made in the complaint? A. I did not consider that "Royal Ideal" was the same thing at all.

XQ732. You do not consider that the word Ideal is in the name at all? A. I did not consider it in that connection, no.

XQ733. You think then this statement is perfectly true that no pen manufactured by the plaintiff bears or ever has born the name Ideal? A. That was my understanding.

XQ734. That is your understanding now, is it? A. No, I have learned something since then about trade-marks that I did not know then.

XQ735. Do you think you would have to have any knowledge of trade-marks to know that a statement like that was untrue? A. Yes. I presumed that the Ideal was the same as the Waterman people used.

XQ736. Is not that word the same as the Watermans use, Ideal? A. Their word is Ideal and this is "Royal Ideal." I presume that is why he was able to get a trade-mark for his goods.

XQ737. "No pen manufactured by the plaintiffs bears or ever has born the word Ideal." That was absolutely a false statement was it not? A. It bore the word Ideal in connection with Royal, as the man's trade-mark called for; as I supposed it was a trade-mark. You say different. 4010

XQ738. And this statement in this complaint is an absolutely false statement isn't it? A. No, it did not have Ideal; it had a double word, Royal Ideal.

XQ739. Is that a true statement? A. I think so, yes.

XQ740. You think that is a true statement still? A. I said yes.

XQ741. You have read the answer of the Waterman Company in the Chapman suit have you not? A. I think so. Those papers were very voluminous.

XQ742. You do not remember reading the answer? A. I presume I read it. 4011

XQ743. You do not know whether Mr. Isaac E. Chapman saw the answer to the complaint in Chapman against Waterman? A. I don't remember whether he did or not. I presume he did. I don't know.

XQ744. Returning to these pens you made for Saadi, you say in this statement that you sold the No. 11 holders at 14 1/2 cents and that they cost you 12 cents. Is that a true statement? A. Yes.

XQ745. And out of that 14 1/2 cents for which you sold them you deduct a commission of 10 per cent which you paid the salesman? A. Yes.

XQ746. That would be 1.45 cents wouldn't it? A. Yes.

XQ747. And after you deduct that commission of 10 per cent to the salesman you deduct 10 per cent more for office expenses? A. Yes.

XQ748. That would be another cent and a half. That would be approximately three cents which you deduct from the selling price? A. Yes.

XQ749. Which would make the selling price 11 1/2 cents and they cost you 12 cents? A. Yes.

XQ750. So that you really lost half a cent on each holder? A. Yes. Do you want me to show you how I did it? I did not know I was losing money until I came to dissect the thing
4013 like this (showing figures to Mr. Watson.)

XQ751. What sizes does that No. 12 that you sold to Saadi correspond to in the L. E. Waterman goods? A. That had a No. 2 pen in it. I think it is a trifle smaller than Waterman's Ideal No. 12. It practically corresponded to our dollar pen.

XQ752. What did the No. 11's correspond with? A. That was a blown holder and does not correspond to anything in the Waterman Ideal line.

XQ753. What does the No. 14 correspond to that you sold Saadi? A. The No. 14 was a blown holder too and does not correspond to the Waterman Ideal. Those two, the 11 and 14, were imprinted on the cap and not on the barrel.

XQ754. What size is this pen Plaintiff's Exhibit No. 14,
4014 which is one of the Saadi pens? A. That is a number twelve.

XQ755. How did you come to mark these Saadi pens as Nos. 11, 12, 14, 15? A. Those are the numbers that he ordered them by.

XQ756. Didn't you know that those were the numbers used by the L. E. Waterman Company? A. No, I don't think they have any 11; they have 12, 13 and 14. I did not know they had any monopoly on numbers because the numbering in the fountain pen trade is like numbering in the shoe trade; they key everything by numbers. They come in sets.

XQ757. It would help to distinguish their goods, where there are similar marks, from those of the Waterman Company, if

you used the same numbers, wouldn't it? A. I don't think so. I don't think anybody buying a pen looks at the holder to see whether there is a number on it or not. I have never sold pens at retail. I don't know what the custom is.

XQ758. The mark used on the pens which you marked Royal Ideal pens had a design somewhat similar to that of the Globe, didn't they, used by the L. E. Waterman Company? A. I think it had a map of Africa.

XQ759. Very similar in its effect to the fountain pen, is it not? A. I think not.

XQ760. No similarity between them? Don't you recall it? A. I recall it as a map of Africa which is nothing like a globe.

XQ761. Round like a globe? A. No, not round; anything but round. 4016

XQ762. I call your attention to the stamping on the pen, Waterman's Ideal Pen, with a globe, and Royal Ideal Pen, with the resembling marks on it? A. It is hard to make out the marks on the Royal Ideal. If it is an intimation it is a mighty poor one.

XQ763. Did you ever make any other fountain pens for anybody else that had any marks on it in simulation of the plaintiff's trade-mark Ideal? A. No, sir.

XQ764. Nothing that resembles the trade-mark Ideal or any other pen? A. Nothing whatever.

XQ765. In connection with any other marks whatsoever? A. No. That is the only offence. 4017

XQ766. Have you ever made any fountain pens for Warren N. Lancaster of Baltimore which had the word "Idea" on it? A. No. He wanted me to once.

XQ767. You never made any though? A. No. He brought them in to me and wanted me to and I told him there was nothing doing. This was after the Saadi affair so that I had had my eye-teeth cut.

XQ768. You have been attending to this litigation pretty carefully since it started, have you not? A. I have.

XQ769. You have been attending the hearings? A. Yes.

4018

XQ770. And you helped to prepare the pleadings in the Chapman case and in the case at bar didn't you? A. I don't quite catch what you mean. I helped prepare my own affidavits. That is the only thing I know of.

XQ771. That necessitated your knowing what the litigation was about and what the other witnesses were swearing to did it not? A. I think I went over most of those affidavits.

XQ772. And you verified the answer in this case? A. Yes.

XQ773. This bill of complaint, the original bill of complaint in this action, was served on April 11, 1910. It was prior to that time that the answer in the Chapman case had been filed, was it not? A. I presume so. If you will show me the date

4019

I can tell. (Looking at the book.) Yes.

XQ774. The answer of the L. E. Waterman Company in the Chapman suit set up their claims fully, did it not? A. I presume so. I have forgotten just what the answer was now.

XQ775. Suppose you look at the answer and see if it does not set up their claims pretty well.

Mr. Bacon: Objected to as the answer shows for itself and this witness cannot tell whether it did or not.

A. They appear to be.

XQ776. And the Modern Pen Company had notice and knowledge of the plaintiff's rights as they claimed them, prior to April 11, 1910, didn't they? A. They had knowledge of

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what they claimed were their rights.

XQ777. On what ground does the defendant claim to use the name A. A. Waterman & Co.?

Mr. Bacon: Objected to as immaterial and calling for a conclusion; that this witness not being a Court or a lawyer cannot tell.

A. As far as I know it is on the ground of the contract with the Modern Pen Company and A. A. Waterman & Co.

XQ778. The contract of June 12, 1905? A. It was about that date. I think that contract was put in evidence here.

XQ779. Which contract do you refer to—contract between whom? A. Between the Modern Pen Company and A. A.

Waterman & Company. I did not have anything to do with it so I don't know. I am not a member of the firm of A. A. Waterman & Co. When they began working I was made an officer of the Modern Pen Company so I simply know that I have taken up the work as I found it.

XQ780. You are manager of A. A. Waterman & Co.? A. Yes.

XQ781. On what ground do they claim the right too use the name A. A. Waterman & Co.? A. On the ground of their copartnership articles with A. A. Waterman.

XQ782. The copartnership articles of June 12, 1905, you refer to? A. I think it is June 12, yes.

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XQ783. As far as you know is that the only ground on which they claim the right to use the name A. A. Waterman & Co.? A. As far as I know. It all came about through the reorganization which was simply a continuation of the old contract with new partners; the same as Frazer and myself and A. A. Waterman.

XQ784. On what ground did you and Frazer and Waterman claim the right to use the name A. A. Waterman & Co.? A. On the ground of the copartnership; common law, as I understand it.

XQ785. You refer to the copartnership agreement of January 9, 1901? A. Yes.

XQ786. Does the present concern, which calls itself A. A. Waterman & Co. claim the right to use the name A. A. Waterman & Co. under Judge Kellogg's decree? A. No, they claim the right under their copartnership articles and we claim that Judge Kellogg's decree distinctly states that they had the right to use the firm name but not a corporate name.

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XQ787. They were not parties to that judgment against Waterman and Gibson, were they? A. Not at that time but they were successors.

XQ788. Who were they successors to?

Objected to as immaterial.

4024 *Hobart W. Geyer*

A. The present firm succeeded the firm of A. A. Waterman & Co. of which William G. Frazer and myself and A. A. Waterman were members.

XQ789. You have just read that paper which shows that the firm never sold its good will? A. It does not say it never sold its good will.

XQ790. You testified so yesterday? A. I said they sold all the personal property, if that term would cover the good will.

XQ791. Do you know that the Court passed on that thing when it appointed a receiver? A. No. I did not know they appointed a receiver until you showed me the paper.

4025 XQ792. Didn't I ask you expressly if they sold the good will and you said no? A. I said they sold all the personal property and I presumed that covered the good will.

XQ793. I ask you distinctly if they sold the good will and the answer was no. I appeal to the record? A. I am quite sure.

XQ794. You are willing to stand on your answer whatever it was? A. I will stand on the answer as I have just given it. It is the same it was before. I am not trying to say one thing yesterday and another today and another different tomorrow. I am trying to tell the truth.

XQ795. Will you please explain to me how there could be any assignment from the concern A. A. Waterman & Co. consisting of yourself, Mr. Frazer and Mr. Waterman to the present

4026 concern?

Mr. Bacon: Objected to as immaterial.

A. As I understand copartnership law one partner can sell all the assets of the partnership.

XQ796. Will you please answer the question? A. I am not a lawyer. I don't know what the law is.

XQ797. Who sold it? A. You have that in the record here. Mr. Waterman and myself sold it.

XQ798. That is what you rely on, that transfer that you and Mr. Waterman made?

Mr. Bacon: I object. It is for the Court to say and not this witness.

A. I am not relying on anything. I am not a member of the firm of A. A. Waterman & Co.; I am simply manager for them.

XQ799. Did you think you were selling the good will of A. A. Waterman & Co. when you made that assignment to the Frazer & Geyer Company? A. Yes, I certainly did.

XQ800. Why did you take part in the receiver proceedings then? A. I don't think I did.

XQ801. You did not take part in the proceedings for a receiver and injunction in which you were plaintiff with Mr. Frazer and in which I have shown you half a dozen orders, affidavits and other papers? A. I started in on that and as I told you before when Mr. Frazer said he was going to wreck the whole thing so as to make the Chapmans lose their investment 4028
I told him he could not use me for any such purpose. I told him I would have nothing more to do with it.

Mr. Watson: I move to strike out the answer as irresponsive.

Mr. Bacon: I object.

Mr. Watson: The witness is cautioned to answer the question. The question is repeated.

A. (Repeated.) I started with Mr. Frazer in it and then dropped out as I have explained.

XQ802. And the receiver as a matter of fact was appointed for the firm in that action? A. So you told me last Friday. I think you showed me the papers. 4029

XQ803. Don't you know that that is the fact? A. As I say I think you showed me the papers, showing that there had been a receiver appointed. I think that is all in the record. I did not know it at the time.

XQ804. Were there any other transfers that you know of at any time except the one that you and A. A. Waterman pretended to make, of the assets or good will of A. A. Waterman & Co., to anybody? A. I don't remember pretending to make any.

XQ805. Is this transfer Plaintiff's Exhibit 133, the only one you ever made? A. I think so. It is the only one I remember.

XQ806. That is the only transfer or assignment that you ever knew of being made by anybody of any of the assets of A. A. Waterman & Co.? A. That is the only one I remember.

XQ807. And that is the one that you referred to when you said that there was an assignment? A. I don't remember that I said that. I don't quite catch your question.

XQ808. A few moments ago you testified that all of the good will had been assigned. That is the one you referred to? A. Yes.

XQ809. This assignment was made to the Frazer & Geyer Company, was it not? A. Yes. It says, "All its assets of every
4031 name and nature whatsoever." If that does not cover good will I don't know what does.

XQ810. As a matter of law it does not. This transfer was made to the Frazer & Geyer Company, was it not? A. Yes.

XQ811. It was not made to a new concern like A. A. Waterman & Co., was it? A. A. A. Waterman & Co. was indebted to the Frazer & Geyer Company and they assigned those to off-set the amount of this indebtedness.

XQ812. They assigned everything they had to the Frazer & Geyer Company, didn't they, as you claim? A. What it says there, yes.

XQ813. And the assets of the Frazer & Geyer Company were sold by the sheriff, were they not? A. I think they were sold
4032 by the sheriff before that assignment was made. I am not sure though, on that.

XQ814. Was there ever an assignment made by the Frazer & Geyer Company of these assets, covered by this assignment I now show you, Plaintiff's Exhibit 133? A. I don't remember. There may have been.

XQ815. When was the Modern Pen Company incorporated? A. I think it was the latter part of June, 1905.

XQ816. Have you not got the exact date that you can give us? A. I haven't it here. I will have to look up the minutes to find out.

XQ817. When did they begin business? A. Just as soon as they were incorporated.

XQ818. That was in June, 1905? A. I think so.

XQ819. When was this $20 which you call an assessment on the Frazer & Geyer stock paid in? A. Some time in June or July, 1905, I think.

XQ820. Does not this letter which I show you call for the payment before June 26, 1905 (handing witness the paper)? A. My recollection is that they did not hold to that date, that they gave them a longer time in which to pay the voluntary assessment.

XQ821. Does the statement in Plaintiff's Exhibit 135 that the Modern Pen Company had already been organized on June 21, 1905, refresh your recollection as to the time it was organized? A. No, I did not have anything to do with the organization and I do not remember just the date. 4034

XQ822. Can you look it up and advise us at the next hearing when the company was organized and began business? A. I think so. I do not keep the minutes but I will try and find out.

XQ823. You testified that you were a director and officer of the Frazer & Geyer Company in May and June, 1905? A. I was an officer from the time it was organized until it was wound up.

XQ824. When was it wound up? A. I think it was the early part of June, 1905. The sheriff came in and then I was dispossessed, as they say. 4035

XQ825. You have not had anything to do with that company since? A. No, the sheriff took charge of all its effects.

XQ826. Has there ever been a directors meeting since the sheriff took control of the property? A. Not that I remember.

XQ827. Would you remember if there had been? A. No, sir; they have so many meetings; I would not be likely to. I have no recollection at all of any such meeting.

XQ828. You were the treasurer of the company at that time? A. I was treasurer during its whole existence.

XQ829. And after the sheriff came in and levied on the stuff which was sold, that ended the Frazer & Geyer Company as far as you have any recollection whatever? A. I have a dim recollection that its books were balanced up or final entries were made in them as of the sheriff's sale.

XQ830. You do not remember any further assignment or any meeting of directors or any action by any of its officers after that time? A. I don't remember any, no.

XQ831. Do you remember when you first got out your stationery for the Modern Pen Company? A. No, sir, I did not have anything to do with it.

4037 XQ832. Were you not connected with the Modern Pen Company at the time it was started? A. No, I think not. I was out for awhile, after I left Mr. Frazer. All that detail work had been done by somebody else.

XQ833. When did you come back? A. I don't remember the date now.

XQ834. Was it a month or two months or six months or six years? A. The latter part of June or the early part of July.

XQ835. When did you send your first salesman out? A. I don't know. I have no recollection of that. It may have been a month later. I don't think any went out until August. I did not have charge of that end of it at that time. I did not have any way to remember it.

4038 XQ836. Is it not a matter of fact that you did not do any business until August 15th, 1905, in the Modern Pen Company? A. I think they did business right from the start. I think they begun business just as soon as they were organized. In fact I know the business was going along all the times. The factory was never closed down at all, neither was the office.

XQ837. What does the firm of A. A. Waterman & Co. own around there now—anything at all? A. Yes, they own all the goods that are being made up. We buy them from them when they are made up.

XQ838. They do not own any of the factory do they? A. Not the plant, no.

XQ839. Is it not a matter of fact that all your accounts there are kept together? A. I have testified that they were not kept together. We keep separate sets of books. They are entirely separate.

XQ840. Does the firm of A. A. Waterman & Co. owe the Modern Pen Company now? A. The Modern Pen Company is now selling agent for the A. A. Waterman & Company. Before it was the other way around.

XQ841. The old concern in which you were a partner, A. A. Waterman & Co., never manufactured any goods at all did they? A. They did the assembling, the same as the L. E. Waterman Company testified they do in their manufacture.

XQ842. The present concern of A. A. Waterman & Co. does not do any selling at all except to the Modern Pen Company, does it? A. That is all. 4040

XQ843. Have you ever advertised in any public print that you were the successors of A. A. Waterman & Co. of Boston? A. I don't think so.

XQ844. Did you ever hold yourself out at any time as the successors of A. A. Waterman & Co. of Boston? A. I don't remember. Mr. Waterman and Mr. Frazer attended to those things at that time and I don't know whether they did or not. It may have been but I have forgotten it if it was.

XQ845. Then you don't remember it now? A. I have no recollection of any such thing.

XQ846. When did you first claim to be the successors of A. A. Waterman & Co. if ever? Did you ever claim to be the successors of A. A. Waterman & Company of Boston? A. I think not. 4041

XQ847. This certificate which was filed in the County Clerk's Office on February 21, 1910, was the first certificate of that character that was ever filed that you knew anything about, was it not? A. As far as I know, yes.

XQ848. Did you ever file or acknowledge a similar certificate for A. A. Waterman & Co. composed of yourself, Mr. Frazer and Mr. Waterman? A. Not to my knowledge. I don't remember it. It may have been done but I have not any recollection of it at all.

4042 *Hobart W. Geyer*

XQ849. Did the present concern of A. A. Waterman & Company at any time advertise itself as the successor of the A. A. Waterman & Company of which you were a member? A. I don't know.

XQ850. Did you ever see any such advertisement? A. I don't remember any such.

XQ851. Did they ever claim that they were successors of that firm? A. I don't know.

XQ852. You never heard anybody claim that did you? A. I don't remember any such claim.

XQ853. Did you ever know anybody to claim that the present
4043 concern of A. A. Waterman & Company is the successor of the A. A. Waterman & Company of Boston? A. I think in the suit they have claimed they were privies.

XQ854. Did you ever know them to claim it any other place, at any other time, anywhere? A. I don't remember. I don't think that occasion ever came up.

XQ855. Did the present concern of A. A. Waterman & Co. pay the debts of the copartnership of which you were a member? A. I think the Modern Pen Company paid those debts.

XQ856. Paid them all? A. Yes, outside of the mortgage. The mortgage was a Frazer & Geyer Company affair, endorsed by A. A. Waterman & Company.

XQ857. Did the Modern Pen Company pay the partnership debts and judgments, which I have referred you to here in this
4044 testimony? A. Who were those judgments in favor of?

XQ858. They were in favor of the Frazer & Geyer Company and the Chapmans? A. Not to my knowledge. As I told you I did not know anything about those judgments until you brought them up and I have not looked at them at all since. I don't know whether they are still standing or not.

XQ859. Didn't you know that the Chapmans offered to transfer these judgments, in the negotiations which they were making for the sale of the Modern Pen Company business? A. I never heard them mentioned at all.

XQ860. That they were to transfer those as part of the consideration in that transaction? A. I never knew anything of

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the kind; I never heard of the judgments until Friday when you mentioned them here. That is, the judgments against myself. I understood they got a judgment against Mr. Frazer but I thought that was on another matter.

XQ861. You had nothing whatever to do with these negotiations for the sale of the business, as discussed on your direct-examination? A. Except as it was brought up at the directors' meetings.

XQ862. You had no conferences with me at any time regarding it? A. No.

XQ863. You had no conferences with F. D. Waterman on the subject? A. Only the time that they were down there on Sunday.

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XQ864. Did he tell you whom he represented when he was down there? A. No.

XQ865. Did Mr. Ferris say whom he represented when he was down there? A. No.

XQ866. Did you know that Mr. Ferris and Mr. Frank D. Waterman, the men who visited your factory, were both officers of Aiken-Lambert Company at that time? A. No.

XQ867. Did you know they were connected with the Aiken-Lambert Company at that time? A. I don't remember now.

XQ868. Do you remember it now? A. No. I don't remember the date the Aiken-Lambert Company was bought in by L. E. Waterman Company.

XQ869. You heard the testimony of Mr. Ferris that he was an officer of the Aiken-Lambert Company at that time didn't you? A. I don't remember, I don't know. I will not deny it at all.

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XQ870. And the order that came for gold pens came from Aiken-Lambert? A. Yes, it was sent by Aiken-Lambert.

XQ871. And the pens were plain pens marked 14 karat? A. Just stamped 14 karat.

XQ872. Did you ever see L. E. Waterman Ideal pens with a plain pen, marked 14 karat? A. No, but we understood that the L. E. Waterman Co. made other pens without their imprint; especially the Remex.

4048 *Hobart W. Geyer*

Mr. Watson: I move to strike out the answer as irresponsive.

XQ873. You personally had no conference with either myself or Mr. Waterman or Mr. Ferris or any other officer of the L. E. Waterman Company regarding these negotiations? A. No, the only conference was that Sunday at the factory.

XQ874. And they were simply looking over the factory at that time and did not tell you who they represented at all? A. Looking over the plant.

XQ875. When you had this correspondence with regard to the Wolfson Bros. advertisement there was not a word appearing
4049 in that correspondence about any other advertisements, was there, except the ones you paid for? A. You mean any letters?

XQ876. Yes? A. I don't think so, but they told me they were going to repeat the ad the following Saturday.

XQ877. Your attorney did not ask you anything about that did he? A. I guess it was forgotten.

XQ878. You heard the testimony of Mr. Asch that you paid for the advertisement which we produced, didn't you? A. Yes, we have not denied that. It was a misunderstanding.

XQ879. There is no misunderstanding that you paid for two advertisements is there? A. No, I understood when I paid for it that I was paying for something for the week following.

4050 XQ880. Is there anything in the correspondence to show that? A. No, the correspondence said that I would pay for an ad when it was done properly. That is my recollection of it.

XQ881. What do you do with the fountain pens of the L. E. Waterman Company which you repair; I mean do you take any in exchange or otherwise? A. Most of them we destroy. Some of them that are in pretty good shape we clean them up and sell them.

XQ882. Do you sell them under the same trade-mark as the Waterman Company put out, or do you sell them under your own name? A. We sell them just as they are, a job lot.

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XQ883. You sell them under the trade-mark of L. E. Waterman Company? A. They are mixed in with a lot of odd pens and we sell them for so many odd pens.

XQ884. Do you sell them at cut prices or the regular prices? A. Secondhand pens we sell at cut prices.

XQ885. Who have you sold those pens to recently? A. We have sold quite a number to an insurance man named Small. He takes most all that we have. I think he gives them away.

XQ886. You have sold them where you have furnished Waterman small boxes with them, have you not? A. No.

XQ887. You never have sold any and furnished small boxes with them? A. I don't think we ever had any of your boxes.

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XQ888. Did you ever know Mr. Martling to do it? A. I don't think so. He never did the selling himself.

XQ889. You don't know that Mr. Martling in answer to a request for Waterman Ideal Fountain Pens furnished the Waterman Ideal Fountain Pens in Waterman boxes do you? A. I don't think he did. I don't know.

XQ890. You don't know where Mr. Martling is do you? A. The last I knew he was with the National Cloak & Suit Company.

XQ891. When did you see him last? A. I think about two months ago.

Adjournment to Tuesday, April 18, 1911, at 10:30 A. M.

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HOBART W. GEYER, resumes the stand.

Cross-examination continued by Mr. Watson:

XQ892. When did you first know about the decree of Judge Kellogg, entered September 3, 1898? A. I think I heard of it sometime within a year or two after Mr. Waterman came with us.

XQ893. You did not know anything about it when he first came with you? A. I think not.

XQ894. It was not discussed between you and Mr. Frazer and Mr. Waterman at the time you formed the partnership?

A. No; it may have been discussed between Mr. Frazer and Mr. Waterman but I don't remember discussing it.

XQ895. When did you first know that it came to the attention of Isaac E. Chapman and William L. Chapman? A. I don't know; I had very little to do with them until within three or four years.

XQ896. When did you first know that they knew about the decree? A. I don't know when they first knew of it. They did most of their business with Mr. Frazer.

XQ897. The question is very simple. When did you first know that they knew about it? A. Excuse me. It must have been some five or six years ago. I don't remember the exact
4055 date.

XQ898. Was it discussed at that time between you and the Chapmans? A. It had been mentioned. I don't think we ever discussed it very much.

XQ899. Does the present firm of A. A. Waterman & Co. admit being bound by that decree? A. Yes.

XQ900. Was this decree ever discussed between you and Mr. Frazer and Mr. Waterman as to whether the firm of A. A. Waterman & Co. of which you are a member were bound by that decree? A. It was always so understood and we always so instructed our salesmen about the selling of our goods, that we were selling them under that decree and they must be very particular to sell them as pens made by A. A. Waterman & Co.,
4056 so as not to have anybody think they were L. E. Waterman & Company goods.

XQ901. Don't you know that the decrees enjoining the calling of the pens made by A. A. Waterman & Co. as Waterman pens? A. No.

XQ902. You don't know that? A. No.

XQ903. I would like to have you look at a copy of the decree which is in evidence? A. It was something that never entered into the question because we never did call them Waterman pens; we always called them A. A. Waterman & Co. pens. That is one of the things we were very particular about.

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XQ904. I ask you if you did not know that the decree enjoined the calling of the A. A. Waterman & Co. pens "Waterman pens"? A. I don't remember it now. I shall have to read the decree.

XQ905. You don't recall anything about that part of the decree at all? A. I don't recollect just how the decree reads. We never did call our pens Waterman pens. It may have been on that account. It was on account of the decree that we were particular to call them A. A. Waterman & Co. pens.

XQ906. You know that dealers that handle A. A. Waterman & Co. pens call them Waterman pens don't you? A. I have never heard them call them that.

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XQ907. Did you ever see the sign in Mr. Carey's window which is in evidence here? A. No, I seldom go by Mr. Carey's at all.

XQ908. Did you know that there is a similar sign now being exposed in connection with your goods in the Hudson Terminal Building? A. I did not.

XQ909. This decree recites on its face that this action came on to be heard on the 7th day of March and subsequent days. I show you a copy of the decree. That appears in the first paragraph of the decree (handing witness the decree)? A. Yes.

XQ910. Why did you write to Bushnell and say that this judgment was obtained by default? A. That was my understanding. I never have seen the decree in full, to my recollection.

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XQ911. You have stated the same fact once or twice in the affidavit have you not? A. That was my understanding. Yes, I think I did. I stated it as I understood it.

XQ912. You were wrong about it weren't you? A. Evidently.

XQ913. Referring to some of these letters which you have produced here, one signed by the Bruhn Drug Company dated November 15, 1910; does that refer to a Waterman Ideal Fountain pen? A. This refers to a No. 13 Ideal.

4060 *Hobart W. Geyer*

XQ914. Do you think that letter shows any confusion in the mind of the writer regarding the manufacture of that pen? A. Yes, we admit that there is confusion.

XQ915. You have a good deal of that same kind of thing all the time don't you? A. We have considerable.

XQ916. I show you the next letter, E. A. Brown & Company, St. Paul, Minn., March 29th, 1910. Does that refer to a Waterman Ideal Fountain Pen? A. Yes, it refers to a No. 2 Ideal, covered with silver. I have forgotten what the catalogue number is.

XQ917. Will you please look at the letter of H. C. Bostwick & Co., January 12, 1911; do you claim that letter was in-
4061 tended to be addressed to you? A. It evidently came to us. I think they are customers of ours. They are dealers.

XQ918. Do you claim letters addressed to the Waterman Pen Company, New York? A. If it comes addressed to us at 22 Thames Street, New York. There is no such concern as the Waterman Pen Company.

XQ919. Do you claim mail and orders which come addressed to the Waterman Pen Co. when it is addressed to the Waterman Pen Company, New York? A. If it is addressed to us at 22 Thames Street. If it does not have our street number on it, we as a general thing do not open it. If we open it and find it belongs to the Ideal we send it up to them.

XQ920. Do you ever open mail which is addressed to the
4062 Waterman Ideal Fountain Pen Company? A. No.

XQ921. Never have done that? A. I don't remember ever having done it. If it has been done it has been done unintentionally.

XQ922. Will you please look at the letter from Ball, Book & Novelty Company, dated February 11, 1911; the writer says he is enclosing one pen; and the name is "Adma" (or Adams). Was that the name of the owner as you understand it? A. Yes, that was the name that was put on the envelope just to distinguish it.

XQ923. Please turn to the letter signed by Wehrly Bros., Hartford City, August 23, 1910. Do you think that shows any

confusion in the mind of the sender as to who made the pen which he sent? A. Yes, we admit confusion.

XQ924. Do you claim mail and orders and business which is addressed to the Modern Ideal Pen Company, New York? A. If it is addressed to us at 22 Thames Street.

XQ925. Do you claim that anything having the word Modern, irrespective of the fact that it contained the word Ideal, belongs to you? A. If it has our street address on it.

XQ926. Otherwise not? A. Otherwise not. If we open a letter and find it should have gone to the L. E. Waterman Company we send it up to them.

XQ927. The next letter, which is signed by the Southern Optical Company, dated December 17, 1910, also shows confusion in the mind of the sender, does it not, as to who made the pen which is enclosed? A. He sent an Ideal pen to us. 4064

XQ928. Does he not say that he is sending one of your fountain pens? A. Yes.

XQ929. Does that show any confusion in the mind of the writer? A. Yes.

XQ930. Do you think that the letter signed E. L. Gow, dated September 5, 1905, shows any confusion as to who made the pen that he is inquiring about? A. I don't know. I presume he was confused. He wrote to us to suggest a remedy for an Ideal fountain pen that leaks. It may be that he had one of our pens and ours was so good that he wanted to know how to get an Ideal to do the same thing. I have not any idea what his thoughts were in the matter. 4065

XQ931. How about the letter signed by K. M. Dickson, November 22, 1910. Does that show any confusion? A. I don't know. He addresses us plainly at 22 Thames Street; as A. A. Waterman & Co., 22 Thames Street and he asks about an Ideal pen.

XQ932. "One of your Ideal pens"? A. Yes, "One of your Ideal pens."

XQ933. Does that show any confusion? A. I think so, perhaps.

XQ934. You are not prepared to say positively that shows confusion? A. I don't know. We admit that there is confusion.

XQ935. I ask you if you are prepared to say positively that it does not show confusion? A. I think so perhaps.

XQ936. You are not perpared to say positively that it does; it is only "perhaps"? A. That is a question of judgment entirely.

XQ937. I ask you if you are prepared to say that it does not positively show confusion? A. I say I think it does but I can not state positively.

4067 XQ938. When you wrote these letters to the Standard Drug Company and to Mr. Bushnell you sent him copies of the decree of Judge Kellogg entered September 3, 1898, did you? A. I would have to read the letters to see. I don't remember now. Unless it is mentioned in the letter I evidently did not. I think I sent a copy of the decree to Mr. Teller. I would have to go all through the correspondence.

XQ939. Do you recall whether you sent Mr. Bushnell at the time you corresponded with him regarding the action against the Standard Drug Company, or to the Standard Drug Company, a copy of Judge Kellogg's decree? A. No, I did not send Mr. Bushnell anything but this letter. I don't think there was any enclosure in it of any kind.

XQ940. Did you send him but one letter? A. That is all.

4068 XQ941. You are prepared to state positively that you only sent him one letter? A. Yes.

XQ942. In connection with this business? A. Yes.

XQ943. And you did not send him a copy of Judge Kellogg's decree? A. No.

XQ944. Did you send a copy of the decree to the Standard Drug Company in connection with that litigation? A. I don't think so. I don't remember. If I sent it the correspondence would show.

XQ945. Did you send a copy of the decree to Mr. Teller? A. I don't think so.

XQ946. Or to his attorney, Mr. Chamberlin? A. No, I did not send anything to Mr. Chamberlin.

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XQ947. Never wrote to Mr. Chamberlin? A. No, I wrote to Mr. Teller to go and see Mr. Chamberlin. I never wrote Mr. Chamberlin a word.

XQ948. Did you employ Mr. Chamberlin to defend Mr. Teller in the action? A. I wrote Mr. Teller to employ him or the firm that he is a member of—to employ the firm that Mr. Chamberlin was a member of. I have forgotten the name now.

XQ949. Did you agree to pay their fees? A. Yes.

XQ950. When did you employ him? A. In my letter to Mr. Teller after the L. E. Waterman Company started this suit for contempt of Court against him. As he had not been enjoined from selling our goods we thought it was no more than right that we should protect him.

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XQ951. You employed Mr. H. W. Hollender of Washington to defend the interests of the Modern Pen Company and A. A. Waterman & Co. in the action of the L. E. Waterman Company against John Saadi in Washington did you not? A. No, sir, I did not.

XQ952. Did anybody connected with the defendant or the A. A. Waterman & Co. employ Mr. Hollender for the purpose I have stated? A. The firm of A. A. Waterman & Co. made some kind of a tentative agreement with him I think it was.

XQ953. You don't know that they retained them to defend their interests in that litigation? A I have forgotten just what that was. The letter I think is in evidence showing just what they did.

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XQ954. Did you pay him anything? A. We paid him $100, yes.

XQ955. Did that come out of the treasury of the Modern Pen Company? A. I think that was paid by A. A. Waterman & Co.

XQ956. You testified that the Modern Pen Company never paid any dividends, is that correct? A. Yes. I did not testify that it had not earned any though.

XQ957. Has there been any distribution of profits at any time among the firm of A. A. Waterman & Co.? A. Yes, I think so. The profits have been turned over to them, so I presume they divided them among themselves.

XQ958. Did you ever know that A. A. Waterman got any profits from the firm of A. A. Waterman & Co. composed of himself and the Chapmans? A. They get their profits. I don't know what they do with them.

XQ959. Do you know whether A. A. Waterman ever got any profits from that firm? A. I don't know.

XQ960. A. A. Waterman severed his connection with that firm, as you have stated in your affidavit, on July 1, 1906? A. Yes.

XQ961. He has had no connection with the concern or its business since. A. No, sir, I don't think he has had any connection with them at all since then.

4073 XQ962. Do you remember receiving back a stock of goods from E. J. McPulim, 2087 Amsterdam Avenue, New York City which had been sold him and which he claimed were sold him under false representation? A. I don't remember the account at all, or the name.

XQ963. Do you sell Aloe's of St. Louis, Mo.? A. No, we have not sold them since Mr. Waterman withdrew from the firm.

XQ964. These pens that they carry are sold from Chicago are they now? A. I don't know; I don't know what they carry.

XQ965. You have not sold Aloe's of St. Louis, since July 1, 1906? A. No, sir, we would like to sell him but we have not

4074 been able to.

XQ966. Is it possible they may buy your goods from some jobber? A. Yes, a lot of jobbers are handling our goods. There is no reason why they could not or should not.

XQ967. I call your attention to an advertisement that appeared in the St. Louis Times of December 1, 1910, and ask you if you furnished the cut which appears in that advertisement (showing witness paper)? A. I don't know. If it was printed it must have been done years ago. We have not sent him anything since Mr. Waterman withdrew.

XQ968. If that was an advertisement of your pens would you consider it a fair advertisement?

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Objected to as a conclusion for the Court.

A. No, we insist on our customers advertising our pens as A. A. Waterman & Co. pens and not as Waterman's.

The advertisement shown the witness is offered in evidence and marked Plaintiff's Exhibit No. 129.

Mr. Bacon: Objected to as incompetent, irrelevant and immaterial and in no way connected with this defendant.

Mr. Watson: Is there any objection on the ground that all of this paper is not produced?

Mr. Bacon: No.

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XQ969. You were going to advise us when the Modern Pen Company was incorporated and when it began business? A. The Modern Pen Company was incorporated the 17th of June, 1905.

XQ970. When did the Modern Pen Company begin business? A. I think the 17th of June when those papers came back.

XQ971. That is when the company was organized and the officers elected? A. I thought this was the date that you wanted and that is the one I looked up. I did not look any further, so I have not any other dates.

XQ972. How does it happen that you sold these Royal Ideal fountain pens to Saadi at a loss? A. I did not sell them at a loss. When I figured them I figured what the whole thing would cost and until I analyzed the thing as to the price I was selling the gold pens at I did not realize that the holders would be sold at a loss. What I lost on the holders I made up on the gold pens.

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XQ973. They were completed fountain pens were they not? A. Yes.

XQ974. Why do you find it necessary to separate? A. I was asked by my counsel to find out just how they figured out for the holders and the pens, as the Royal Ideal imprint was on the holders only.

XQ975. It was a complete fountain pen and very frequently the imprint is only on the holder in fountain pens is it not? A.

4078 *Hobart W. Geyer*

No, most everybody has the name on the pen as well as on the holder.

XQ976. Don't you manufacture goods which you imprint only on the holder? A. Yes, very cheap pens—cheap gold pens and a blown holder. That is the only thing that we put out that way.

XQ977. This Exhibit No. 14, the Royal Ideal pen; do you know that this pen retails at $1.50? A. I have not any idea what it retails for.

XQ978. And you sold it for $6 a dozen? A. Yes.

XQ979. What is the inspection that you put on your goods before they leave the factory? A. They are inspected as to the
4079 pen and feed, being properly adjusted, being fitted into the section properly, as to the section and cap fitting just right; that is, the section fitting the barrel and the cap fitting both the barrel and the section; as to the pen being properly set in and smoothed properly and properly adjusted.

XQ980. You test them as to whether the joints are tight or not? A. We do.

XQ981. In what way? A. We have a machine on the same principle as a hydraulic pump. We put the holders under about six pounds pressure. If we found that they would stand six pounds pressure without leaking at the joints they were very tight.

XQ982. What test do you put them to as to whether the
4080 feed will operate or not? A. We do not test the feed. The feeds are all made right, and the feeds are all inspected to see that they are all the same, so that that is not necessary. This other test, as to the section end is something we have been doing eight or nine months I think.

XQ983. Never did it before that time? A. No, we found that holders did get out that were not perfect and we devised this machine and had it made for us to overcome that difficulty.

XQ984. About eight or nine months ago you started that? A. Yes, about that time.

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XQ985. Prior to that you made no test of the joints? A. No.

XQ986. You do not fill your pens generally with ink before they are sent out? A. We do not.

XQ987. And you do not know except theoretically whether they are right or not? A. Yes, we do know from experience that they do write.

XQ988. That is purely theoretical? A. When you are putting out 600 or 800 pens a day and they work right when they get to the consumer there is not much theory about it.

Mr. Watson: I move to strike out the answer as irresponsive and repeat the question.

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XQ989. (Repeated.) That is purely theoretical? A. No, that is our experience.

XQ990. What proportion of your total output are end joint pens? A. About 50 per cent I should say.

XQ991. And the rest of them are divided among the different styles you make, safety pens, middle joint pens and self-filler pens? A. Yes.

XQ992. Do you know a concern named Tiffany Pen Company? A. I never heard of it. I heard that question the other day—asked one of our salesmen. Some two or three or four years ago there was a letter came to us for some fountain pen concern in our building but I have forgotten what the name was. I simply returned it to the post office and never opened it.

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XQ993. Do you sell any concern of the name of Tiffany Pen Company? A. No, I never heard of the name and I am not sure that this letter was addressed to the Tiffany Company.

XQ994. When you got these gold pens back from Saadi didn't you supply other gold pens in their place? A. We supplied gold pens imprinted "Warranted 14 Karat."

XQ995. Why did you deduct it from the cost then? You made your profit on the other pens just the same didn't you? A. That was a different sale entirely.

4084 *Hobart W. Geyer*

XQ996. Didn't he simply send them in for exchange to get other pens; was not that what he testified? A. I presume that is what he wanted.

XQ997. Didn't he write that he sent in those pens for exchange? A. Yes, but those others did not have our name on them; there was nothing but the imprint warranted 14 karat.

XQ998. Don't you make it a practice to sell to parties known as the travelling show people, that are called in the trade fountain pen fakirs, that sell pens around the country here and there? A. No, we sell some of them.

XQ999. Don't you sell them on consignment? A. No.

4085 XQ1000. To make certain about matters that I may want to ask other witnesses about, I show you a fountain pen which is marked "W. N. Lancaster Idea," enclosed in a star, 1893, Baltimore, Md., U. S. A., and ask you if you have at any time made fountain pens and stamped them with word Idea, enclosed in a star similar to the marking on the pen that I now show you? A. Mr. Lancaster brought a wheel with an imprint and wanted me to imprint some holders for him with it and I refused.

XQ1001. You are familiar with the imprint that I have just shown you on fountain pens? A. I never saw it but once, when he brought the wheel to me.

XQ1002. You never saw it on fountain pens? A. No.

4086 The pen shown the witness is offered for identification and marked Plaintiff's Exhibit 140.

XQ1003. Do you know who makes those pens that I have shown you like Exhibit 140? A. No, sir, I do not.

XQ1004. Why did you object to making pens and stamping them like Plaintiff's Exhibit 140? A. This was after I had imprinted those pens Royal Ideal and this suit against Saadi had started and I certainly will not imprint anything that has the slightest tinge of "Ideal."

XQ1005. You thought that the stamping Idea was too close to Ideal; is that the reason you refused? A. I think it was gotten up to take advantage of the word Ideal.

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XQ1006. You think that marking was likely to cause the pen to be mistaken for Waterman's Ideal? A. I don't think so. I don't know what his idea was about it but I know that I will not imprint anything that had a tinge of Ideal to it.

XQ1007. You don't think then that there is any chance of mistaking that pen for a Waterman Ideal by reason of the marking? A. I know I would not. I don't know whether somebody else would or not.

XQ1008. Was not that the reason that you refused to make them for Mr. Lancaster, because you thought they would be mistaken for Ideals? A. No.

XQ1009. That that marking would be considered a simulation or imitation of the plaintiff's trade-mark? A. I thought 4088
it was intended for an imitation or a simulation, yes.

XQ1010. When you made the affidavit in support of the motion for an injunction in the case of Chapman against the L. E. Waterman Company you had then heard of the decision of Judge Barnard on the motion for preliminary injunction in the Waterman-Saadi case had you not? A. I think so but I am not sure.

XQ1011. The making of the Royal Ideal pen for Saadi was fresh in your mind at this time was it not? A. Yes.

XQ1012. And the complaint which was sent to you by Mr. Saadi soon after it was served upon him in December, 1909, showed that the plaintiff complained of the Royal Ideal pens did it not? A. I think I saw that complaint, but I am not sure 4089
now, at that time.

XQ1013. Didn't you make affidavit that you took that complaint to your counsel? A copy of that complaint was sent to you by Mr. Saadi soon after it was served on him was it not? A. I don't remember. I don't think so.

XQ1014. I show you a letter of John Saadi, dated December 7, 1909, and ask you if he did not tell you that the Waterman Company was complaining of the Royal Ideal pens markings on the pens you had made and furnished him? A. Yes.

XQ1015. This letter is part of Exhibit 20? A. Yes, the letter of December 7th, 1909, states that.

XQ1016. Did he about that time send you a copy of the complaint? A. No, sir.

XQ1017. Did Isaac E. Chapman consult with you at all in reference to these litigations in Cleveland and Washington? A. I think he did about the Washington litigation but not about the Cleveland.

XQ1018. Do you recall any of the facts contained in his affidavit verified August 10th, 1910? This was in the Cleveland suit. A. Yes, this one from Saadi we did not receive though until the latter part of January or February, 1909, according to my recollection.

4091 XQ1019. Were not those complaints both before the Chapman action started? A. I don't remember now.

XQ1020. The letter which I have shown you of December 7, 1909, brought clearly to your mind the complaint which the Waterman Company was making against the marking of pens with the words "Royal Ideal Pens" on them did it not? A. That is all that he wrote me, that they were trying to serve him with an injunction against his selling Royal Ideal pens.

XQ1021. You knew that you made those pens, didn't you? A. I certainly did.

XQ1022. And you knew that when you made the affidavit of February 21, 1910, which I have shown you? A. Yes.

XQ1023. And you knew it when you verified the answer in the action at bar, didn't you? A. Yes.

4092 XQ1024. And when you verified the answer in the action at bar you knew all about the claims of the L. E. Waterman Company? A. Yes.

XQ1025. Was it true that the defendant, the Modern Pen Company, has either directly or indirectly violated any valid trade-mark or trade name of the complainant? A. That was my understanding at the time. I supposed it to be trade-mark, Royal Ideal, issued by the United States Patent Office. I did not know when we imprinted them that way that we were doing anything that we had not a perfect right to do.

XQ1026. You know now that that was not a trade-mark don't you? A. No. You said so the other day.

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XQ1027. You don't know anything about it? A. No, sir.

XQ1028. You still think it is a trade-mark? A. I don't know what it is.

XQ1029. Returning to the Wolfson correspondence; in that letter of December 18, 1909, you write "Your letter of the 17th inst. received and we would be very much pleased to stand one-half of the cost of the ad as per your former request." There is no indication in there is there that you intended to have paid for any other advertisement than the one that was called to your attention in the letter of the 17th? A. That was my intent. That letter came in the very busiest part of the year and they had stated in their letter of the 17th that I was answering, that if we preferred they would advertise the goods as A. A. Waterman & Co. pens, so I had nothing to do but take it for granted that that was what they intended to do.

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XQ1030. You did as matter of fact pay for the advertisements which were presented to you in the letter of February 17th, 1909, didn't you? A. So I found out within a couple of months, through this dispute.

XQ1031. Did you ever furnish cuts to the Lazarus Jewelry Store? A. No, that must have been an old cut that I had eight or ten years ago. We have not put out a cut of that sort for years.

XQ1032. Do you disclaim that cut? A. That is a cut of an old middle joint pen that was made years ago, before it was improved upon.

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XQ1033. You disclaim that cut? A. Yes, the Modern Pen Company never sent out a cut like that. They never had one.

XQ1034. Did A. A. Waterman & Co. ever send out a cut like that? A. Not the present firm of A. A. Waterman & Co.

XQ1035. You do not stand responsible for what the A. A. Waterman & Company did before the present firm was organized do you? A. This was sent out by the firm of A. A. Waterman & Co. of which Mr. Frazer, Mr. Waterman and myself were members.

XQ1036. The present firm of A. A. Waterman & Co. does not stand responsible for what that firm did, does it? A. They stood responsible for anything that they were responsible for.

4096 *Hobart W. Geyer*

XQ1037. If the firm of A. A. Waterman & Co., of which you are a member, furnished the electrotype contained in the Lazarus Jewelry Store advertisement, which I have shown you, which they have been using improperly, you do not consider the present defendant or the present firm of A. A. Waterman & Co. responsible for furnishing that cut do you? A. The Modern Pen Company have assumed all the liabilities of the old firm of A. A. Waterman & Co.

XQ1038. The Modern Pen Company has assumed all the liabilities of the old firm of A. A. Waterman & Co? A. Yes, that is my recollection and understanding of it.

4097 Mr. Bacon: I wish it to appear on the record that the cut referred to bears the imprint "A. A. Waterman & Co. Modern" and nothing else.

XQ1039. The advertisement contains a cut of a fountain pen and the cut of the fountain pen bears the words "A. A. Waterman & Company, Modern" does it not? A. Yes.

XQ1040. And that is the cut that we are both referring to when we are asking and answering the last few questions? A. The first question was if we had sent that out and I stated that we had not because we have not had any of those cuts since the reorganization. We have sent out similar cuts but not that particular one.

XQ1041. Does the Modern Pen Company stand responsible
4098 for all of the acts of the A. A. Waterman & Co. of which you were a member?

Mr. Bacon: Objected to as this witness is not a member of the present firm of A. A. Waterman & Co.

A. There has nothing come up that I know of. It would have to come up before the Board of Directors, if any such incident did occur, and be passed upon by them.

XQ1042. There has never a case come up where the responsibility of A. A. Waterman & Co. for anything that the firm of A. A. Waterman & Co. of which you were a member did, come into question? A. If there were any pens sent out that the customer wanted to return or exchange for credit, the present cor-

poration of the Modern Pen Company took them back and gave them credit or exchanged them or did whatever was necessary. I don't know of anything else that has happened that has called for any action. 4099

XQ1043. Have you found out whether the Modern Pen Company is responsible or not for the judgment against the former firm of A. A. Waterman & Co.? A. I don't think they are.

XQ1044. Have you found out anything about it one way or the other since I last questioned you? A. No.

XQ1045. Have you asked anybody? A. No.

XQ1046. Will you please give us a list of the people to whom you have sold Waterman Ideal Fountain Pens? A. The only one I remember is the man named Small that I spoke to you about the other day. 4100

XQ1047. Where is his place of business? A. I think it is on Broad Street but he comes into the office and buys the pens in there.

XQ1048. When did you sell him? A. I don't know. The clerks waited on him.

XQ1049. Do you remember selling some of these pens to a man named D. J. Handler? A. No. Handler has not bought anything of us for five years, it seems to me, and I never sold him myself. I don't know what he bought.

XQ1050. You had nothing to do with that transaction? A. I don't remember anything about it except that he was one of the men who skipped out owing us some money which we never have been able to collect. We cannot locate the man at all. 4101

XQ1051. Do you consider the advertisement of the Lazarus Jewelry Store which I now show you a fair advertisement (showing witness a paper)? A. It is certainly not a fair advertisement of our pen. I think it is a better ad for the Ideal pen than ours although it does not say anything about Ideal.

XQ1052. The words "Waterman's Fountain Pen" in the trade generally means L. E. Waterman Company goods don't they? A. I think so generally with the trade.

XQ1053. Did you have anything to do with paying for that advertisement of the Lazarus Jewelry Store? A. No.

XQ1054. Did you have anything to do with making it up? A. I never saw it. I never heard of it until it was put in here as an exhibit.

XQ1055. Did you ever pay for any advertising matter either directly or indirectly put out by Warwick Bros. & Rutter? A. No.

XQ1056. Never allowed them any additional discount for its advertising? A. No. We allowed them simply discounts additional towards helping to pay for show cases instead of shipping them from here. That is the only thing.

XQ1057. Do you know a concern by the name of Bernheimer Bros. of Baltimore? A. We sold them one bill of goods.

4103 XQ1058. When did you sell them? A. I think it was within two or three months, to my recollection.

XQ1059. You furnished them a showcase with a bill of goods? A. Yes, it was one of the Waterman Ideal showcases that had got into our place. It probably came from the manufacturer along with ours and when it reached there they notified us that it was imprinted Waterman's Ideal instead of ours and we had all the expense of bringing it back and sent them a new one to replace it.

XQ1060. The reason it happened to go back was because it got broken in shipping, was it not? A. They notified us it was broken but it was imprinted Waterman's Ideal. That is the best information we had on the subject.

4104 XQ1061. Do you think you would ever have heard about it if it had not been broken? A. That I don't know. I presume we would. The same people as I understand it, makes show cases for Waterman's Ideal that makes them for us and evidently it must have got mixed up in their place in shipping. The same thing has happened to us with Mabie, Todd & Bard; the show cases got mixed in shipment.

XQ1062. How long has your present show case man been making show cases for you? A. Lately about two years.

XQ1063. That same concern had been making them for the Waterman Company for some years prior hadn't they? A. That I don't know. They used to make them for us eight or ten years ago and then we dropped them for some reason, I have

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forgotten what it was, and came back to them about two years ago. I might explain that these show cases come to us all packed ready for shipping out and we do not open them at our place; we simply put the customer's address on and ship them to them without ever opening them.

Recess.

The advertisement shown the witness of Lazarus Jewelry Store is offered in evidence and marked Plaintiff's Exhibit 141.

Objected to as incompetent, irrelevant and immaterial and not connected in any way with the defendant.

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XQ1064. The concern Lazarus Jewelry Company mentioned in the advertisement Plaintiff's Exhibit 141 is one of your customers and buys your pens does it not? A. There is a man named Lazarus; I presume that is the one that refers to.

XQ1065. How recently has he been buying pens? A. Not within a year or so. I don't think he has bought anything within the last year although he may possibly, a small bill.

Mr. Bacon: This is objected to as there is nothing to indicate when this advertisement was issued or where.

XQ1066. Where is Lazarus located? A. Somewhere in Georgia. I don't remember the town now.

XQ1067. 513 Cherry Street, Macon, Ga., is it not? A. I think it is Macon, yes.

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XQ1068. Did you not see a copy of this circular in the latter part of 1909? A. I think not. I think I saw the exhibit that you had. I don't think I saw the original. That is my recollection. I have seen it in the printed record or in the answer, or something.

XQ1069. Are you familiar with the advertisement of G. Cabrini, a copy of which I am showing you (showing witness a paper)? A. No, I am not. I think I saw one of his ads once but it was not anything like this one.

XQ1070. You have not seen a copy of any newspaper which contained an advertisement like the one I now show you? A.

4108 *Hobart W. Geyer*

No, I don't think so. I don't remember ever having seen that ad.

Mr. Watson: Counsel for plaintiff asks counsel for defendant if he will admit that advertisement similar to the one now shown in the copy were published by G. Cabrini of Milan, Italy, and other places in several European newspapers?

Mr. Bacon: No, we know nothing about it except what was in the printed case.

XQ1071. Did you ever allow or pay anything to Cabrini directly or indirectly for advertising? A. No, the only thing is
4109 we have furnished him with placards and circulars that we had printed here. These were printed in English and were our regular placards, the same as we issued to our dealers in this country.

XQ1072. If you find the name Waterman such a handicap as you state why do you use it?

Mr. Bacon: Objected to as immaterial and not founded upon fact.

A. We use it because it belongs to us.

XQ1073. It is a fact that you find it a great handicap to you inasmuch as your goods are so much superior to the goods of the L. E. Waterman Company; is that a fact? A. I never made any such statement.

4110 XQ1074. Is it a fact? A. That we have not proved out. I cannot tell you what the fact is in that respect.

XQ1075. Was Ailman & Son of Boston authorized to receive mail addressed to you at Boston? A. I never heard of it until Miss Dooly so testified yesterday but I understand that some seven or eight years ago while Mr. Waterman was with us he did write such an authorization and that the present company being ignorant of it has never countermanded it and do not know anything about it.

XQ1076. Is it true as she stated that she has on various occasions sent you letters which she has opened? A. I find out that some did come to our repair department. They never

reached me so I did not know anything about it. They came in with repairs.

XQ1077. Have you ever been to the Day factory at Seymour? A. I have not.

XQ1078. You know nothing about the factory except from hearsay do you? A. That is all.

XQ1079. You don't know anything about what they manufacture there except from hearsay? A. That is all.

XQ1080. Do you know whether A. A. Waterman is connected with a concern in Chicago which you were inquired about on your direct-examination? A. I do not know but I understand he is not connected at all with them now.

XQ1081. He has not been connected with them for some time; 4112
is that your understanding? A. I think close for two years.

XQ1082. If you wanted to differentiate your goods from those of the L. E. Waterman Company would it not be easy for you to do so by omitting the use of the name Waterman?

Objected to as immaterial.

A. We could do it in any quantity of ways.

XQ1038. As a matter of fact you admit there is a lot of confusion between the goods of the L. E. Waterman Company and those put out by A. A. Waterman & Co., do you not? A. Yes. The bulk of the confusion that we complain of is the fact that L. E. Waterman Company's representatives go around talking to the trade that there is no such concern as A. A. Waterman 4113
& Co. and that they have no right to sell our goods.

XQ1084. Do you know of any such representation being made? A. I know I have had from 150 to 250 reports from my salesmen and others.

XQ1085. When did you have those reports? A. They keep coming in continually. There is apparently no break in them.

XQ1086. None of those reports have been put in evidence have they? A. No, I think not.

XQ1087. The letter written to Hammell that you complained so much about, referred the party to the Modern Pen Company did it not, 22 Thames Street? A. I think so; I am not sure; I did not read that letter.

XQ1088. I show you a copy of the letter. A. There is nothing in the written letter about the Modern Pen Company. That letter states that there was no such firm as A. A. Waterman & Co., New York, and refers him to the Modern Pen Company.

XQ1089. And the Modern Pen Company is the concern which comes in contact with the outside public in selling all of the products of the A. A. Waterman & Co., is it not? A. Yes.

XQ1090. And if you had written to Mr. Hammell in answer to his letter you would have written to him on the Modern Pen Company paper wouldn't you? A. Yes, which distinctly states
4115 that we are the sole selling agents for A. A. Waterman & Co.

XQ1091. Notwithstanding the fact that you find the name Waterman is such a handicap you make it a point don't you to use the name Waterman on all of your advertising matter, on your letterheads and billheads and on your invoices and all your literature? A. Wherein is the fact stated that it is a handicap? I don't remember any such fact having been stated or any such claim made.

XQ1092. You don't think it is a handicap then? A. You are asking about the fact. I state that I have not heard any such fact mentioned.

XQ1093. You have never heard your counsel say that they were injured by the fact that the name was so similar to ours did you? A. No, he stated that we were injured by the con-
4116 fusion which was created.

XQ1094. That confusion came from the fact that the name and marking of the goods were so similar did it not? A. The marking is not similar. There is no similarity to the marking at all. The only similarity is that they both have the name Waterman.

XQ1095. What causes the confusion between the goods? A. The same that causes the confusion between the Bakers Cocoa and the three Fabers lead pencils; simply because there is a family name and more than one party of the same name making similar goods.

XQ1069. The question is repeated. A. There is no confusion between the goods.

4117

XQ1097. There is no confusion between the goods? A. None that I know of.

XQ1098. You testified that there was a lot of confusion between the goods? A. No, the confusion is in the people who have the goods.

XQ1099. I call your attention again to some of the letters that I called your attention to this morning; for instance the first one, the Bruhn Drug Company, dated November 15th, 1910. I ask you if there is not there shown a confusion between the goods of the L. E. Waterman Company and those put on the market by A. A. Waterman & Company? A. The Bruhn Drug Company was confused, the goods were not confused.

4118

XQ1100. Didn't they confuse between the goods? A. The goods have no intelligence; they cannot be confused.

XQ1101. Wasn't there confusion between the goods in the minds of the Bruhn Drug Company? A. The confusion was in the minds of the Bruhn Drug Company as to the maker of the goods.

XQ1102. And when you say there has been no confusion between the goods that is your explanation, is it? A. That is the explanation I made.

XQ1103. Is that your explanation for your statement that there is no confusion between the goods? A. I don't know any other that I could make.

4119

XQ1104. And the same explanation you make in regard to the letter of the Southern Optical Company of December 17, 1910? A. I don't know what caused that confusion I am sure.

XQ1105. And in your experience you have never found any confusion resulting from similarity in the marking of the goods? A. No, personally I have not run across anybody that has been mistaken in it at all.

XQ1106. You never have seen any confusion in the trade? A. Not personally, no.

XQ1107. Why are you able to say then that there has been considerable or "quite extended," as you put it, confusion in the trade or in the minds of the public? A. From the letters that we get and from the reports that I get.

4120

XQ1108. Does not that confusion come because of the similarity of the names of the concerns and the similarity in the marking of the goods? A. Some part of it is confusion and some of it carelessness. Within two weeks I got a letter from Aiken-Lambert Co., addressed to A. A. Waterman Co., signed by one of the officers, I think it was. They certainly ought to know the difference between A. A. Waterman & Co. and A. A. Waterman Co. I don't think that is confusion; I think it is carelessness. A lot of these others are carelessness in my opinion.

XQ1109. If there is so much confusion and you are injured so much as you and your counsel state why do you use the name

4121

Waterman? A. As I stated before, it belongs to us.

XQ1110. Is that your only reason? A. I don't know what the reasons of all of the directors in the Modern Pen Company are but that is one of my reasons. I am there to carry out the instructions of the President and the Board of Directors.

XQ1111. On what ground do you base your right to the name A. A. Waterman & Co.?

Objected to as immaterial.

A. On the grounds of the copartnership articles.

XQ1112. Between A. A. Waterman and the Chapmans? A. The copartnership articles; the common law and the decree of September 3, 1898.

4122

XQ1113. How do you claim any right under the decree of September 3, 1898, of Judge Kellogg? A. I am not a lawyer. I understand that it comes down to the right as privies or successors of the old concern.

XQ1114. You have no personal knowledge of the concern of Waterman & Gibson? A. No.

XQ1115. You never knew Mr. Gibson did you? A. I have no recollection of ever having met him at all.

XQ116. Do you know of any assignment that has ever been made by the firm of Waterman & Gibson of its trade name or good will? A. I do not know of any, no.

XQ1117. You never saw any did you? A. Not to my recollection; not to my knowledge.

4123

XQ1118. You never saw any transfer of the trade name and good will of the firm of A. A. Waterman & Co. of which you were a member to the present partnership of A. A. Waterman & Company did you? A. I don't remember having seen any.

XQ119. You never joined in making any such transfer did you? A. I don't think so. I don't remember though.

Mr. Watson: Counsel for complainant states that he has called upon the defendant to produce all of the correspondence of which he has produced a part, passing between Watson & Raymond, or Samuel S. Watson, or Walter B. Raymond, on the one side and Isaac E. Chapman or William L. Chapman on the other side concerning an alleged attempt to buy and sell the defendant's concern; that plaintiff's counsel has produced a copy of a letter dated April 18, 1907, by Watson & Raymond to Isaac E. Chapman and asks that the same be included among the correspondence.

4124

Mr. Bacon: Defendant's counsel says that he has never been able to find the receipt of any such letter or of any correspondence on that date but that another search will be made and if any is found it will be produced.

Mr. Watson: Plaintiff asks that a copy of the letter which he has produced be included among the correspondence as part of the Exhibit A-45.

4125

XQ1120. Did you pay any part of the expense of the advertisement Exhibit 24, which I show you (handing witness the paper)? A. No, sir.

XQ1121. Did you see the advertisement before it was issued? A. No.

XQ1122. Did you see it after it was issued? A. I don't remember ever having seen any of their ads.

XQ1123. Did you pay at any time directly or indirectly any part of the expense of Exhibit 23 or 24? A. No, sir, I never paid or allowed Warwick Bros. & Rutter anything for advertising. The only allowance we ever made them was an extra discount towards the cost of show cases which they preferred to

have made in Canada to save the duty rather than have our cases sent to them from here.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ1124. Let us clear up the mystery of the friction attendant upon the reorganization. I will ask you first who were the managers of the Frazer & Geyer Company in the early stages of its history? A. Mr. Frazer and myself.

RDQ1125. You were joint managers? A. Yes.

RDQ1126. During that time did they make money?

4127 Objected to as immaterial.

A. Yes.

RDQ1127. 25 or 30 per cent on their stock?

Same objection.

A. We made 10 per cent on the preferred stock and from 25 to 45 per cent on the common.

RDQ1128. You had substantially no acquaintance with the Chapmans when they brought in their money? A. No, sir.

RDQ1129. When was this pooling agreement entered into?

Mr. Watson: Objected to as there is no evidence anywhere that at any time there was a pooling agreement.

4128 A. You mean A. A. Waterman & Co. and the Frazer Geyer Company?

RDQ1130. I mean the pooling agreement between Frazer, I. E. Chapman and his friends?

Mr. Watson: Objected to as not proper re-direct examination.

A. I think it was in the summer of 1902, early in 1902. I have forgotten just the date.

Mr. Watson: I move to strike out the answer as immaterial and irrelevant to any issue in the case, and not proper re-direct examination.

4129

RDQ1131. Did this pooling agreement comprise Mr. Frazer, Mr. I. E. Chapman and all of his friends?

Same objections.

A. Yes.

RDQ1132. And that related to the common stock only?

Same objections.

A. Yes.

RDQ1133. And the common stock only had voting power?

Same objection.

A. That is right.

4130

RDQ1134. When this pooling agreement was entered into were you deposed as manager?

Mr. Watson: Objected to as immaterial and not proper re-direct examination.

A. Yes.

RDQ1135. Then who became the sole manager? A. Mr. Frazer.

RDQ1136. And from that time on did the company make or lose money?

Mr. Watson: Objected to as immaterial and not proper re-direct examination.

4131

A. Soon after that they began to lose money.

RDQ1137. Is it a fact that in the early part of the year 1905 the company had lost a great deal of money, and the management was in the hands of Mr. Frazer only and yet on account of this pooling agreement it could not be taken from his hands?

Same objections.

A. Yes.

RDQ1138. Is it also a fact that he owned the merest trifle of the stock and substantially all of his stock was hypothecated to Mr. Chapman for a loan?

Mr. Watson: Same objection and as immaterial and not proper re-direct examination.

A. Yes.

RDQ1139. And notwithstanding the fact that his management had been disastrous and that he owned substantially no stock, nevertheless, it was impossible, under the terms of the pooling agreement, to get rid of him?

Mr. Watson: Same objection, and as leading.

A. Yes.

RDQ1140. This being the condition of affairs, was there a
4133 stockholders meeting called in April?

Mr. Watson: Objected to as immaterial and not proper re-direct examination and as leading.

A. There was.

RDQ1141. Were you present at that meeting?

Same objections.

A. Yes.

RDQ1142. Was Mr. Frazer there? A. He was.

RDQ1143. Was there a reorganization committee appointed? A. Yes, there was.

RDQ1144. What was the principal reason for having a re-
4134 organization of the company?

Same objections.

A. They wanted to put it under a new management as they were not satisfied to continue under the old management with the losses that were being piled up.

RDQ1145. Did they also require new money in order to continue the business?

Mr. Watson: The same objection. I move to strike out all this line of testimony as immaterial and irrelevant and not proper re-direct examination; also that the questions are improper in form and leading.

4135

A. Yes.

RDQ1146. How much money did they need?

Same objections.

A. They figured that they needed, I think it was, $15,000 or $18,000.

RDQ1147. Could they assess the stock of the old company?

Same objections.

A. They could not.

RDQ1148. Was there any way to get new money except by a reorganization in the nature of an assessment?

4136

Same objections.

A. That is the only way that was figured out.

RDQ1149. Were Frazer, Geyer and Waterman all on this reorganization committee?

Same objections.

A. Yes.

RDQ1150. Is that the committee that issued the circular already in evidence marked Exhibit 41?

Mr. Watson: The same objections and plaintiff's counsel renews his motion to strike out all of this testimony as incompetent, irrelevant and immaterial.

4137

A. Yes.

RDQ1151. I will ask you if on or before May 10, 1905, substantially all of the stockholders had agreed to this reorganization scheme, including Frazer, Geyer and Waterman?

Mr. Watson: The same objections and the same motion is renewed.

A. My recollection is that most of them had agreed to it.

RDQ1152. Who was Mr. William E. Weaver? A. He was Mr. Waterman's lawyer.

RDQ1153. Was he also a stockholder in the Frazer and Geyer Company?

4138 Mr. Watson: The same objections and the same motion is renewed.

A. I think he had four shares of stock. He had a few shares and I think it was four.

RDQ1154. Was it given to him by Mr. Waterman? A. Given to him by Mr. Waterman for services rendered to Mr. Waterman.

RDQ1155. I ask you if on or about May 10th Mr. Weaver, the attorney for Mr. Waterman, sent out this circular to stockholders?

4139 Mr. Watson: The same objection and the motion is renewed.

A. I think I received one substantially like that.

RDQ1156. Do you know Mr. Weaver's signature? A. Yes.

RDQ1157. Is that his? A. That is his.

Mr. Bacon: I offer in evidence a letter of May 10, 1905, W. E. Weaver to A. S. Bacon, enclosing a circular, bearing the same date, W. E. Weaver to the stockholders of the Frazer & Geyer Company.

Letter and circular marked Exhibit A-62.

Mr. Watson: Objected to as irrelevant and immaterial.

4140 RDQ1158. After May 10, 1905, I will ask you whether or not Mr. A. A. Waterman, Mr. Frazer and Mr. Geyer all withdrew from the reorganization scheme suggested in Exhibit 41?

Mr. Watson: The same objection and motion renewed.

A. Yes, we did.

RDQ1159. Is it not a fact that on May 15th Mr. Frazer told Mr. I. E. Chapman that he would do everything in his power to break up the company and prevent anybody from getting anything?

Mr. Watson: The same objections and same motion renewed.

4141

A. Yes, just about that date.

RDQ1160. Did Mr. Frazer tell you the same thing?

Mr. Watson: Same objection and motion renewed.

A. He told me so about that time, yes.

RDQ1161. As an answer to Defendant's Exhibit A-62, were not the suits brought that have been testified here by you?

Mr. Watson: The same objections.

A. The foreclosure suit?

RDQ1162. The suit of Chapman against Frazer & Geyer Company; Chapman Estate against Frazer & Geyer Company, and Waterman & Co.; Frazer & Geyer Company against Waterman & Co.; and Chapman against Frazer? A. Yes.

4142

RDQ1163. All begun about May 17th?

Objected to as entirely irrelevant and immaterial.

A. Yes.

RDQ1164. These suits having all of them been begun on or about May 17th was not the letter Plaintiff's Exhibit 136 addressed by Alexander S. Bacon, attorney, to William G. Frazer and Hobart W. Geyer and A. A. Waterman, received by you (showing witness paper)?

Mr. Watson: Same objections, and motion renewed.

A. Yes.

4143

RDQ1165. Did not this letter contain an offer of Mr. I. E. Chapman to advance the assessment on all those shares of stock whose owners could not afford to pay?

Mr. Watson: The same objection and that the exhibit speaks for itself.

A. Yes.

RDQ1166. After sending out this letter after the beginning of these suits did Mr. Waterman reverse his attitude and come in under the new scheme of reorganization, which differs from the other only in making a so-called assessment of $20 instead of $15 per share.

4144

Mr. Watson: The same objection and motion renewed.

A. Yes.

RDQ1167. Thereafter you and Mr. Frazer brought actions for receivers in order to prevent this reorganization, did you not?

Mr. Watson: The same objection. The complaint is in evidence.

A. Yes, in order to prevent the reorganization and prevent our losing our positions as manager, or Mr. Frazer as manager
4145 and myself as treasurer.

RDQ1168. Then that was the principal object in beginning those suits, was it? A. That is my recollection.

RDQ1169. Then later when you found out that Mr. Frazer had been misrepresenting you to the Chapmans, you came over to the new reorganization, did you?

Mr. Watson: The same objections.

A. When I found out that he was going to wreck the thing, just so as to make the Chapmans lose all that they had in it, I went over to Mr. Chapman. I told Frazer that I would not stand with him for any such thing as that, and I went over and told Mr. Chapman that anything I could do to help I would do.

RDQ1170. You and your friends had about how much in it
4146 at that time? A. $30,000.

RDQ1171. Did you and your friends all come in and pay the $20 assessment, so-called? A. Yes.

RDQ1172. Were there any of the stockholders of the Frazer & Geyer Company that did not come into the reorganization and pay their $20 assessment? A. The only one I can remember was Mr. Frazer's wife and Mr. Wickes, a friend of Mr. Frazer, who each owned two or three shares. Mr. Frazer's assessment, I think, was paid by Mr. Chapman after the stock was bought at auction, or receiver's sale.

RDQ1173. Mr. Frazer's stock, or substantially all of it, was held by Mr. Chapman as collateral to a loan? A. Yes.

4147

RDQ1174. And was afterwards sold out? A. He paid the assessment to protect his loan.

RDQ1175. So that everybody came in excepting perhaps the trifling shares of Mrs. Frazer and Mr. Wickes?

Mr. Watson: The same objections and motion to strike out the testimony as immaterial and not proper re-direct examination.

RDQ1176. Did you pay your assessment without assistance? A. Yes, I paid it without assistance.

RDQ1177. Then Mr. Martling was made manager in the very beginning? A. I think on the start Mr. Chapman himself was there regularly for two or three months. After that 4148
Mr. Martling was made the manager.

RDQ1178. He was a new man, brought in from the outside? A. Mr. Martling was one of the salesmen for the old firm of A. A. Waterman & Co., who had been with them for several years.

RDQ1179. After Mr. Martling was disposed of you were made manager? A. Yes, when he left in October, 1908, I think it was.

RDQ1180. And since that time you have been very prosperous?

Mr. Watson: The same objections. The books of the company are the best evidence.

4149

A. Yes, doing well.

RDQ1181. Was Mr. A. A. Waterman a stockholder and director in the Modern Pen Company? A. Yes.

RDQ1182. Has there ever been a time when the trade name of A. A. Waterman & Co. was printed in any way like the name L. E. Waterman Company so as to simulate it even remotely? A. No.

RDQ1183. There never has been any claim of that character, has there? A. I never heard of any such claim.

RDQ1184. You said that 50 per cent of your product was end joint pens, is that so? A. About 50 per cent in number, not in value.

RDQ1185. And that 50 per cent in number comprises exclusively cheap pens, does it not? A. They retail from $1 up to $3.50, without the mountings.

RDQ1186. While the middle joint and self-filler retail for how much? A. From $2 to $6, the plain ones without any mounting.

RDQ1187. Does the Modern Pen Company ever sell goods on consignment? A. Once in a while a customer will want some goods for something special and just for a selection we would send them. That is only in special cases. It does not amount to much of anything.

4151 RDQ1188. Just one pen? A. Yes, where one of their customers will want a special pen they will write us to send them a few so that they will have them to select from in case they do not have just what they wanted in stock. Sometimes they return all, sometimes they keep all.

RDQ1189. To that same dealer you would not sell a dozen pens under that consignment? A. It is an out and out sale.

Mr. Watson: I move to strike out all this line of testimony as immaterial and irrelevant to any issue in the case.

RDQ1190. Have you information that L. E. Waterman Company sell their goods throughout Mexico on consignment?

4152 Mr. Watson: Objected to as hearsay, immaterial and irrelevant.

A. It has been so reported to me.

Mr. Watson: I move to strike out the answer as incompetent.

RDQ1191. By whom?

Mr. Watson: The same objection.

A. By my salesmen.

Mr. Watson: I move to strike out the answer as incompetent.

RDQ1192. Do you know of any other manufacturers of pens who test them by machinery? A. I do not; no, sir.

RDQ1193. Have you ever heard of any? A. No, sir; that is an original idea of my own that I had worked out.

RDQ1194. You had a machine made? A. I had a special machine made.

RDQ1195. Under your directions? A. Yes.

RDQ1196. Did you ever know of any other manufacturer of pen points that had a high pressure machine to make the gold homogeneous?

Mr. Watson: The same objection.

A. No, the only thing I have heard of has been in the line 4154
of a trip hammer, which, of course, does not press the pen scientifically the same as our hydraulic press.

Mr. Watson: I move to strike out all this line of testimony as immaterial and incompetent, and not proper re-direct examination.

RDQ1197. Have you made a computation of the agency reports on some of your customers, so as to know who are quoted as millionaires, and in high figures?

Mr. Watson: Objected to as immaterial and irrelevant, and not proper re-direct examination.

A. Yes, partially, that is all. Our ledger is kept by the card 4155
system and every month every account that has been closed out, that there is nothing owing, those cards are taken out and put into the other ledger; and I had the bookkeeper go through those open accounts early in the month, which was when they are at the smallest number, and he found that there were fourteen or fifteen of our customers who are rated at a million and upwards in Dun's agency book.

RDQ1198. And how many at half a million and upwards? A. Fifteen or twenty that were rated from $200,000 or $300,000 up. I have forgotten just what the figures were.

Mr. Watson: I move to strike out all this line of testimony as immaterial and irrelevant, and not proper redirect examination.

A. (Continued.) If we went through all of our accounts which are more or less active, more than this, we would probably find five or six times as many with those ratings.

RDQ1199. When the original firm of A. A. Waterman & Co. was organized in 1901, did Mr. Waterman transfer his patents to that firm? A. Yes.

RDQ1200. Do you remember how early in this litigation you told me, or the Chapmans, anything about this sale of Royal
4157 Ideal Pen Holders to Mr. Saadi?

Mr. Watson: Objected to as immaterial and irrelevant to any issue in this case.

RDQ1201. Was it long after the Saadi litigation had begun and when the testimony was taken? A. It was some two to four months after that, I think.

RDQ1202. Why was it that you did not mention this before?

Mr. Watson: The same objection.

A. When the suit was begun against Saadi I did not have any interest in it, I had no interest in the imprint "Royal Ideal" at all; I never paid any attention to it until the injunction was
4158 granted enjoining him from selling pens imprinted A. A. Waterman & Co.

RDQ1203. And it was such a trifling matter that you did not give it thought, is that right?

Mr. Watson: The same objection, and as leading.

A. Yes, I did not pay any attention to it whatever.

Mr. Watson: The same motion to strike out.

RDQ1204. How many completed pens do you make a day on an average?

Mr. Watson: Objected to as immaterial and irrelevant.

4159

A. We will average in ordinary times between 500 and 600. In the fall, in the rush season it is considerably larger than that.

RDQ1205. How many men does it take to assemble the parts for this number?

Mr. Watson: The same objection.

A. We have one man at it continually, and another one helping out who works part of the time, perhaps not one-half.

RDQ1206. You stated that all of your employees in your factory are expert workmen; but do those who assemble the pens get as big wages as those in many other departments?

Mr. Watson: Objected to as immaterial and irrelev- 4160
ant to any issue in this case.

A. No, sir; they do not. One of them gets good wages, the other one does not get as much. He is more in the line of an assistant.

RDQ1207. About how much does the man get who is paid the most?

Mr. Watson: The same objection.

A. $20 or $22; the other gets $14.

RDQ1208. While many of your experts get more than that? A. Yes.

RDQ1209. Is the pen that retails at $1 the cheapest pen that is made that is marked A. A. Waterman & Co.? A. Yes. 4161

RDQ1210. Do you have any makes that sell for less than that? A. No, we do not make anything to list less than $1, but we make a cheaper pen that we list at $1 that is made with a cheap holder and a cheaper pen in it, a smaller pen, lighter pen and we give a larger discount.

RDQ1211. What is that pen called? A. It is stamped with the imprint "Federal." A good many have the dealers' imprint on them. It is what we call our imprint line.

RDQ1212. Do you make any pens with manufactured iridium? A. Yes, the cheap pens.

4162

RDQ1213. How cheap are those? A. $1 up. All of our $1 list pens have manufactured iridium. Anything above that, the higher price, has the native iridium.

RDQ1214. Have you at all times, both before this litigation begun and after, acknowledged the right of the L. E. Waterman Company to the trade-mark "Ideal?" A. Yes.

RDQ1215. And when this small order from Saadi came in for cheap pens did it occur to you that you were violating the trade-mark?

Mr. Watson: The same objections and as immaterial, incompetent and irrelevant.

4163

A. No, he showed me he had what I supposed and I still understand, was a trade-mark, Royal Ideal; I presumed he had as much right to Royal Ideal as the L. E. Waterman Company had to Ideal.

Mr. Watson: I move to strike out the answer and counsel for plaintiff calls for the production of the exhibits or copies of the label used by Saadi and introduced during the taking of his testimony, that this witness may be advised as to what Mr. Saadi really had.

Mr. Bacon: Defendant's counsel states that the original exhibits were left with Mr. Saadi by consent and copies will be produced as soon as they can be had from

4164

Washington.

RDQ1216. You spoke of sending circulars and signs to a customer in Italy. I ask you if these are the signs that you sent to him with this circular (handing witness sign and papers)? A. Yes, those are samples of them.

Mr. Bacon: The two placards and the circular are offered in evidence and marked Exhibit A-63.

Mr. Watson: Objected to as immaterial and irrelevant.

RDQ1217. Are these circulated extensively through the United States and Europe?

4165

Mr. Watson: Objected to as leading and immaterial.

A. Yes, sir; we send them to most all of our customers.

RDQ1218. Have you in any single instance ever issued an advertisement that merely referred to your product as Waterman pens? A. No, sir.

RDQ1219. Did you ever knowingly pay for the advertisement of any customer that so referred to that pen as Waterman pen only?

Mr. Watson: Objected to as the testimony of this witness is to the contrary.

A. No.

4166

RDQ1220. Your advertisements are mostly in the trade journals, are they? A. No, not so much in the trade journals; a number of the trade journals have preferred not to take our ad until this litigation is finished.

RDQ1221. Your advertisements are in all sorts of papers and periodicals? A. Yes.

RDQ1222. I show you the Cornell Widow and an advertisement therein, and ask if that is a very fair representation of all of your advertisements (showing witness paper)? A. Yes.

The advertisement referred to in the Cornell Widow is offered in evidence and marked Exhibit A-64.

Mr. Watson: The same objections.

4167

RDQ1223. I call your attention to a quotation contained in a placard and circular as follows: "If it isn't an A. A. it isn't a Modern," and I ask you if that quotation is found in substantially all of your advertisements? A. Yes.

RDQ1224. Have you ever knowingly sold either directly or indirectly, through any salesman any A. A. Waterman & Co. goods simply as Waterman? A. No, sir.

Mr. Watson: Objected to as incompetent and it is impossible for this witness to know.

A. No, sir.

4168

RDQ1225. Have you in each instance given explicit instructions to salesmen as to how your goods should be sold, and if so, state the tenor of such instructions? A. The instructions have been for them to sell them as the goods of A. A. Waterman & Co., that we are making our self-fillers and middle-joint pens of a different class and so much superior to the Waterman Ideal pens, that we do not want them confounded at all; and our end-joint line is practically the same as the Ideal, as far as quality is concerned, but the price is about one-half the price of the Ideal.

RDQ1226. Then the middle-joint and the self-filler sell for about the same as the Ideal? A. Yes.

4169 RDQ1227. And the end-joints which are just as good as the Ideal sell for about one-half? A. Yes.

RE-CROSS EXAMINATION by Mr. Raymond:

RXQ1228. What percentage of the stock of the Frazer & Geyer Company did the Chapmans control prior to 1905? A. How much prior do you mean?

RXQ1229. From 1903 to 1905? A. I have not that information with me now. I would have to look it up.

RXQ1230. Is it not a fact that they controlled somewhat less than a control of the stock in 1904? A. No, they and their friends had control as far as the actual investment was concern-

4170 ed, but the control was in the common stock, and Mr. Frazer and Mr. Chapman had made what the Colonel calls a pooling arrangement whereby it was tied up so that Mr. Frazer practically controlled the company in that way.

RXQ1231. And Mr. Chapman could not have his own way in the management of the company at that time? A. No, he could not.

RXQ1232. When did Mr. Chapman first begin to express a desire to have his own way in the management of the company? A. I think it was late in 1903 or in 1904 when the statement showed that we were losing money.

RXQ1233. Was it not in 1903? A. I say it was either late in 1903 or early in 1904.

4171

RXQ1234. Don't you know that Mr. Chapman entered into negotiations with Mr. A. A. Waterman in 1902 and 1903 with a view of securing a better control of the name A. A. Waterman? A. I never heard of it.

RXQ1235. At whose instigation were these various modifications of the contract in 1905? A. I got it from Mr. Frazer that it was through Mr. Chapman, but I did not have anything personally to do with them. Mr. Chapman seemed to be prejudiced against me, and I have found out since that he was prejudiced through statements that Mr. Frazer had given him.

RXQ1236. Did you ever have any conversation with Mr. Chapman? A. Only what came up at the directors' meetings.

RXQ1237. You never had any conversation with him about making and signing these various contracts? A. No, not until the last one that was made I think before the reorganization in 1905.

4172

RXQ1238. At whose instigation was this so-called partnership contract extended from ten years to forty years? A. I got all my information from Mr. Frazer.

RXQ1239. Don't you know that Mr. Chapman insisted upon that? A. So Mr. Frazer told me. The first modification was that Mr. Chapman thought that the profits of the copartnership should go to the stockholders.

RXQ1240. And did not Mr. Chapman insist that Mr. Waterman be more closely connected with the company than he was prior to that time? A. I don't know; he may have; I don't know.

4173

RXQ1241. Didn't you take any part in those negotiations which led up to an assignment of all the profits of the A. A. Waterman & Co. by Mr. Waterman to the Frazer & Geyer Company? A. No.

RXQ1242. Didn't you know anything about it? A. I knew they were working out some plan, but I did not know anything about the details of it until the papers were brought to me for signature.

RXQ1243. Did you know of the relation of Mr. Waterman and the Chapmans at that time? A. No, I did not know they had any special relations.

RXQ1244. In 1905 did not Mr. Waterman take a stand with the Chapmans in this reorganization matter? A. At the time of the reorganization he did not at first and then he went over. That is what troubled Mr. Frazer a whole lot just before the break came. After the break and Mr. Frazer had said that Mr. Waterman would stick to us, then after two or three days he said he was afraid Mr. Waterman was going with the Chapmans.

RXQ1245. Don't you know that all that time Mr. Waterman was in negotiation with the Chapmans? A. No, I do not.

RXQ1246. Don't you know that on May 27th Mr. Waterman made a private contract with Mr. Chapman? A. Yes,
4175 that was after the suits were brought.

RXQ1247. You did not know anything about it at that time? A. No.

RXQ1248. And you did not even suspect it? A. No, I got all my information from Mr. Frazer.

RXQ1249. When did you first hear anything about the foreclosure of the chattel mortgage? A. The latter part of May, 1905.

RXQ1250. Do you remember when that chattel mortgage was first put on the property? A. No, I think it was in 1904, but I am not positive.

RXQ1251. Was there not anything said at that time about Mr. Chapman's putting the money into the stock of the com-
4176 pany? A. I don't know. It may have been.

RXQ1252. Did Mr. Chapman refuse to put the money into the stock of the company? A. He did not put it in, so if he was asked he must have refused.

RXQ1253. Did he not insist on its being put in the form of a mortgage on the assets of the company? A. I would not be surprised, as we gave them a mortgage and we would not have done so voluntarily.

Adjourned to Wednesday, April 19, 1911, at 10:30 A. M.

4177

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.

4178

Met pursuant to adjournment at the office of Alexander S. Bacon, 37 Liberty Street, New York, April 19, 1911, at 10:30 A. M.

Appearances:

Samuel S. Watson and Walter B. Raymond, for Complainant.
Alexander S. Bacon, for Defendant.

HOBART W. GEYER, resumed the stand.

RE-CROSS EXAMINATION continued by Mr. Raymond:

4179

RXQ1254. Do you know how much money Mr. I. E. Chapman and W. L. Chapman and Alfred N. Chapman and Harriet Buchanan actually put in the stock of the Frazer & Geyer Company?

Mr. Bacon: Objected to as not re-cross examination; all that has been gone into on the cross-examination.

A. Isaac E. Chapman had $27,000 in the stock; William L. Chapman had $4,900; I don't know just how much the rest of the family had, but it was in the neighborhood of $15,000 or $20,000, I think—the family and the estate.

RXQ1255. Was that in the stock of the company? A. In the stock of the company, yes.

By Mr. Bacon:

RDQ1256. That does not include the friends; that is only the relatives? A. Just the immediate family.

By Mr. Raymond:

RXQ1257. Can you tell me when this money was put in? A. No, I have not the date with me.

RXQ1258. Was it prior to 1904? A. Yes, there was no stock issued after. There were ten shares of stock issued after
4181 1903 and 1904. I think that ten shares was issued to a man named Hoffman; and the Chapmans did not buy any stock after 1903.

RXQ1259. After they put this amount in the stock was there any stock remaining in the treasury of the company? A. There was.

RXQ1260. How much? A. About $175,000.

RXQ1261. Still remaining in the treasury? A. Yes, that had never been issued.

RXQ1262. After the Chapmans had put in this sum of money, how did they advance money after that? A. I think they advanced it on collateral notes. My recollection now is that they had our accounts receivable assigned to them covering their loan
4182 and afterwards that was changed over into a chattel mortgage.

RXQ1263. Wasn't there any instrument issued to protect these sums of money which they had invested in the stock? A. I never heard of any; I don't remember any.

RXQ1264. You don't know why it was done in that way instead of their buying treasury stock of the company? A. No, I presume they had put all the money into this stock that they cared to.

RXQ1265. When you come down to 1905, will you state what occurred with reference to Mr. Frazer and the Chapmans? A. You mean now in May or June, or earlier?

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RXQ1266. Take it from January, 1905? A. Along the first part of 1905 there was some discussion as to a new agreement, or a change of the agreement that we had. I remember that.

RXQ1267. What agreement? A. The agreement between Arthur A. Waterman, I think it was, and Frazer & Geyer Company. There were three or four agreements there. I have forgotten now just which it was, but I know at that time I had one or two evenings that I was over at Mr. Chapman's house, with the others, discussing the agreement that was to be changed, and that was the first one where I had had anything to do with it, and I have forgotten just what changes were made. The agreements are offered in evidence. They show for themselves.

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RXQ1268. Was not Mr. Waterman at that time complaining that he did not have sufficient capital to expand the business as he desired? A. I don't remember about that.

RXQ1269. What was Mr. Waterman's value to this concern?

Mr. Bacon: Objected to, as it is impossible for this witness to state a man's value.

RXQ1270. What was he good for? A. He had the decision as to styles and prices, and discounts on the fountain pens and he acted as the principal salesman, I should think you might call him. That was the duty that he had all the time that he was with us, the parts that he had charge of.

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RXQ1271. What did Mr. Waterman actually do with reference to supervising the styles? A. He passed on them, as I understand it; he passed on them entirely.

RXQ1272. Did you ever see him when you were there, passing on styles? A. Not personally, no. I was not in the office much of the time when Mr. Waterman was there.

RXQ1273. Did you ever hear of his passing on any styles? A. Yes.

RXQ1274. Rejecting any styles? A. They were being changed continually. It was done under his supervision.

RXQ1275. Did you ever change the place where you bought your rubber, from the time you started in business until the

present time? A. Yes, we used to buy from the Goodyear Vulcanite Co. part of our stock. After Mr. Waterman came with us we bought from the American Hard Rubber Company.

RXQ1276. You always bought the same quality, didn't you? A. I don't know whether there was any difference in the quality or not. It is so many years since we have had Goodyear rubber that I don't remember just what that was.

RXQ1277. I mean you always bought the same quality from the American Hard Rubber Company? A. Yes, we always bought the Akron rubber.

RXQ1278. Do you claim that you ever changed the style of your pens from the time you made them in 1899 and 1901?
4187 A. The style was continually changing. When we first made the self-filler we twisted it with our fingers. Under the Stone patent it is twisted with a button on the end of the holder.

RXQ1279. Mr. Waterman was not the inventor of that pen, was he? A. I think the invention was gotten up on his idea. That is my understanding of it.

RXQ1280. Was not Mr. Stone the inventor of that? The patent was taken out in his name? A. Mr. Stone was the superintendent or foreman that worked under Mr. Waterman. He was Mr. Waterman's direct representative.

RXQ1281. Was not the patent taken out in Mr. Stone's name? A. Yes.

RXQ1282. Did not Mr. Stone work on that? A. As I stated,
4188 it was Mr. Stone that elucidated Mr. Waterman's idea; that is my recollection.

RXQ1283. Did not Mr. Stone make affidavit that he was the inventor of this pen? A. I presume he did. He is the one that took out the patent.

RXQ1284. You would not know personally anything about what took place at that time? A. That is what I stated. That was all my understanding. I met Mr. Waterman very seldom during the day, and I did not know just what he was doing.

RXQ1285. What was Mr. Waterman's attitude in January, 1905? A. My recollection is that he and Mr. Frazer were working together all the time.

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RXQ1286. Did Mr. Waterman express a desire to go in business for himself? A. I think there was something of that sort. I think that was the reason of the change of the contract or agreement.

RXQ1287. Do you remember what he stated as the reason he wanted to go in business for himself? A. No, I do not. Mr. Waterman and I had very little to do with each other, because I was not around when he was, or he was not around when I was, rather.

RXQ1288. Was Mr. Waterman present at these discussions that you had with Mr. Chapman over at his house? A. Yes, there were two or three evenings that we were there.

RXQ1289. Did Mr. Chapman say that he was willing that Mr. 4190
Waterman should go into business for himself in the western territory? A. That I don't remember.

RXQ1290. That was finally embodied in the contract? A. I don't know. The contract shows. I don't remember the discussion. It was very voluminous. I have forgotten just what it was.

RXQ1291. Didn't you ever have any discussion with Mr. Chapman alone after this? A. No.

RXQ1292. Do you know whether Mr. Frazer did? A. Mr. Frazer said he did, but I don't know anything about it.

RXQ1293. Was there any unfriendliness between Mr. Chapman and Mr. Frazer at that time? A. I don't know; I don't know just when that started. I think the unfriendliness started 4191
after the annual meeting early in April or at the annual meeting.

RXQ1294. Did not Mr. Chapman say that he did not care whether Mr. Waterman stayed with the concern or not? A. Not to my knowledge.

RXQ1295. Didn't he always take that attitude? A. Not to my knowledge. I never heard anything of it.

RXQ1296. Do you remember those contracts in June, 1905, did you have anything to do with those? A. Which contracts are those?

RXQ1297. The partnership agreement? A. You mean between Chapman and Waterman?

RXQ1298. Yes. A. No, I didn't know anything about them.

RXQ1299. When did you first hear any discussion of a partnership between the Chapmans and Waterman? A. It must have been the latter part of June, I think, 1905.

RXQ1300. After the contracts were actually made? A. I don't remember just those dates now. There were so many changes at that time it would be impossible to tell which came first, or what happened at any certain date.

RXQ1301. Do you remember Mr. Waterman ever at any time expressing himself to you as being dissatisfied with the arrangement he was working under? A. Mr. Waterman had no conversation with me to amount to anything. I never had any-
4193 thing to do with him.

RXQ1302. Was the interest always paid on these chattel mortgages? A. It was.

RXQ1303. Was the stock paying any dividend? A. There was no dividend paid after, I think February, 1903, a dividend was paid on the first preferred stock, is my recollection.

RXQ1304. A cash dividend? A. A cash dividend.

RXQ1305. So the Chapmans were getting their interest on their money all during this time? A. On their mortgages, yes.

RXQ1306. What occurred with reference to the reduction of Mr. Frazer's salary? A. As I recollect it, at the first meeting of the directors after the meeting of May, 1905, his salary was reduced to $40, and his contingent salary raised. Whether he
4194 accepted it or refused to accept it, I have forgotten. I know he was considerably upset about it.

RXQ1307. From whom was he to receive this salary? A. From the Frazer & Geyer Company.

RXQ1308. Did he receive any salary from A. A. Waterman & Co.? A. No, he received nothing but the 10 per cent on the investment of $500.

RXQ1308a. While you were a partner in A. A. Waterman & Co. did not Mr. Chapman assume to act and dictate the policy of A. A. Waterman & Co.? A. No, not to my knowledge; I never knew that he did. It was left entirely with Mr. Frazer.

RXQ1308b. Was he not with Mr. Frazer a great part of the time? A. Not to my knowledge.

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RXQ1308c. Didn't you see Mr. Chapman down there? A. No.

RXQ1308d. Didn't you go to his office and confer with him? A. Very seldom. No, I don't know that I ever went to his office.

RXQ1308e. Didn't you make daily reports to Mr. Chapman of what was doing? A. No, I have no recollection of any such thing.

RXQ1308f. Don't you know that Mr. Frazer was in constant touch with Mr. Chapman all during these times? A. I don't know it. I understood that he was close with Mr. Chapman from the time Mr. Chapman first came in there. He told me that he and Mr. Chapman were conferring together.

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RXQ1309. Did A. A. Waterman & Co. take any action independent of the Frazer & Geyer Company? A. A. A. Waterman & Co. attended to the selling of the goods entirely, practically running the business.

RXQ1310. They had no business independent of what they turned over to the Frazer & Geyer Company, did they? A. I don't quite catch what you mean.

RXQ1311. They turned over all their profits to the Frazer & Geyer Company, did they? A. All except the 10 per cent that came to Mr. Frazer and myself, and I think Mr. Waterman assigned all of his to the Frazer & Geyer Company.

RXQ1312. And A. A. Waterman & Co. did not do any business except with the goods that they got from the Frazer & Geyer Company? A. Yes, they bought thousands of dollars of stock outside; they bought pearl goods and boxes and advertising matter and paid all their bills for advertising.

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RXQ1313. Where did they get the money to pay them? A. From the Frazer & Geyer Company.

RXQ1314. Do you remember that they bought goods on terms, to be paid only after they were sold? A. No, we paid all our creditors and what surplus we had left over we would pay to the Frazer & Geyer Company.

RXQ1315. You would use the accumulated profits of the A. A. Waterman & Co. to buy these goods? A. No, we used

whatever we had. We used the credit of Frazer & Geyer Company. They were our principal creditors, and instead of paying them we paid the other people first. They borrowed money from the bank as well. They did a general business the same as any concern.

RXQ1316. Who had to do with the policy as to whether the A. A. Waterman & Co. were to buy goods in this way, or not? A. Mr. Frazer, I think, did practically all the buying.

RXQ1317. Was it not all done under the authority of the resolutions from the Frazer & Geyer Company? A. No.

RXQ1318. Was not that done by the direct authorization of Mr. Chapman as president of the Frazer & Geyer Company? A.
4199 No, A. A. Waterman & Co. never consulted with Mr. Chapman; that is I never did and I don't know that Mr. Frazer ever did, as to how we should run the business of A. A. Waterman & Co. The only thing that was discussed between them was the prices that A. A. Waterman & Co. should pay the Frazer & Geyer Co. for the goods.

RXQ1319. That price was simply a matter of bookkeeping, was it not? A. No more so than anything else.

RXQ1320. Was not the price computed on the basis that he was going to turn all the profits over to Frazer & Geyer Company? A. Yes, practically.

RXQ1321. As a matter of bookkeeping? A. It did not make much difference whether it went that way, or whether we turned
4200 it over later on as per our agreement, when we made the assignment or agreement, or whatever it was.

XQ1323. Take it at the end of 1903, was there not a deficit; did not A. A. Waterman & Co. owe Frazer & Geyer Company a considerable sum? A. Yes, they always owed Frazer & Geyer Company.

RXQ1323. What was done at that time to adjust this difference? A. I have forgotten now.

RXQ1324. Wasn't there a bookkeeping entry balancing the account? A. I think there was.

RXQ1325. In 1905 the same thing happened? A. I don't know whether there was any entry made in 1905 or at the end

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of 1904. My recollection is it was at the end of 1904, but I am not sure.

RXQ1326. In 1905 the same state of affairs occurred didn't it a book deficit? A. That is what I said; when I said 1904, I meant December 31, 1904.

RXQ1327. In 1905, was there not a deficit also? A. That is when there was a big deficit that showed up.

RXQ1328. Was not the matter of making a bookkeeping entry to offset this deficit taken up? A. No, I think that was done by Mr. Frazer and myself and my recollection is that when Mr. Chapman—when it was brought to his attention by the accountant, that he did not sanction it at all; he said that was not the proper thing to do.

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XQ1329. He made that an excuse to force out Mr. Frazer, didn't he? A. I think the only excuse he had for forcing out Mr. Frazer was the fact that Mr. Frazer was losing so much money.

RXQ1330. As a matter of fact was not this deficit in 1905, a pure matter of bookkeeping? A. Yes.

RXQ1331. Frazer & Geyer Co. had charged A. A. Waterman & Co. too much for the goods? A. I think not. It was a case that the money had been lost in the business.

RXQ1332. In 1904, it was a pure matter of bookkeeping, was it not? A. The same thing applies. It was a case that money had been lost. I don't remember any entry having been made except one. I have not looked it up so I don't remember.

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RXQ1333. How was this money lost? A. Lost in the fact that the expenses of running the business were larger than the profits.

RXQ1334. What expenses? A. Salesmen, advertising, general expenses of all kinds.

RXQ1335. How about cases? A. Show cases?

RXQ1336. Show cases? A. What about them. What do you mean?

RXQ1337. Didn't you spend a large amount of money in show cases? A. Surely.

RXQ1338. Was not all that money charged up against A. A. Waterman & Co.? A. I think so. I think A. A. Waterman & Co. bought those show cases.

RXQ1339. Was not Mr. Waterman complaining all the time that he was expanding the business and the show cases were needed for the new business that he was getting? A. I don't know. As I told you before I did not have much to do with Waterman.

RXQ1340. Was not that matter discussed with A. A. Waterman & Co.? A. I don't recall it. I know Mr. Frazer was doing the buying and he bought a good many thousand dollars worth of show cases.

4205 RXQ1341. Especially at that time? A. All the time Mr. Waterman was connected with us I presume we must have paid $10,000 or $11,000 for show cases.

RXQ1342. And they were bought in that very time, 1904, 1905? A. They bought show cases from the start; from the time we first went with Mr. Waterman. The old firm of William G. Frazer & Co. furnished show cases.

RXQ1343. What was the year you did the largest business, in A. A. Waterman & Co.? A. I don't know, I think it was 1903.

RXQ1344. Was it not 1904? A. I don't remember.

RXQ1345. Did they not do $160,000 worth in 1904? A. I don't remember. I have not those figures with me. I think the largest year's business we had was about $146,000; that is my

4206 recollection.

RXQ1346. That was the largest amount of business they ever did in a year? A. That the old concern ever did, yes. That is my recollection.

RXQ1347. What did Mr. Chapman know about the pen business; was he ever down in the factory? A. I did not meet Mr. Chapman. I don't know. I heard that he was at the factory sometimes, but I did not meet him there.

RXQ1348. Do you know whether Mr. Chapman was a practical pen man? A. I think he was not.

RXQ1349. Was there anybody in the family who had invested in this that was a practical pen expert? A. I don't know any of them that are.

RXQ1350. Were any of them ever in the factory directing the operations? A. I don't think so, not to my knowledge.

RXQ1351. What was the function of the Chapmans in this concern? A. I would call them financial backers.

RXQ1352. They simply backed the concern financially when they got into difficulties? A. That is what they did. Whether they did it "simply" or any other way, it was quite an item to furnish the amount of capital that they did.

RXQ1353. They did not know, or have anything to do with the pen business at all? A. Except as directors of the Frazer & Geyer Company.

RXQ1354. Simply financial management? A. They discussed the management. Practically all they did was to attend to the financial part of it.

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RXQ1355. The same condition applies today, does it not? A. It does.

RXQ1356. None of the Chapmans are practical pen experts? A. I don't so consider them.

RXQ1357. And even to this day they never have anything to do in directing the operations of the factory? A. No, they do not now at all.

RXQ1358. In this so-called copartnership of A. A. Waterman & Co. there is nobody who is a practical pen man today, is there? A. I don't know of any so-called copartnership.

RXQ1359. In A. A. Waterman & Co.? A. That is a copartnership. Mr. I. E. Chapman and Mr. William L. Chapman are members of that firm.

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RXQ1360. And there is no practical pen man connected with the concern? A. I don't consider them practical pen men. They are practical business men, but not practical pen men.

RXQ1361. They have nothing to do with the factory? A. Except that they have me look out for it and Mr. Van Valer as superintendent.

RXQ1362. They themselves have nothing to do with it? A. They give no personal attention to it themselves.

RXQ1363. Was Mr. Waterman a practical pen man? A. He professed to be.

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RXQ1364. Did you so consider him?

Objected to as immaterial.

A. I don't know what his knowledge in regard to pens is, I am sure.

RXQ1365. Why did you take him in partnership with you in the beginning? A. We had been selling the firm of A. A. Waterman & Co. of Boston a part of their product of gold pens, and when we heard that he was going to leave Boston or break his connection with his firm there we thought we could get all his business by having him come with us, and we could also increase that business largely by using our methods of doing

4211 business.

RXQ1366. You did not take him in partnership because of any knowledge that he had of the pen business? A. No, it was simply to get the business that they had, that the old firm of A. A. Waterman & Co. had in Boston.

RXQ1367. Then this provision that he should have the right to dictate as to the size and quality of pens was simply done as a compliment? A. That was an agreement between him and Mr. Frazer. I do not know anything about it. The co-partnership articles were drawn ready for signature.

RXQ1368. It was purely a complimentary agreement? A. I don't know; Mr. Frazer attended to that.

XQ1369. Didn't you take that up later in other copartner-

4212 ships? Did not that provision always appear in the copartnership? A. I think it did, but I don't think it was ever discussed at all.

RXQ1370. Was not that agreement put in there simply that Mr. Waterman should appear on paper to have some active function in the partnership? A. No, I think not. The firm would have been many thousands of dollars better off if that provision has not been in there.

RXQ1371. Then Mr. Waterman was not a success as a pen man? A. I don't know whether it was on account of that, or on account of the fact that he and Mr. Frazer did not quite agree on those details. That was something that they attended to entirely.

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RXQ1372. During the year from 1905 to 1906, Mr. Waterman was still connected with you, was he not? A. Yes, he was a member of the firm of A. A. Waterman & Co. and was a director and officer of the Modern Pen Company.

RXQ1373. Mr. Frazer was not connected with you? A. Not after the latter part of June, 1905.

RXQ1374. Did the business in 1905 and 1906 show any marked increase? A. I don't remember. I think it was increased, but I have not those figures.

RXQ1375. There was nothing so great that you would remember it? A. It is impossible to remember what the sales are for a series of years.

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RXQ1376. Were there any dividends paid in 1905 and 1906? A. There have been no dividends paid by the Modern Pen Company since its organization.

RXQ1377. Is it a fact that the Chapmans were obliged to loan more money to the concern in 1905 and 1906? A. They did later on; whether it was 1906, I do not know.

RXQ1378. Do you remember a note that was made to the Criterion Securities Company in 1905? A. No, I think there was a note made to Mr. Chapman that was endorsed over to the Criterion Securities Company.

RXQ1379. So the concern was not a revolutionizing success after Mr. Frazer got out of the concern? A. It is a success now.

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RXQ1380. But in 1905 and 1906? A. No, not immediately.

RXQ1381. How about after Mr. Waterman got out in 1906? A. After he got out the firm suffered from the fact that one-half of its territory had been given over to Mr. Waterman, which meant quite a reduction in the business.

RXQ1382. Didn't you make more money? A. I don't remember. I think we lost money right along for a while, for the first year after Mr. Waterman went west.

RXQ1383. Did not the business that you did show more profit? A. The business has not shown much profit until after Mr. Martling left and I was put in charge. Since then it has shown a good profit.

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RXQ1384. Mr. Waterman's regime, then, did not show any very great profit, did it? A. The first year after the reorganization there was a very good showing according to my recollection.

RXQ1385. What year was that? A. That was from July, 1905, to July, 1906.

RXQ1386. What did Mr. Waterman do about supervising the styles during that time? A. I don't think there were any changes in styles that year. I don't remember.

RXQ1387. What did Mr. Waterman do with reference to the company during that year? A. I think Mr. Waterman was on the road most all that time, selling goods.

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RXQ1388. That is all that he did? A. I think that is about all that he did; that is my recollection.

RXQ1389. In what part of the country was he selling goods? A. I think through the western part; I am not positive.

RXQ1390. That is what he calls his own territory, is it not? A. I don't know what he calls it.

RXQ1391. That was the territory that afterwards became his when he started in business for himself, was it not? A. I think it was practically that same territory. I am not sure of that either.

RXQ1392. How many salesmen did you have at the time Mr. Waterman was on the road?

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Objected to as immaterial.

A. I think we had six or eight; I have forgotten now. It may have been more.

RXQ1393. Mr. Waterman was the only salesman who had unlimited territory, was he not? A. He did not have an unlimited territory. I think the territory was divided up among the different salesmen and each one had his own territory.

RXQ1394. And Mr. Waterman had this western territory? A. I don't know; I think so; I am not positive; I don't remember just what he did have.

RXQ1395. Do you know what proportion of the business was sold by Mr. Waterman alone? A. I do not.

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RXQ1396. Was it a large proportion of the business? A. I think he sold about as much as any of the other salesmen. I don't remember just what his sales were.

RXQ1397. Just about the same as the other salesmen? A. I don't remember whether he sold much more or not.

RXQ1398. It was about just the same? A. I don't remember.

RXQ1399. Did he sell as much as all the other salesmen put together? A. I am quite sure that he did not.

RXQ1400. Did he sell as much as any three salesmen? A. I don't know. I don't think so. He may have.

RXQ1401. It was just about the same as the other salesmen? A. I don't know just what his sales were.

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RXQ1402. Then Mr. Waterman was not a great asset to the company as a salesman, was he? A. I consider that he was as good an asset or a better asset than any of the other salesmen that we had.

RXQ1403. But he was not a marvelous salesman that would sell more than half a dozen other men? A. He would sell more than some half a dozen men.

RXQ1404. I mean more than half a dozen of your other men? A. Not more than any half dozen men that we had. It would be an extraordinary salesman indeed that would do that.

RXQ1405. Whether he was a fair average salesman? A. I think Mr. Waterman had some salesmen working under him and their sales were kept separate from his, although they belonged to him; that is my recollection. I may be mistaken about that. I have not those figures at all. I have no way of telling without looking it up, to see what he did.

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RXQ1406. When did these accountants report on the books of the Frazer & Geyer Company? A. I think they reported semi-annually. That is my recollection.

RXQ1407. On January 1st and July 1st? A. I am not sure whether our books closed the first of January or the first of February or the first of March. The dates were changed in different years. I have forgotten just what they were then.

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RXQ1408. It was after this first audit, however, in 1905, that friction began to arise between Mr. Chapman and Mr. Frazer? A. I think so.

RXQ1409. Sometime in January or February? A. I think it was in February, that is my impression. But I am not sure of that. I have not looked up the dates.

RXQ1410. Didn't you have any conversations with Mr. Chapman at all about Mr. Frazer's management? A. No, I think not.

RXQ1411. When did this question of reorganization first come up? A. I think it was in April, 1905.

RXQ1412. And that came up at a directors' meeting? A.

4223 I don't think so. I don't remember.

RXQ1413. Didn't you testify that it came up in a directors' meeting in April, 1905, at which a reorganization committee was appointed? A. That was a stockholders meeting. A special meeting was called of the stockholders.

RXQ1414. Who was on that reorganization committee? A. I think there were about nine or ten on it. I think both the Chapmans were on it, W. L. and I. E., and Mr. Waterman, Mr. Frazer and myself, a man named Wilson, I think, and Mr. Hay and Mr. Jayne; that is my recollection. I am not sure all those were there.

RXQ1415. On your direct-examination you testified that there was no means of raising money. Did you have $175,000 worth

4224 of stock in the treasury? A. Yes.

RXQ1416. Was not that stock available for sale? A. There was no market for it, in the condition the company was in. You cannot get anybody to buy stock in a company that is losing money.

RXQ1417. When it was reorganized the stockholders were to contribute were they not? A. Yes, they did. They reorganized and were under a new management.

RXQ1418. Was the question of changing the management discussed at this meeting in April, 1905? A. Yes, I think it was. That was the principal thing that was discussed.

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RXQ1419. And in whom was it proposed to put the new management? A. I don't think that was discussed at all, although it may possibly have been.

RXQ1420. What part was Mr. Waterman to have in this new management? A. I don't know.

RXQ1421. Was not that discussed? A. I don't think so. I don't remember any discussion about it.

RXQ1422. Was anything said about Mr. Waterman starting business for himself in the western territory at that time? A. I don't remember it.

RXQ1423. Did not Mr. Chapman at that time say that he did not care whether Mr. Waterman stayed with the concern or not so long as he left his name there? A. I don't remember 4226
having heard Mr. Chapman make any such statement. He may have made it but I don't remember it.

RXQ1424. Was Col. Bacon present at that meeting? A. He was.

RXQ1425. Did he present any plan of reorganization? A. I think he did, yes. I think it was his plan that was discussed at that meeting.

RXQ1426. Did that plan provide for a new partnership of A. A. Waterman & Co.? A. I think so; I am not positive; I think it did.

RXQ1427. And you and Mr. Frazer were to drop out? A. That was my recollection.

RXQ1428. Did you agree to that at that time? A. My recol- 4227
lection is that I did, yes.

RXQ1429. And Mr. Frazer? A. Mr. Frazer agreed to it subject to seeing his attorney; that is my recollection of his statement.

RXQ1430. How about Mr. Waterman? A. I don't know. I think Mr. Waterman agreed to it too but I am not sure.

RXQ1431. Was it discussed as to who were to be partners in this concern? A. I don't remember now.

RXQ1432. Was the name of the new company discussed? A. I think several names were suggested and the Modern Pen Company among them. "Modern" was our brand under which we sold our high grade goods.

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RXQ1433. Was not the name A. A. Waterman & Co. discussed? A. I don't think it was discussed except that it was to be continued. I don't think so.

RXQ1434. Don't you remember a discussion at that time about using Mr. Waterman's name as a corporation name? A. I don't think so. It is possible, but that was always the understanding, that he was enjoined from using his name as a corporate name so I don't think any thought was given to it.

RXQ1435. Don't you remember Mr. Waterman saying that if they chose that name he had to be indemnified against any suit that might be brought against him? A. I don't remember it.

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RXQ1436. Was that injunction discussed at that time? A. I don't think so; I don't remember.

RXQ1437. I read you from an affidavit of William G. Frazer verified the 22nd of June, 1905, in the action brought by yourself and William G. Frazer against A. A. Waterman and Gratz Nathan; "And deponent further says that it is not true that a large proportion of the sales have been made through A. A. Waterman, and of which fact Chapman must have knowledge. The largest sales of said Waterman amounted to about $25,000 during any one year and the total sales for the said year amounted to substantially $157,000." Do you know whether or not that statement is correct? A. No, I don't know what Mr. Waterman's sales were in any one year. I never looked them

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up to see.

RXQ1438. I read you also from the same affidavit "That it grew from a very small beginning to a business, the largest year being about $157,000"? A. My recollection of the largest sales was $144,000, but I may be mistaken. I have not looked up those figures at all. I had not any idea you wanted it and I did not look into that.

RXQ1439. It is a fact, however, that a large proportion of the sales of the Frazer & Geyer Company were not made by Mr. Waterman? A. I think that is right, as he was only one of a good many salesmen that we had.

RXQ1440. Was not a large part of your business a mail order business? A. No, it was when we first started but after

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Mr. Waterman came with us it was most all done by salesmen on the road.

RXQ1441. Did not Mr. Chapman take a very decided stand in April, 1905, against Mr. Frazer? A. No, he simply took a stand against paying him the $50 a week that he had been getting and insisted on reducing it to $40.

RXQ1442. Was that the only thing that he was complaining about? A. That is the only thing I have any recollection of.

RXQ1443. Was Mr. Chapman a very easy man to get along with.

Objected to as immaterial.

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A. Mr. Frazer seemed to get along with him all right and seemed to be able to get all the money that he wanted out of him for three or four years.

RXQ1444. What did Mr. Waterman bring into the partnership by the way of capital—anything? A. He brought some patents and tools and different things that he brought on from Boston.

RXQ1445. Did he bring any large sum of money? A. He did not.

RXQ1446. Did he have any credit? A. Not to my knowledge.

RXQ1447. Didn't he have a record of several failures behind him? A. I never heard of his having failed. I heard of his failing two or three years ago but never previous to that.

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RXQ1448. Did not the Colonial Pen Company fail that he had been connected with, immediately prior to the making of your partnership with him? A. I think it failed some months after he made this contract with us.

RXQ1449. He never had been connected with any big success in the pen business under his own management had he? A. I don't know. He was connected with the L. E. Waterman Company for some time.

4234 *Hobart W. Geyer*

RXQ1450. He had not anything to do with the management of that company? A. Not to my knowledge. I don't know what his position was there.

RXQ1451. Did he ever claim to you that he had anything to do with the management of the L. E. Waterman Company? A. He never made any claim to me; as I have testified, I had hardly anything to do with Mr. Waterman.

RXQ1452. Was not there a rather heated discussion at this meeting in April, 1905, over Mr. Frazer's attitude toward the company? A. I don't think so at the time. I know there was considerable feeling among several of the stockholders who were not connected with the company except as stockholders, that
4235 they did not like the stand Mr. Frazer had taken. I think he said that he wanted to refer to his counsel before he decided on anything and they did not like that.

RXQ1453. Did not Mr. Chapman get very excited then? A. I don't remember.

RXQ1454. And passed a very uncomplimentary remark about Mr. Frazer and his management? A. I don't remember it.

RXQ1455. You will not swear that that did not happen? A. I don't remember anything about it.

RXQ1456. Don't you remember it was a very heated meeting that you had there? A. No, I don't remember that it was anything out of the ordinary.

RXQ1457. Don't you remember that Mr. Frazer lost his
4236 head and Mr. Chapman lost his head and there was a very heated discussion? A. No, I do not. It may have been but I don't remember it.

RXQ1458. Col. Bacon says that did not occur at that meeting. Were you at any subsequent meeting to this? Was there a meeting of the reorganization committee held soon after that? A. I think so but I am not sure. I think there was another meeting, or some recommendations made; I have forgotten whether I was at that meeting or not.

RXQ1459. Did you know anything about this $1500 and some odd that Mr. Chapman loaned Mr. Frazer? A. No, I did not know anything about it.

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RXQ1460. Did you know what that money was loaned to him for? A. I did not. I never knew anything about Mr. Frazer's private affairs at all.

RXQ1461. Did not Mr. Chapman air all this at that meeting? A. I have no recollection of any such thing.

RXQ1462. Or at any meeting? A. I have no recollection of any such thing.

RXQ1463. Don't you remember Mr. Frazer withdrawing from the meeting on account of a heated discussion? A. He may have done so but I don't remember it.

Mr. Bacon: I was present at all those meetings and there was nothing of the kind occurred at all.

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A. (Continued) Mr. Frazer may have had some hot discussion with Mr. Chapman when he was there alone but I don't remember ever having heard of any such thing.

Mr. Bacon: The discussion of which you speak was with Mr. Chapman alone on May 15th.

RXQ1464. How did it come that you brought this suit in connection with Mr. Frazer; what were the circumstances surrounding it? A. As I had been connected with Mr. Frazer for a good many years I wanted to do what I could to protect him in his position.

RXQ1465. And did you not consider at that time that the Chapmans were taking a rather high handed method to oust Mr. Frazer and yourself? A. The Chapmans had never been friendly with me and I felt that they were more or less prejudiced. I did not know where they had got their prejudice but I had always felt that from the time I first had anything to do with them.

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RXQ1466. You felt that they were trying to get control of this company for themselves? A. I could not blame them—the company losing money—I could not blame them for wanting to put it on a safe basis.

RXQ1467. What did you join Mr. Frazer in this suit for? A. As a matter of friendship for Mr. Frazer.

RXQ1468. Did you not make rather a damaging affidavit against the Chapmans in that suit? A. No, I think not. Anything that I said against them was on information and belief.

RXQ1469. Didn't you take the position that they were trying to force you and Mr. Frazer out, whether you wanted to go or not and they were doing it by whatever method came to their hands? A. I don't think so. I don't know just what the affidavit does say.

RXQ1470. Did you not take the position that Mr. Waterman was acting in conjunction with them? A. I don't remember; I don't think so.

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RXQ1471. Do you remember when Mr. Waterman stopped the mail? A. I think that was about June 6th or 8th, something like that that he stopped it.

RXQ1472. 1905? A. 1905.

RXQ1473. Do you remember when you tried to pay your attorney Mr. Straley? A. Yes.

RXQ1474. What happened then? A. We gave him a check signed by A. A. Waterman & Co.; I think it was on the Chatham Bank or Oriental Bank; and we told him at the time that we did not know whether he would collect it. He said he would take the chances on collecting it if we would give it to him and we gave it to him and payment was stopped by Mr. Waterman as I understand it.

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RXQ1475. Didn't you claim that that was done by Mr. Waterman in conjunction with the Chapmans? A. I don't know who it was done by, I don't know who did it. I may have claimed that I thought so but I did not know who did it.

RXQ1476. You knew at that time Mr. Waterman was acting with the Chapmans, didn't you? A. I think that was after June 8th, after we had been served with a notice by Mr. Waterman that the firm was dissolved by Mr. Frazer not paying his loan or having an unsatisfied judgment against him or something.

RXQ1477. You testified in your cross-examination that you closed the books of the Frazer & Geyer Company; is that true? A. When do you mean?

RXQ1478. In June, 1905? A. I think they were closed about that time. I don't think they were ever finally balanced up or anything of that sort. I think the last entries that were made were made at that time. That is what I should have said. I don't remember any entries since then.

RXQ1479. You testified in your re-direct examination that there were stockholders who didn't come into your re-organization? A. Yes, there were only two that I remember.

RXQ1480. Has there ever been any meeting of the Frazer & Geyer Company since June, 1905? A. Not to my knowledge.

RXQ1481. Ever any proceedings taken for the dissolution of that company? A. Not to my knowledge.

RXQ1483. Have there ever been any dividends declared? A. 4244
I never heard of any.

RXQ1484. Any distribution of assets? A. I don't think there were any assets. I never found any; I never heard of them.

RXQ1485. Did you ever divide with the stockholders who did not come into the reorganization, the considerations that were received for these various transfers of property? A. They did not offset the debts. The Frazer & Geyer Company were still in debt.

RXQ1486. Did you ever consult these stockholders? A. I have not, no.

RXQ1487. Was there ever any stockholders' meeting to discuss the transfer of all these assets? A. I don't know; I don't remember. I think that was left to the officers. I think the 4245
President had full authority to do that by virtue of his office.

RXQ1488. This transfer entirely divested the Frazer & Geyer Company of all its assets, did it not? A. No, its assets were used to pay off its debts, as far as they would do it.

RXQ1489. It did not have any assets remaining? A. No.

RXQ1490. Do you know of any assets that the Frazer & Geyer Company had? A. I don't know of them.

RXQ1491. You have not known of any since the Sheriff took possession? A. Not that I remember now.

RXQ1492. And you do not know of any stockholders' meeting that was ever held to authorize the transfer of all the assets

of the Frazer & Geyer Company to anybody? A. I don't remember any. I think they were all sold out by the Sheriff so that there was nothing left.

RXQ1493. Didn't you make a transfer to the Frazer & Geyer Company? A. Transfer of what?

RXQ1494. Assuming to act with Mr. Waterman as liquidating partners of A. A. Waterman & Co.? A. We transferred whatever A. A. Waterman & Co. had to offset their indebtedness to the Frazer & Geyer Company.

RXQ1495. What is the cheapest pen that you make marked A. A. Waterman & Co.? A. It retails for $1.

4247 RXQ1496. To whom do you sell this class of pen? A. We sell them to practically all of our customers, I guess. There are something like six or eight or nine thousand customers. Most all of them handle them; probably a majority any way.

RXQ1497. Don't you make a practice of selling your pens to the traveling pen salesmen? A. No, sir, we sell all of our lines to all kinds of trade, that is legitimate.

RXQ1498. Is this pen of the same quality of rubber as the other pens that you make? A. Yes, that is the same.

RXQ1499. What grade of rubber do you use in your pens? A. We use what is called Akron stock made by the American Hard Rubber Company.

RXQ1500. Are there several grades of that stock? A. That I don't know. I think there is only one.

4248 RXQ1501. Do you have to do with buying this rubber? A. I do.

RXQ1502. Do you buy the highest grade of rubber? A. I do.

RXQ1503. And do you put that grade of rubber on these dollar pens? A. I do.

RXQ1504. What is this blown rubber that you speak of? A. That we use in the cheap pens that we imprint for different people, different imprints.

RXQ1505. What grade of rubber do you use in the end joint pens that retail for $3.50? A. We use the same stock.

RXQ1506. Is that the same grade of rubber that you use in the highest grade Modern pens? A. It is.

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RXQ1507. The same degree of workmanship on it? A. Practically the same, yes.

RXQ1508. What time do you allow on your sales?

Mr. Bacon: Objected to as immaterial, calling for trade secrets, and the witness is directed not to answer. Besides defendant's counsel protests against these days of wearisome and fruitless examination, substantially all of which is irrelevant, incompetent and immaterial; and especially protests against this prolonged re-cross examination, which is not proper re-cross examination at all, but really another examination by another attorney.

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RXQ1509. You have said in your direct-examination that you never sell on consignment. I now ask you what you allow in the sale of pens to customers?

Mr. Bacon: The same objection and same direction.

RXQ1510. Do you refuse to answer?

Mr. Bacon: I direct him not to answer.

RXQ1511. Do you refuse to answer? A. I refuse to answer under direction of my counsel.

Mr. Raymond: I will certify the question.

RXQ1512. How much stock do you carry?

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Mr. Bacon: That is the same objection and the same direction; that a rival concern has no right to go into the secrets of their adversaries in this way.

RXQ1513. Do you refuse to answer? A. I do.

RXQ1514. Is it not a fact that you do not carry over $9,000 or $10,000 worth of stock at any one time in your factory?

Mr. Bacon: The same direction.

RXQ1515. Do you refuse to answer? A. Yes.

RXQ1516. In your re-direct examination you stated that the concern was prosperous now. Are you paying any dividends? A. It is not; it is reducing its mortgage.

4252 *Hobart W. Geyer*

RXQ1517. That is the mortgage to the Chapmans? A. The mortgage to the Chapmans.

RXQ1518. How much money have you paid back to the Chapmans?

Mr. Bacon: Objected to and the witness is directed not to answer. It is no business of the L. E. Waterman Company.

RXQ1519. Do you refuse to answer? A. Yes.

Mr. Watson: I will certify the question.

RXQ1520. Are you accumulating any surplus? A. We are.

4253 RXQ1521. How much surplus have you accumulated in the last two years?

Mr. Bacon: The same objection and the same direction.

RXQ1522. Do you refuse to answer? A. Yes.

Mr. Raymond: I will certify the question.

RXQ1523. What profits have you made in the last two years?

Mr. Bacon: The same objection and the same direction.

4254 RXQ1524. Do you refuse to answer? A. Yes.

Mr. Raymond: I will certify the question.

RXQ1525. You stated that no manufacturer tests his pens by machinery; how do you know? A. I said as far as my knowledge went.

RXQ1526. You have no knowledge of general pen factories, have you? A. Yes, we have men at work for us that have worked in different factories and we get reports that way.

RXQ1527. Have you ever been in any other pen factory in your life than the A. A. Waterman & Co.? A. Yes.

RXQ1528. For how long a time? A. I have been in several for perhaps half an hour at a time.

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RXQ1529. What factory have you been in? A. I have been in Heath's several times. I have been in Horn's several times some years ago—the M. T. Horn Company.

RXQ1530. How long ago? A. Probably seven or eight years ago. I have been in other factories; I don't remember them now; I did not pay much attention.

RXQ1531. Have you been in any factory during the last three years? A. I have been in Heath's several times in that time.

RXQ1532. What kind of a factory is it? A. They make rubber holders and they make mountings.

RXQ1533. Do they take the turning out of the barrel of their pen before they fit it? A. That I don't know.

RXQ1534. Do you do it? A. We do.

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RXQ1535. Have you ever been in the L. E. Waterman Company's factory? A. I have not.

RXQ1536. Have you ever been in the factory of any one of the large pen manufacturers of the country? A. You mean outside of our own?

RXQ1537. Yes? A. I don't think so.

RXQ1538. You never have been in the Parker factory? A. No.

RXQ1539. The Moore? A. No.

RXQ1540. The Conkling? A. No. I have been in the Davidson Rubber factory and the Sterling factory.

RXQ1541. How long ago is that? A. I think two or three years.

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RXQ1542. Have you ever been in Mabie, Todd & Bard's? A. No.

RXQ1543. That is where the Swan pens are made? A. Yes.

RXQ1544. You don't know anything about what is going on, of your own knowledge, in the big pen factories of the country? A. No, I only know what the holders are that they turn out.

RXQ1545. Have you ever attended any conventions of pen manufacturers? A. No.

RXQ1546. Have you ever put your pens in competition with any of the leading pens of the United States in exhibitions? A. I have not.

RXQ1547. Do you know whether most of the leading concerns of the country do enter their pens in these competitions? A. No, I think the L. E. Waterman Company are practically the only ones that do it to any extent.

RXQ1548. Do you know that of your own personal knowledge? A. I do not.

RXQ1549. I show you this large yellow sign, Exhibit A-63. When did you first get that sign out? A. I think about nine or ten months ago.

4259 RXQ1550. Since this suit was begun? A. I think it was before this suit.

RXQ1551. It was about the time the suit was begun? A. No, I think it was before that.

RXQ1552. Do you mark or designate any of the styles of your pens alphabetically? A. No, only that cheap blown holder.

RXQ1553. What do you call that? A. We call that Federal A.

RXQ1554. Do you know of any other pen manufacturer who designates the style of their pen alphabetically? A. I don't know of any. Our only reason for doing that was to keep the cheap holders separate from those we numbered which were

4260 our better grade.

RXQ1555. Have you any style of pen "A. A."? A. No. We had A, B, C and D which were four different styles, blown holders, but we dropped all but the A. Our other holders, we key them according to the size of the pen and the style of the holder. Our self-filling style, with a No. 2 pen, we call No. 20; the "2" designating the size of the pen and "O" the self-filling holder. The same in the middle joint, No. 22; the first "2" is the size of the pen and the second "2" is the middle joint. The 32 meaning a middle joint with a 3 pen. And the end joint it starts with No. 103; the "1" means the size of the pen and "03" the end joint holder.

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RXQ1556. Don't you know as a matter of fact that it is the custom of pen manufacturers to designate the different styles of their pens by the letters of the alphabet put on the pen? A. The style of the gold pen?

RXQ1557. No, the style of the pen? A. No. They practically all do it by numbers as far as I know.

RXQ1558. Have you never seen the alphabetical designation on the pen? A. I have not. I don't remember having seen it.

RXQ1559. Did you ever see the letter S on a pen? A. On the pen itself?

RXQ1560. No, on the holder? A. Meaning a short nib?

RXQ1561. No, meaning "safety"? A. No.

RXQ1562. Did you ever see the letters S. F.? A. No. I think 4262
I have seen S. F. in the L. E. Waterman catalogue but that is only lately.

RXQ1563. Have you never seen the letters G. M.? A. Not on the pen itself.

RXQ1564. On the holder? A. We use that on our label.

RXQ1565. Have you ever seen it on a holder? A. I have not.

RXQ1566. Have you never seen the letter D used in connection with fountain pens? A. No, sir.

RXQ1567. But you have seen various letters in the alphabet used to designate the style or kind of pen that it is? A. No, the only thing that I know about the letters designating anything is the style of point used in the factory in making the gold pens. The pen grinders know their pens by letters, the style of pen 4263
that is wanted, whether fine or medium or coarse, etc.

RXQ1568. That system is in general use is it not? A. Yes, among the pen grinders; that is all; it is something not used except in grinding the pens, telling the grinder what style of point you want.

RXQ1569. What does the word "Modern" mean? A. I am not a dictionary but I presume it means up to date.

RXQ1570. That is not a fanciful designation is it of your pens? A. That is the brand that we make them under.

RXQ1571. It is not a fanciful designation?

Mr. Bacon: I object as immaterial and I direct the witnoss not to answer as they are apparently trying to get some evidence which they will prevent the getting of a trade-mark for the name.

RXQ1572. You call your pens up to date pens don't you? A. They are right up to the minute.

RXQ1573. You consider your own pens right up to the minute? A. I certainly do.

RXQ1574. Didn't you pick out this name "Modern" to describe the up-to-dateness of your pen? A. I think Mr. Waterman picked this name out when he first came with us and I
4265 think he used it when he was in Boston but I am not sure.

RXQ1575. Don't you know that that name was transferred to the Colonial Pen Company? A. I do not.

RXQ1576. Didn't it belong to them in the first place? A. Not to my knowledge. I never had anything to do with naming it "Modern." It was done by Mr. Waterman and Frazer when he first came with us.

RXQ1577. I show you this Exhibit A63 again, the yellow sign, and ask you whether you did not get that sign out after the Chapman suit was brought against the L. E. Waterman Company in the State Court? A. I think that was started some months prior to that.

RXQ1578. Didn't you get it out afterwards? A. I don't re-
4266 member the date. It was about a year ago that we got these up.

RXQ1579. Have you distributed those widely? A. I presume we have put them out among three hundred or four hundred customers.

RXQ1580. When did you first send them to Europe? A. I don't remember. It may be two or three months ago.

RXQ1581. Very recently? A. It may have been right after we got them. I have forgotten. We have sent so many different kinds of placards that I don't keep any record of those dates. That was gotten up as a special placard for one of our customers who wanted a placard to use in a trolley car.

RXQ1582. I show you Exhibit A-64 and ask you when you first discontinued using the name A. A. Waterman & Co.

on the cuts that you sent out for your pens? A. This cut here was a special one gotten up by an advertising man and I used that while I was getting out some others. It was unintentional. It was something that was done by an advertising man and rather than to wait to get out new ones I used that.

RXQ1583. I show you Plaintiff's Exhibit 139 and ask you to look at the cut there and see whether you find the name A. A. Waterman & Co. on the cut. It is pretty fine but you saw it the other day? A. I cannot see it on there.

RXQ1584. You cannot see A. A. Waterman & Co. on there? A. I never got up any cut like that. I don't know when it was done but the chances are, it is so small they could not get any lettering on it.

4268

RXQ1585. Is it not a fact that you have been leaving the name A. A. Waterman & Co. off of the cut? A. No, this cut in this exhibit is the only one that I know of that has not had the name on it and where that other cut came from I don't know.

RXQ1586. What papers have you advertised in in the last three years?

Mr. Bacon: Objected to as immaterial and the witness is directed not to answer. There must be some limit to this tiresome examination.

RXQ1587. Did you not testify on your direct-examination that you had been advertising extensively? A. Yes, I think so.

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RXQ1588. How much have you spent in advertising in the last three years?

Mr. Bacon: Objected to as immaterial and the witness is directed not to answer.

RXQ1589. Do you refuse to answer? A. I do.

Mr. Raymond: I will certify the question.

RXQ1590. In what papers have you advertised?

Mr. Bacon: You may answer that if you can remember.

A. I don't keep any list of them. We have advertised in the New York Evening Sun last December, one issue. We advertised in two or three lawyers' magazines and several medical magazines. I have forgotten the names. I don't remember. I would have to look that up. I cannot keep track of those things.

RXQ1591. Have you ever advertised in Munsey's? A. I do not advertise in the so-called popular magazines.

RXQ1592. Have you for the last two years? A. Not for the last two years; I think three years ago—before that I advertised in them.

RXQ1593. You heard the testimony of Mr. Bartlett didn't you in this case? A. Yes.

4271 RXQ1594. Did you hear Mr. Bartlett state that you sold these pens as a non-advertised pen? A. As a what?

RXQ1595. As a non-advertised pen? A. I don't know, I don't remember. He may have said so. I did not catch it if he did.

RXQ1596. Do you advertise in any of the trade journals? A. I have just begun advertising in one of the druggists' papers and I have had an ad in the American Druggists Syndicate paper for several months. I don't know whether that is a paper or a catalogue or what they do call it.

RXQ1597. Do you ever advertise in any of the stationery trade papers? A. No, not for some years.

RXQ1598. Why don't you? A. I testified yesterday they
4272 object to taking our ad until this litigation is settled.

RXQ1599. Was that the case before this litigation was commenced? A. I got the information from either Mr. Frazer or Mr. Martling, I have forgotten which, that they wanted to drop our ads some years ago because the L. E. Waterman Company who were large advertisers stated that if they kept our ad in they would drop their ad out of their paper.

Mr. Raymond: I move to strike out the answer as incompetent on its face and as hearsay.

Mr. Bacon: I object.

4273

RXQ1600. You never had any conference personally with those running the stationery trade journals did you? A. I did not. I tried to give you the reason as you asked for it.

RXQ1601. Have you ever tried to put any ad in any of the stationery trade journals? A. I instructed our advertising men to do it, within three or four months. He brought back the report just as I have stated it that they preferred to wait until the litigation was settled.

RXQ1602. What style of an ad did you instruct them to put in? A. I don't think a copy of the ad had been made up. We were to advertise our automatic self-filled fountain pen, with "Modern Pen Company, sole selling agent for A. A. Waterman & Co." That was practically the part that they objected to, the only part.

4274

RXQ1603. What part was that? A. That we were agents for A. A. Waterman & Co. They did not want to carry the two Waterman ads until the case was settled. They did not want to get into any trouble, as I understood it, through threats that had been made by the L. E. Waterman Company representative.

Mr. Raymond: I move to strike out the last part of the answer as incompetent and heasay and not responsive.

Mr. Bacon: It is objected to.

RXQ1604. What profit has the Modern Pen Company made during this last year?

4275

Mr. Bacon: Objected to as immaterial and the witness is directed not to answer.

A. I refuse to answer.

Mr. Raymond: I will certify the question.

RXQ1605. What profits have they made during the last two years?

Mr. Bacon: The same objection and direction.

A. I refuse to answer.

Mr. Raymond: I will certify the question.

4276 *Hobart W. Geyer*

RXQ1606. What profits have they made since you were manager?

Mr. Bacon: Same objection and direction.

A. I refuse to answer.

Mr. Raymond: I will certify the question.

RXQ1607. You testified in your re-direct examination that since you became manager the concern has been prosperous. What do you mean by prosperous? A. I mean that we have made satisfactory profits and conducted a satisfactory business.

RXQ1608. What are those profits?

4277

Mr. Bacon: The same objection and direction. We are not giving our secrets to our adversaries.

A. I refuse to answer.

Mr. Raymond: I will certify the question.

RXQ1609. How much money have the Chapmans at present invested in A. A. Waterman & Co.?

Mr. Bacon: Objected to as immaterial and the witness is directed not to answer.

A. I refuse to answer.

Mr. Raymond: I will certify the question.

4278

RXQ1610. As a matter of fact have they any money in A. A. Waterman & Co.?

Mr. Bacon: The same objection and direction.

A. I refuse to answer.

Mr. Raymond: I will certify the question.

RXQ1611. Has the amount of capital of A. A. Waterman & Company changed from the time when you were a partner?

Mr. Bacon: The same objection and direction. Besides, this witness is not a member of A. A. Waterman & Co. and cannot know.

4279

A. I refuse to answer.

Mr. Raymond: I will certify the question.

RXQ1612. Are you the general manager of the A. A. Waterman & Co.? A. I am manager of their manufacturing interests, yes.

RXQ1613. Do you keep the books? A. No.

RXQ1614. Have you not charge of the books? A. General charge, yes.

RXQ1615. They are kept under your supervision? A. Yes.

RXQ1616. That is all in your department? A. That is all in the A. A. Waterman & Company, yes. I have charge of everything, general supervision of everything.

4280

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ1617. When A. A. Waterman came into the original firm with you and Mr. Frazer did he not bring his line of customers with him? A. Yes.

RDQ1618. And did he not produce substantially all the trade that A. A. Waterman & Co. had? A. Yes, it was through his ideas, as I understood it.

RDQ1619. And all of the pens that they sold were sold through him were they not, in the beginning? A. Right after he came with us, yes.

RDQ1620. In other words, he brought the entire good will and all the customers that he had before into this new firm in 1901?

4281

Mr. Raymond: I object to that. There is nothing whatever to show that any good will was brought. The witness cannot testify as to that. Good will is a question of record evidence.

A. Yes.

RDQ1621. Had A. A. Waterman ever failed in business before 1901? A. I never heard of his having failed.

4282 *Hobart W. Geyer*

RDQ1622. Or before July 1, 1906? A. I never heard of his having failed. I always heard him take pride in the fact that he never had.

Mr. Watson: I move to strike out the answer as incompetent and hearsay.

RDQ1623. A. A. Waterman & Company that preceded your firm were manufacturers were they not? A. Yes.

RDQ1624. And the Colonial Pen Company was their selling agent?

Mr. Watson: I move to strike out all of the last two
4283 answers as the witness has previously said that he knew nothing about it, never had seen their factory and knew nothing about their business.

A. Yes.

RDQ1625. Is it not a fact that A. A. Waterman dictated the policy of the original firm of A. A. Waterman & Co.?

Mr. Watson: Objected to as highly improper in form and leading.

A. I think he did wholly after he came with us.

RDQ1626. And he dictated the styles of pens, and the method of manufacture and the patents under which they should be manufactured and everything of that character? A. Yes.

4284 RDQ1627. Mr. Waterman was an inventor was he not of pens? A. Yes.

RDQ1628. Had taken out several patents? A. Yes.

RDQ1629. And those were brought into the new firm? A. Yes.

RDQ1630. And patents taken out since in Mr. Stone's name and other people's names were really directed by him?

Mr. Watson: Objected to as highly incomeptent.

A. That is my understanding.

RDQ1631. When the note already in evidence for $10,000, given by Frazer & Geyer Company to the Chapman estate and

4285

endorsed by A. A. Waterman & Co., was given was not that money advanced by the estate to a bank to take up a loan of about $10,000 where they were paying some twelve per cent interest?

Mr. Watson: Objected to as there is no such note in evidence.

A. Yes, that was a loan that we had at the Stuyvesant Bank.

Mr. Watson: I move to strike out the answer as incompetent. There is no such note in evidence.

RDQ1632. Do you know as a fact that the Chapman estate advanced $20,000 to the Frazer & Geyer Company to take the place of the loan that Frazer & Geyer had with the Stuyvesant Bank whereon they were paying one per cent a month? 4286

Mr. Watson: Objected to as immaterial.

A. Yes.

RDQ1633. Mr. I. E. Chapman and William L. Chapman are actively engaged as members of the Merritt & Chapman Derrick & Wrecking Company? A. Yes.

RDQ1634. That is their business? A. Yes.

RDQ1635. And not the pen business? A. No.

RDQ1636. And they don't pretend to have any active participation in the pen business, except the financial end of it? A. That is right.

4287

RDQ1637. Mr. I. E. Chapman suffers from a very severe nervous affliction does he not? A. Yes.

RDQ1638. Which incapacitates him in part from business? A. Yes, I think so. It is called St. Vitus Dance; it certainly troubles him a good deal.

RDQ1639. At the present time you represent the Chapmans in looking after their interest in A. A. Waterman & Co.? A. Yes.

RDQ1640. The manufacturing end of the business? A. Yes.

RDQ1641. And all the time that A. A. Waterman was connected with A. A. Waterman & Co. or the Frazer & Geyer Company or the Modern Pen Company, as an officer and director did

4288 *Hobart W. Geyer*

not those firms and corporations utilize his patents, his business experience and the customers in the pen trade that he controlled? A. Yes.

RDQ1642. And he had a great many customers that were personal to himself and went with him when he went out of the business?

Mr. Watson: Objected to as leading and incompetent.

A. Yes.

RDQ1643. During the early days of the Frazer & Geyer Company Mr. Frazer had the confidence of Mr. Isaac E. Chapman did he not and you did not have? A. Yes.

4289 RDQ1644. The rubber from which you make your rubber holders is bought from whom? A. The American Hard Rubber Company.

RDQ1645. Is it the very best rubber that they manufacture? A. Yes.

RDQ1646. Can any better rubber be obtained in the market?

Mr. Watson: Objected to as immaterial and incompetent and wholly beyond the knowledge of this witness.

A. I don't know of any better.

RDQ1647. Has it the reputation of being the very best?

Mr. Watson: The same objections.

4290 A. Yes.

Mr. Bacon: I offer in evidence the minutes of the special meeting of the stockholders of the Frazer & Geyer Company dated April 19, 1905; and of a meeting of the reorganization committee dated April 26, 1905.

Marked Exhibit A-65.

Also a letter from A. A. Waterman to the Oriental Bank dated June 14, 1905.

Marked Exhibit A-66.

Counsel for plaintiff objects to all three of the above offers as incompetent, irrelevant and immaterial.

RE-CROSS EXAMINATION by Mr. Raymond:

RXQ1648. Do you know who drew these minutes that are put in evidence as A-65? A. No, I do not, I think Robert Elliott but I am not sure.

RXQ1649. He was Mr. Chapman's secretary was he not? A. He is one of the stenographers down there. I don't know whether he acts as secretary or not.

RXQ1650. Any evidence of irritability would not appear in these minutes would it? A. The minutes are supposed to tell what occurs.

RXQ1650a. I read you from the minutes of the meeting of April 19, 1905: "Mr. I. E. Chapman then spoke about the losses 4292
of the company during the last two or three years, its present poor condition, the differences existing between him and Mr. Frazer and explained why the business needed more cash." Does that refresh your recollection as to what occurred at that meeting? A. I think there was a simple statement of facts. That is all I remember.

RXQ1651. Were these differences between Mr. Frazer and I. E. Chapman put in rather strong language by Mr. Chapman? A. I don't think so. I don't recall any strong language.

RXQ1652. I read you further: "Mr. I. E. Chapman then stated that endeavoring to carry on a larger business without sufficient capital and employing inexperienced salesmen had been among the things which caused that loss." Does that re- 4293
fresh your recollection as to what occurred at that meeting? A. There was nothing out of the ordinary occurred. It was a simple statement of facts and then the thing was referred to a committee to report and make a recommendation.

RXQ1653. Is not that the fact, as to what caused the loss? A. I don't remember any inexperienced salesmen although we may have had them.

RXQ1654. Don't you know as matter of fact that the loss was caused by Mr. Waterman trying to branch out the business to too large an extent, and giving too many cases to customers, etc.? A. No, sir. I have been giving more cases since I took

4294 *Hobart W. Geyer*

charge than he gave during that period and we have made money instead of losing it.

RXQ1655. Were you present at that meeting of April 26, 1905, of the reorganization committee? A. I have forgotten whether I was there or not.

RXQ1656. Do you remember this: "1. That in order to give confidence to the stockholders something be inserted in the report to show that during the last few months the company has been holding its own; that radical and economical changes have been made during this time." Do you remember that? A. That was a report made by Mr. Frazer.

4295 RXQ1657. This is the report of the meeting of the reorganization committee? A. I don't remember that.

RXQ1658. Was that true that for a few months prior to April 26, 1905, the company had been holding its own? A. I think not. I will have to look up the records to see.

RXQ1659. Do you remember this: "2. That the name of the new company be left to the Board of Directors"? A. I don't remember. I don't remember whether I was at that meeting.

RXQ1660. Don't you remember a discussion as to whether or not you were going to make the company's name the "A. A. Waterman Pen Company"? A. I never heard that discussed. I never knew that was brought up at all.

RXQ1661. Didn't you hear it discussed as to whether or not you could use the name A. A. Waterman in a corporate name?

4296 A. No, there was no room for discussion. The decree was as clear as could be. A. A. Waterman could not use his name in a corporation.

RXQ1662. Don't you remember that I. E. Chapman said he was going to get advice on that subject and use the name if he could? A. No.

RXQ1663. Was it not discussed as to the state in which you were to incorporate? A. Not in my presence, no. I never heard of it.

RXQ1664. Didn't you hear discussion to the effect that they wanted to incorporate under some other law than the State of New York with the name A. A. Waterman in a corporate form? A. No, sir, I never heard of it.

4297

RXQ1665. What patents do you use today that were gotten out by A. A. Waterman? A. We use the reed feed. I don't remember what others he got out personally.

RXQ1666. Was that a patent of A. A. Waterman? A. Yes, that was a patent of A. A. Waterman. That is my recollection.

RXQ1667. Who else uses that? A. The Sterling Fountain Pen Company use it.

RXQ1668. Does the Boston Safety Fountain Pen Company use it? A. Not to my knowledge. Possibly they do.

RXQ1669. Does W. N. Lancaster use it? A. Lancaster uses it, yes, at times. Lancaster uses it through having bought out the Colonial Pen Company's assets as I remember.

4298

RXQ1670. Does the Colonial Pen Company have a right to use it? A. That I don't know.

RXQ1671. Is that the only patent that you use today gotten out by A. A. Waterman? A. I don't know. I have not looked through the patents for years. I don't know just which ones he did get out that we use.

RXQ1672. When the payment of that $250 check was stopped by A. A. Waterman was not a bond required? A. I don't know. I never knew anything about the particulars of it at all.

RXQ1673. You don't know whether I. E. Chapman went on that bond? A. I don't know anything about it. I was on the other side of the fence at that time.

Recess.

4299

4300 *Josephine Dooley*

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,

vs.

MODERN PEN COMPANY,
4301 Defendant.

Met pursuant to notice at the office of Alexander S. Bacon, 37 Liberty Street, New York, April 17, 1911, at 10:30 A. M.

Appearances:

Samuel S. Watson and Walter B. Raymond, for Complainant.

Alexander S. Bacon, for Defendant.

JOSEPHINE DOOLEY, a witness called on behalf of the defendant, being duly sworn, testifies as follows:

Direct-examination by Mr. Bacon:

4302 Q1. Please state your name, residence and business? A. Josephine Dooley; 10 Bromfield Street, Boston; business, fountain pens.

Q2. How long have you been in the fountain pen business? A. About nine years and a half.

Q3. Do you deal in pens exclusively? A. Yes.

Q4. Do you also repair pens? A. Yes.

Q5. How long have you been repairing pens? A. Nine years.

Q6. Do you repair pens of all makes? A. Yes, any kind.

Q7. With whom are you connected in business in Boston? A. Ailman & Son.

4303

Q8. Have they been at 10 Bromfield Street during the last nine years that you have been with them? A. Yes.

Q9. And they have been in the same location for how many years? A. About forty-five years on that street.

Q10. And from what you have learned from them, how long have they been in that exact location?

Objected to as incompetent.

A. Fifteen years; fifteen years in that exact store.

Q11. Have L. E. Waterman Company been at 8 School Street all the nine years that you have been there? A. No.

Q12. They have moved? A. Yes, since we have been there.

4304

Q13. Does your business as a repairer of pens bring you in contact with all kinds of fountain pens? A. Yes.

Q14. Yours is a very large concern? A. Yes, it is considered a big concern.

Q15. One of the largest in Boston? A. Yes.

Q16. Were you employed by anybody before you were employed by Ailman & Son? A. Yes, the Colonial Pen Company.

Q17. How long were you with them? A. Six months.

Q18. Were you ever with the L. E. Waterman Company? A. No.

Q19. Does your experience as an expert repairer of pens and assembler of pens permit you to have a decided opinion as to the intrinsic value of the different makes of pens?

4305

Mr. Watson: Objected to as incompetent and without proper foundation; no proper foundation being shown that this witness has ever had any practical experience in repairing pens or knows anything about the manufacture or is a competent witness on the subject-matter inquired about.

A. Yes.

Q20. During these nine years? A. Nine years and a half.

Q21. Have you repaired all sorts of pens? A. Yes.

Q22. Many L. E. Waterman Company pens? A. Yes, any number of them.

4306 *Josephine Dooley*

Q23. In that length of time would it run into the thousands? A. Yes.

Q24. Will you state in your own words what is your opinion of the different makes of L. E. Waterman Company pens and A. A. Waterman & Company pens, comparing them, grade for grade, and giving the reasons for your opinion?

Mr. Watson: Objected to as without proper foundation; the witness showing that she has never manufactured goods and has no practical experience to entitle her to give an expert opinion.

4307 A. What do you mean—the point of the pen?

Q25. Yes? A. The L. E. Waterman pen opens where the finger grasps it, as a joint; while the A. A. Waterman pens have a joint in the center; and the self-filling pen has no joint, making it a better pen. Is that all you want me to say?

Q26. No, I want you to go on and tell the difference. What have you found to be the trouble generally with L. E. Waterman pens? A. That they leak at the joint.

Q27. They screw on at the joint? A. Yes.

Q28. And after awhile the screw gets loose? A. Yes, the threads wear.

Q29. What is the universal complaint of those pens that have come in to you?

4308 Mr. Watson: Objected to as highly leading and improper in form, and there is no evidence as to the facts stated in the question.

Q30. Of the thousands of L. E. Waterman pens that have come to you to be repaired what, generally, has been the trouble with them?

Same objections.

A. They flow too freely when they are nearly empty and they leak at the joint.

Q31. Is that true of the middle joint A. A. Waterman pen? A. No.

4309

Q32. Is it true at all of the A. A. Waterman self-fillers? A. No; that is the better one of the three.

Q33. In comparing the different makes of pens as they have come under your observation, which, in your opinión, is the best pen that is manfactured? A. The A. A. Waterman self-filler.

Q34. Do you speak of this merely from its method of construction, or from its workmanship, or both?

Mr. Watson: Objected to as without proper foundation; and this witness is not shown to have any knowledge that would entitle her to testify as an expert on the matters inquired about.

A. Both.

4310

Q35. Do you find that the A. A. Waterman middle joint pen is weak at the middle joint? A. No.

Q36. What have you to say, if anything, in relation to the feeds of the two different pens? A. You mean the difference in the two?

Q37. The difference in the feed? Do you know anything about the reed feed? A. Yes; that checks the flow of the ink.

Q38. Is that considered a good feed in the trade? A. Yes.

Q39. Is it considered the best? A. I don't find trouble in the feed at all, in either case.

Q40. You don't find any trouble either in the A. A. Waterman or the others? A. It is in the joint that I find the trouble.

Q41. If an L. E. Waterman pen comes into your shop to be repaired, do you repair it? A. If I can, yes. 4311

Q42. There are some things sometimes that are so broken or out of repair that they cannot be repaired? A. I don't repair gold pens, but I straighten and clean and adjust them.

Q43. If there is anything that you can do with the pen do you do it? A. I do it. I straighten it and clean it and smooth it.

Q44. If there is nothing that you can do with the pen, what do you do? A. Send it to 8 School Street.

Q45. Do you have any complaint as to what is done with A. A. Waterman pens at 8 School Street? A. They don't reach us.

4312 *Josephine Dooley*

Q46. What do you mean by that? A. The L. E. Waterman Company people over there say we are out of business and they don't know where they could find us.

Mr. Watson: I object to that and move to strike it out as incompetent and immaterial.

Q47. Is that the universal complaint, that they are very disagreeable?

Same objections.

A. Yes.

Q48. What do they say about the A. A. Waterman Company
4313 pens? A. That they are an imitation of the real Waterman; they are not a regular Waterman—genuine; entirely indifferent as to who they are.

Q49. How often do you get such complaints as that? A. I should say two or three times a week on an average.

CROSS-EXAMINATION by Mr. Watson:

XQ50. Who paid you for coming on here? A. I have not got paid yet.

XQ51. How much do you expect to get? A. I don't know. I might get my railroad fare, but that is all.

XQ52. When did you come on? A. Last night.

4314 XQ53. On the night train? A. No.

XQ54. Yesterday afternoon? A. Yes, one o'clock.

XQ55. No one gave you money to come on with? A. No.

XQ56. You came with your own money? A. Yes.

XQ57. No one has promised you your railroad fare or anything else? A. No.

XQ58. Then you came on here as a voluntary act? A. For Ailman & Son.

XQ59. Did they ask you to come on? A. Yes, they told me to come on.

XQ60. Did they tell you they were going to pay you? A. They will, yes.

4315

XQ61. Pay your expenses? A. Yes.

XQ62. What are they going to give you? A. What it costs to come on here.

XQ63. Didn't they advance you any money when you started? A. No, I used my own money.

XQ64. You are somewhat of a philanthropist? A. I know I will get it back.

XQ65. What people have told you that they have said that L. E. Waterman Company at School Street that A. A. Waterman & Co. were out of business? A. Different customers.

XQ66. Who are they? A. Mr. Bowman.

XQ67. Where does he live? A. I cannot tell you; on Milk Street.

4316

XQ68. What is his business? A. I could not tell you his business. I could give you the right number of the building.

XQ69. What is the right number? A. He is one that has come in this week. The number is 232 Milk Street, A. L. Bowman.

XQ70. What is his business? A. I could not tell you his business.

XQ71. What did he say? A. He took a pen in there to be repaired, to put a new pin in the button on the end and they charged him seventy-five cents for it, and the pin fell out and he put in a common pin himself. Later on he dropped his pen and broke it, bent it up, and he went in there again to have it repaired and they told him that they had never repaired other makes of pens since the time he was in there. He happened to come up Bromfield Street and saw the A. A. Waterman sign and he came in, asked me if I could fix that pen and I said yes. I told him if he came to us we would only charge twenty-five cents for fixing the pen. He was quite put out about it and told me the story.

4317

XQ72. He did not tell you that A. A. Waterman was out of business, did he? A. They told him that they did not know where we were; that we were in New York and they could fix it, and they undertook to fix it.

4318

XQ73. Then your statement that he said that A. A. Waterman & Co. were out of business is not correct? A. No they are not out of business.

XQ74. He said they were in New York, didn't he, out of business in Boston; is not that so? A. We represent A. A. Waterman & Co. in Boston.

XQ75. Are you their agents? A. We sell their pens.

XQ76. Are you their agents? A. I think it is agent.

XQ77. Are you the legal representative of that concern? A. No.

XQ78. Do you get their mail in Boston? A. Sometimes we open the Boston mail.

4319 XQ79. Letters addressed to A. A. Waterman & Co., Boston, you open? A. We have permission to.

XQ80. You have an order from the Post Office to deliver that mail to you? A. Yes, there was an order.

XQ81. It still holds good? A. Yes, it still holds good. I still open it.

XQ82. Who was the order signed by? A. The head one in this concern here. I couldn't tell you.

XQ83. When was it given? A. Five or six years ago.

XQ84. Does the company here in New York know that you do that? A. Yes.

XQ85. And have known it right along? A. Yes.

XQ86. And approved it? A. Yes.

4320 XQ87. Has A. A. Waterman & Co. got any place of business in Boston? A. Do you mean offices?

XQ88. Any place of business? A. No.

XQ89. Would it be true to say that they had no place of business in Boston? A. No, I think we represent them.

XQ90. You think you are that "place of business"? A. Yes, we have the retail branch on our signs.

XQ91. And then you think if a Waterman representative at 8 School Street said that A. A. Waterman & Company was in New York and did not have an office in Boston, that they would be telling what was not so? A. Yes, they should send them to us.

XQ92. Because you are A. A. Waterman & Co.? A. Yes.

XQ93. That is the only thing that Mr. Bowman said, that they said at 8 School Street that the A. A. Waterman Company's business was in New York, and they did not have any Boston office? A. They did not have any Boston office.

XQ94. But they had a place in New York? A. I don't know that they said that they did not have a place in New York, but I know they said they did not have a place in Boston.

XQ95. And they were out of business in Boston as far as they knew? A. Yes.

XQ96. They did not say they were out of business in New York, did they? A. No.

4322

XQ97. You never heard anybody say that the L. E. Waterman Company at 8 School Street told that A. A. Waterman & Co. were out of business in New York, did you? A. No.

XQ98. When were you with the Colonial Pen Company? A. About nine years and a half.

XQ99. The Colonial Pen Company? A. Yes, Colonial.

XQ100. You have been with the Colonial Pen Company nine years and a half? A. Yes, nine years and a half ago.

XQ101. How long were you with them? A. About six months.

XQ102. What year was that? A. 1902 I came to them. That would make it 1901.

XQ103. Were you there when the Colonial Pen Company failed? A. Yes.

4323

XQ104. And they finally closed up? A. Yes.

XQ105. And they sold out to Mr. Lancaster? A. Yes, I left just before they sold out to him.

XQ106. That was the Colonial Fountain Pen Company? A. Colonial Pen Company, they styled them.

XQ107. Not the Colonial Fountain Pen Company? A. No.

XQ108. Who was the manager of the Colonial Pen Company when you left? A. Mr. Chaplin. I worked under him.

XQ109. Was he still there when you left? A. No, he left about the same time.

4324

XQ110. You don't know who succeeded him, do you? A. Mr. Eberstein.

XQ111. Did you work under Eberstein at all? A. Yes, for a short time.

XQ112. How long? A. About a week or so.

XQ113. Have you ever had anything to do with the manufacture of fountain pens? A. No, only just for what was in the factory; we had a factory.

XQ114. And you worked in the factory also? A. Yes, I used to go down in the factory.

XQ115. You did not work in the office? A. No, I went to the factory in the mornings to learn how to take pens apart and straighten them and then I worked in the office. I wanted to learn the business.

4325

XQ116. You never did anything but just repair? A. No, sir.

XQ117. Never learned anything about manufacturing pens? A. No, just repairing.

XQ118. Do you sell any L. E. Waterman Company pens in your store? A. No.

XQ119. Never did? A. No.

XQ120. You never have sold any? A. No.

XQ121. Never handled them at all? A. No. I have handled them at the Harvard Co-operative Society, in Cambridge.

XQ122. When was that? A. During the opening of the college.

4326

XQ123. When, what year? A. Probably six years ago; I am not sure.

XQ124. How long? A. Just for a couple of weeks.

XQ125. That is the only time? A. Yes, twice, different seasons.

XQ126. Who were you working for then? A. For the A. A. Waterman Company.

XQ127. You were working for A. A. Waterman & Co.? A. I went there to help.

XQ128. You were selling A. A. Waterman & Co. pens? A. No, I didn't sell any pens there. There happened to be some L. E. Waterman pens there to sell. I would sell any makes that were there.

XQ129. Do you sell in the store at Ailman's any A. A. Waterman & Co. goods? A. Yes.

XQ130. That have a joint near the end? A. Yes, we sell the Lincoln.

XQ131. Is that the only kind of pen that you have that has a joint near the end? A. That is the only kind.

XQ132. They are all Lincolns, are they? A. All that we sell with the end joint.

XQ133. All stamped Lincoln? A. All stamped A. A. Waterman & Co. now, but they used to be stamped Lincoln.

XQ134. How long have you been selling those pens that have the joint near the finger? A. Ever since I went in there we had some. 4328

XQ135. You have been selling them right along all the time? A. Right along.

XQ136. You never have any trouble with those leaking at the joint? A. Yes, we do not guarantee them.

XQ137. Do they leak under the joint? A. They are apt to.

XQ138. What is the price of those pens? A. We sell them just the one size, $1.

XQ139. That is the only style you carry? A. That is the only style we carry.

XQ140. When you were with the Colonial Pen Company in 1902— A. 1901, I think it must be.

XQ141. 1901—did you sell middle joint pens, the same as you have been talking about here now? A. Yes. 4329

XQ142. You used to sell boxes like the one I now show you (showing witness a box)? A. Yes.

XQ143. That is the same kind of box you used? A. It had "& Co." on it—"A. A. Waterman & Co."

XQ144. The rest of the box is the same as the one I show you? A. Yes, just the same. I never saw a box like that (indicating).

XQ145. Do you know W. B. Clark & Company of Boston? A. Yes, booksellers.

XQ146. Stationers? A. Yes.

XQ147. Do they sell fountain pens? A. Yes.

4330 *Josephine Dooley*

XQ148. A pretty large store, is it not? A. Yes.

XQ149. As large as your store? A. Bigger.

XQ150. A good deal bigger? A. They don't sell as many pens as we do.

XQ151. How do you know? A. I know the clerk up there. I do quite a little of their repairing.

XQ152. You never worked for them? A. No.

XQ153. You don't know anything about their business except what the clerk tells you? A. That is all.

XQ154. But you know you sell more fountain pens than they do? A. I think I do.

4331 XQ155. You are prepared to swear that you sell more fountain pens than they do? A. No, I would not say that.

XQ156. You remember you are under oath here and whatever you say is supposed to be truthful? A. Yes.

XQ157. Don't you want to withdraw that statement that you sell more fountain pens than they do? A. I don't know. I don't know just how many.

XQ158. Don't you think that is the proper answer to make, that you don't know? A. I sell as many anyway.

XQ159. Do you know that? A. Yes.

XQ160. You are ready to swear that you sell as many as they do? A. Yes.

XQ161. You don't know how many they sell? A. I don't know how many, but I imagine.

4332 XQ162. You imagine? A. Yes.

XQ163. You don't know anything about it? A. No, I would not say.

XQ164. Do you know the Hobson-Warren Company of Boston? A. Yes.

XQ165. That store is in a prominent place in Boston? A. Yes. They failed up.

XQ166. Where was their store? A. Washington Street.

XQ167. They are not doing any business at all now? A. They are out of business.

XQ168. Is Franklin Street near your store? A. Yes, quite near.

4333

XQ169. Are there any large dealers of fountain pens on Franklin Street? A. Yes.

XQ170. Name them? A. Thorpe Martin, Samuel Ward and Fairbanks.

XQ171. Does Samuel Ward carry Waterman Ideal Fountain Pens? A. Yes.

XQ172. It is a pretty large store is it? A. Quite a big store.

XQ173. Do you carry more pens than they do? A. No, I would not say any more, but as many.

XQ174. Do you know how many they sell? A. No, I would not be apt to know that.

XQ175. Then you don't know whether you sell as many or not, do you? A. I think I do.

4334

XQ176. But you don't know anything about it? A. No, I don't know.

XQ177. Fairbanks—do they sell Waterman Ideal Fountain Pens? A. Yes.

XQ178. They are a big store too? A. No, not very large.

XQ179. Jordan & Marsh sell Waterman Ideal Fountain Pens? A. Yes, they sell all makes down there.

XQ180. What makes do they sell? A. They used to handle the Colonial quite a little.

XQ181. Do you know whether they sell any other pen except the Waterman Ideal Fountain Pen? A. I don't know now. I wouldn't say.

XQ182. Is that one of the largest department stores in Boston? A. Yes, but their fountain pen department is not a large department.

4335

XQ183. How do you know? A. I have been down there several times.

XQ184. How many pens do they display in their stock? A. I should think they had a gross.

XQ185. You have spoken about the quality of the Waterman Ideal Fountain Pen as compared with the A. A. Waterman & Co. Do you know anything about the class of rubber that is in these pens? A. No, I would not.

4336

XQ186. Do you know anything about the quality of gold pens in these different fountain pens? A. I know they all are about fourteen karat.

XQ187. You know nothing about their manufacture? A. I have seen them made.

XQ188. You don't know anything about the grades? A. I have seen it in the factory.

XQ189. You don't know anything about the iridium? A. I have seen the iridium and seen them put it on.

XQ190. Are you able to tell the difference in the grades of iridium? A. No.

XQ191. You don't know anything about that? A. No.

4337

XQ192. I think you testified that you found no difficulty with the L. E. Waterman Company feeds? A. No.

XQ193. That they fed all right? A. Yes.

XQ194. What is the general reputation of the L. E. Waterman Company Ideal Fountain Pen in the market? A. It is a pretty well advertised pen. It is very well known.

XQ195. Very widely advertised? A. Yes.

XQ196. Very well known? A. Yes.

XQ197. It is considered the standard upon the market? A. It is considered one of the standard pens, yes.

XQ198. And has been ever since you have known anything about fountain pens? When you were with the Colonial Pen Company it was then considered the standard pen in the market,

4338

was it not? A. Yes, they still have them there.

XQ199. I say the Waterman Ideal Fountain Pen was considered the standard pen on the market when you were with the Colonial Pen Company? A. Yes.

XQ200. And always has been ever since? A. Yes.

XQ201. Carried by the best stores in the larger towns? A. Yes, some of them.

XQ202. What is the name that people speak of the L. E. Waterman Company pens usually? A. The Waterman Ideal Pen.

XQ203. It is usually called the Waterman pen is it? A. Waterman Ideal.

XQ204. Never called Waterman's pen? A. Very seldom.

XQ205. Never referred to as Waterman pens? A. No, they come into my place for a self-filling pen.

XQ206. Did you ever have any of the middle joint pens break in the center? A. Not often.

XQ207. You do not have much trouble with those? A. No, not often. They are better now than what they used to be.

XQ208. They used to make those and sell them when you were with the Colonial Pen Company? A. Yes, I sold the self-filling pen there too.

XQ209. Do you know whether the L. E. Waterman Company sell a self-filling pen? A. Yes. 4340

XQ210. They do? A. Yes.

XQ211. They sell a great many different styles of pens? A. Yes.

XQ212. Your business at Ailman's is mostly an optical business is it not? A. Yes, we run a fountain pen department though with them.

XQ213. That is simply a counter in a very big optical store? A. It is quite an important part.

XQ214. It is a counter in a big optical store that sell A. A. Waterman & Co. pens, field glasses and all kinds of optical instruments? A. Yes, it is an optical store but the front of the store is taken up with fountain pens.

XQ215. Just one side? A. It is only a one side store in all. 4341

XQ216. One side of a narrow store? A. It is quite a big store.

XQ217. It is not a narrow store, with a counter on only one side? A. Yes.

XQ218. Only room for a counter on one side? A. With chairs for people to sit on the other side.

XQ219. But there is no counter on the opposite side? A. No.

XQ220. There is not room enough? A. No.

XQ221. How many repairs do you get of the A. A. Waterman & Co. pens a week? A. Sometimes we get as many as twenty

to twenty-five, sometimes thirty a day; that is when we are terribly busy.

XQ222. How much do you get on an average? A. I should say a good average would be fifteen a day.

XQ223. That is A. A. Waterman pens? A. No.

XQ224. All pens? A. All kinds.

XQ225. All kinds? A. Yes.

XQ226. How many of those are A. A. Waterman? A. Naturally the big part of them are A. A. Waterman because it is an A. A. Waterman store.

XQ227. What do you mean by a big part? A. Say ten of them any way.

4343 XQ228. Ten out of fifteen? A. No, there would not be as many as that; it might be eight.

XQ229. Eight out of fifteen? A. Yes.

XQ230. What was generally the matter with these pens? A. Sometimes they need cleaning, sometimes they would break the pen; sometimes they would bend it; sometimes they need tightening up; sometimes the cap would be broken—what would be the matter with any pen.

XQ231. Did you ever have any trouble with replacing the sack? A. No, the sacks last.

XQ232. You don't replace sacks? A. No. Of course we do replace them but not every day.

XQ233. Do you ever have pens come in to you with the knob
4344 at the end broken off? A. Yes.

XQ234. Quite frequently? A. No, not particularly often.

XQ235. How many of those in a day do you have? A. We would not have one a day. We would not have two a week.

XQ236. How many of these fifteen pens on an average that you receive a day for repair are L. E. Waterman Company goods? A. Four any way; four or five.

XQ237. What is the matter with those pens? A. Leak at the joint.

XQ238. Always leak? A. Leak at the joint.

XQ239. That is the only trouble you ever have with them? A. Some of the pens, sometimes they flow too freely towards the end.

XQ240. You never have any broken pens come back? A. We don't repair broken pens. I don't count those because we send them out.

XQ241. What proportion of the pens that you sell in your store are Lincoln pens? A. There is a small proportion.

XQ242. You don't carry a full line of A. A. Waterman & Co. goods do you? A. Yes, we carry one each so that if they want them we have got them.

XQ243. Don't you know they make other styles and sizes of pens that have a joint under the finger? A. They carry larger ones.

XQ244. Don't you have those? A. No.

XQ245. Then you don't have a full line? A. No, not that 4346
particular style. We don't want it. We run mostly on the self-filling.

XQ246. How many pens a week do you sell of all kinds and all sizes? A. I could not tell you exactly. Sometimes it is more and sometimes less.

XQ247. Give us an average? A. I should say a good average would be thirty a week. That would be ordinary business.

XQ248. Do you know anybody else in Boston that sells these pens at retail? A. Yes.

XQ49. Who? A. Smith & McCance.

XQ250. Where is that? A. 38 Bromfield Street.

XQ251. Do they carry as many pens in stock as you do? A. No, not quite as many. 4347

XQ252. Do they carry a large stock? A. Yes.

XQ253. Who else sells A. A. Waterman & Co. goods in Boston that you know? A. D. C. Percival.

XQ254. Do they retail them? A. No, they wholesale them.

XQ255. They do not sell at retail? A. No.

XQ256. Who sells at retail? A. W. B. Clark & Co.

XQ257. How long since they carried them? A. They send to me occasionally for pens.

XQ258. W. B. Clark & Co.? A. Yes.

XQ259. Is their place on Tremont? A. 26 Tremont.

XQ260. How often do they send down to your store for pens? A. Not very often.

4348 *Josephine Dooley*

XQ261. Once a week? A. No.

XQ262. Once a month? A. Yes.

XQ263. How many pens do they get when they send down—more than one? A. The last time they got three.

XQ264. Did they return them all? A. No, sold them all.

XQ265. Did not return any? A. No.

XQ266. Do you know whether they carry any stock of A. A. Waterman & Co. pens? A. No, not a big stock.

XQ267. They don't carry any stock at all? A. They may have half a dozen there.

XQ268. Anybody else that you can name? A. M. I. Ayer, Old South Building.

4349 XQ269. Does she carry a big stock of A. A. Waterman & Co. pens? A. Yes.

XQ270. About the same as yourself? A. About the same, yes.

XQ271. Who else sells A. A. Waterman & Co. goods there? A. The Diamond Company. I don't know what they call it—on Washington Street.

XQ272. Anybody else? A. F. H. Thomas & Co., Boylston Street. They carry a big line of our goods.

XQ273. How are these A. A. Waterman & Co. goods usually offered for sale; do you sell them as Waterman pens? A. No.

XQ274. You never sell them as Waterman? A. No.

XQ275. What do you mean by Waterman pens—A. A. Waterman & Co.? A. L. E. Waterman pens would be Waterman pens.

4350 XQ276. They are usually termed in the trade Waterman pens? A. Yes.

XQ277. And when people ask for Waterman pens they mean Waterman Ideal fountain pens don't they? A. Yes, I think they would.

XQ278. Do you think you repair daily twice as many A. A. Waterman & Co. pens as you sell? A. No.

XQ279. Well, your figures indicate it? A. I have only struck an average on the sales.

XQ280. You say you sell about thirty pens a week? A. Yes.

XQ281. And you repair about eight a day? A. That might be I am only just guessing at it. I have not got exact figures.

XQ282. Have you not in your store been telling customers that the L. E. Waterman Company did not make a self-filling fountain pen? A. No.

XQ283. Never told anybody that? A. No.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ284. If a person comes into your shop and says, "I want an Ideal pen" what do you do? A. I send him over to 8 School Street.

RDQ285. Do you try to sell him anything else? A. No. If they want an Ideal they will usually insist upon an Ideal and 4352
I will send them over there.

RDQ286. If a man is carrying an A. A. Waterman & Co. pen he would be as apt to call it a Waterman pen as anything else? A. Yes, sometimes they mean our pen.

RDQ287. When they come into your shop do they ask for a Waterman? A. Yes, and it happens to be our pens that they are talking about.

RDQ288. It depends entirely on what pens they have been accustomed to? A. Yes; half the people don't see the initials "A. A." and "L. E."

RDQ289. Is it not a fact that there are fifteen or twenty different concerns in Boston that sell A. A. Waterman & Company pens? A. Yes, there must be that many. I am not familiar
with the wholesale. 4353

RDQ290. If an L. E. Waterman pen comes broken you send it right over to 8 School Street? A. Yes.

RDQ291. How often do you find a sack that has been broken in the A. A. Waterman & Co. self-filler. Is it rarely or not? A. Rarely.

RDQ292. How many would you find in a day or a week or a month? A. Two a week would be a big average.

RDQ293. How long do these sacks usually last? A. They are guaranteed to last two years, but I have one that is six years old now.

RDQ294. How often do you find the knob on the end is broken? A. About once or twice a week.

RDQ295. Those knobs are now much stronger and better than they used to be? A. Yes.

RDQ296. Much larger? A. Yes.

RDQ297. Mr. Chaplin who was formerly with the Colonial Pen Company and concerning whom you have testified is now the manager of the New England Branch of the L. E. Waterman Company? A. Yes.

RDQ298. In Boston? A. Yes.

RDQ299. He does the buying for the store? A. I think so.

RDQ300. All of it? A. Yes.

RDQ301. You buy of the A. A. Waterman Company? A. Yes.

4355 RDQ302. And you buy outright and sell? A. Yes.

RDQ303. That is the only sense in which you represent them?

Mr. Watson: I object to this as leading and directly opposite from the witness' prior testimony, and the court's attention is called to the fact.

A. Yes.

RDQ304. Is there any writing in existence, or has there ever been, between Ailman & Son and A. A. Waterman & Co. in relation to the sale of pens?

Mr. Watson: Objected to as incompetent and not within the knowledge of this witness.

4356 A. Yes, there was a letter.

RDQ305. Letters? A. Yes.

RDQ306. What was the effect of those letters? A. That we should take the retail branch of the business and represent A. A. Waterman and opening the letters, anything marked Boston.

RDQ307. Was not that done many years ago? A. Yes.

RDQ308. Probably over six years ago? A. Yes, five or six.

RDQ309. Before the Modern Pen Company was started? A. Yes, before.

RDQ310. Have you ever assembled the parts of a pen? A. Yes.

RDQ311. You got instructions in regard to that from the factory? A. Yes.

4357

RDQ312. Is that a very difficult thing to do? A. No.

RDQ313. It is about the easiest thing in the manufacture of pens, is it not? A. Yes.

RDQ314. How long does it take anybody to assemble the different parts and adjust them? A. Two or three minutes.

RDQ315. This Lincoln pen with the joint under the finger is the cheapest grade that you sell? A. Yes.

RDQ316. As to the relative sales by Clark & Company and yourself you simply know what was told you? A. Yes, that is all.

RDQ317. Is that clerk a man or a woman? A. A woman.

RDQ318. What did she tell you about their sales?

Objected to as incompetent.

4358

Question withdrawn.

RDQ319. You spoke of the L. E. Waterman Company being large advertisers. In your opinion are their sales made on their advertisements or on their merits?

Objected to as incompetent.

A. On their advertising.

RDQ320. That is your opinion as an expert pen repairer?

Same objections.

A. Yes.

RDQ321. Did you ever see with your own eyes an Ideal self-filler? A. I have seen the Remex, that has a soft rubber sack.

4359

RDQ322. It has a bar at the side? A. That is a Conklin.

RDQ323. There is a kind of pressure bar on the side? A. Yes. I meant that little knob on the end, is that what you mean, that little silver plated thing?

RDQ324. Do the L. E. Waterman people make a self-filler that is called the Ideal? A. No.

RDQ325. Have you ever seen one? A. I never saw one.

RDQ326. Substantially all their goods, the pens that they push, have a joint under the finger?

Objected to as incompetent and immaterial.

A. Yes. They have a safety pen with it as well now.

4360

RDQ327. Is it not a fact that the plaintiff's house or business at 8 School Street treated you so impolitely that the Ailman Company wanted you to come down here and testify? A. Yes.

RE-CROSS EXAMINATION by Mr. Watson:

RXQ328. What did they do to you that seems to have hurt your feelings? A. They don't know where we are.

RXQ329. Why should they know where you are? A. On the same principle that I know where they are. We use them politely.

RXQ330. You represent A. A. Waterman & Co.? A. We
4361 like to sell all the A. A. Waterman & Co. pens that we can.

RXQ331. Do you represent the A. A. Waterman & Co. New York? A. No, not personally.

RXQ332. In what way do they slight you in not knowing where you are? A. As I said before, they don't know where we are, if a person comes in and asks for us.

RXQ333. When they come in and ask for Ailman & Son— A. We would send them over.

RXQ334. When they ask for A. A. Waterman & Co. you think that they should send them to you? A. Yes.

RXQ335. And because they do not send them to you, that is your ground of complaint? A. Yes.

RXQ336. That is the only ground of complaint that you have
4362 isn't it? A. Yes.

RXQ337. When customers come in and ask for Waterman pens do you sell them an A. A. Waterman & Co. pen? A. I tell them that there are two Watermans.

RXQ338. When they ask for a Waterman pen do you sell them an A. A. Waterman pen? A. No, I tell them that there are two Waterman pens.

RXQ339. If they come in and ask for a Waterman pen you always explain the difference to them? A. I always explain the difference to them.

RXQ340. It would be wrong to sell them a Waterman pen without explaining the difference, under those cirdcumstances would it not?

4363

Objected to; this is not a school of morals.

A. No, I don't think so.

RXQ341. You think it would be all right to sell them an A. A. Waterman & Co. pen when they ask for a Waterman? A. Yes.

RXQ342. That would be all right? A. Yes.

RXQ343. You do that right along? A. No, never. I always explain the difference.

RXQ344. Why? A. Because I feel as if I am waiting on the customer and I feel obliged to explain that there are two. I don't look at the wrong or the right side of it.

RXQ345. When they come in and ask for a Waterman pen you sell them an A. A. Waterman & Company pen? A. I sell them our pens, yes. I don't always sell them. 4364

RXQ346. You try to sell them? A. Yes, I try to sell them a fountain pen.

RXQ347. When they ask for an L. E. Waterman self-filling pen what do you sell? A. They usually mean my pen.

RXQ348. You sell them an A. A. Waterman & Co. pen? A. I tell them that it is an A. A. Waterman & Co. fountain pen.

RXQ349. And always explain the difference? A. Yes.

RXQ350. When did you open any mail addressed to A. A. Waterman & Co., Boston? A. It is some time now?

RXQ351. A month? A. It is longer than that; it is a couple of months any way. As a rule I send it on to New York.

RXQ352. Without opening? A. Yes, but I can open it. 4365

RXQ353. You have a right to open it? A. Yes.

RXQ354. And they knew in New York that you have been doing it all the time? A. Yes.

RXQ355. Did you write them about it? A. No, they wrote me.

RXQ356. And told you to? A. Yes.

RXQ357. When did this correspondence take place? A. Five or six years ago.

RXQ358. There never has been any correspondence since about it? A. No.

4366 *M. Isabel Ayer*

RXQ359. Did the Modern Pen Company know that you sent the letters that you opened? A. Sometimes they never saw them. I would open them and send them off again.

RXQ360. Sometimes you would send them off? A. Yes.

By Mr. Bacon:

RDQ361. Are you the largest and best known seller of A. A. Waterman pens in Boston? A. Yes.

Signature waived.

UNITED STATES CIRCUIT COURT,

4367 SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN, Plaintiff,

vs.

MODERN PEN COMPANY, Defendant.

Met pursuant to adjournment at the office of Alexander S. Bacon, 37 Liberty Street, New York, April 18, 1911, at 10:30

4368 A. M.

Appearances:

Samuel S. Watson and Walter B. Raymond, for Complainant.
Alexander S. Bacon, for Defendant.

M. ISABEL AYER, a witness called on behalf of the defendant, being duly sworn, testifies as follows:

Direct-examination by Mr. Bacon:

Q1. Please state your name, residence and business? A. M. Isabel Ayer, 130 Bowdoin Street, Boston; business address, 7 Old South Building, Boston; business, merchant.

4369

Q2. Do you have a fountain pen store? A. I do; it is called "The Fountain Pen Store."

Q3. That is the name of it? A. Yes.

Q4. Have you been devoting yourself exclusively to fountain pens? A. Since 1903. I have a small side line in addition, for the last three years.

Q5. And what is that? A. Picture puzzles.

Q6. How long have you been in the fountain pen business? A. Since August, 1903.

Q7. What were you doing before that? A. For one year I canvassed fountain pens. Previous to that I was a teacher.

Q8. Do you also make a business of repairing pens? A. Yes, that has been so from the start.

4370

Q9. Do you advertise yourself as a pen expert? A. I do, it is on my card.

Q10. What makes of pens do you handle? A. Ten of the leading makes. Do you want to know their names?

Q11. Yes? A. A. A. Waterman Modern Pen, L. E. Waterman Ideal, the Conkling, the Moore, the Boston, the Sterling; I did have the Crocker.

Q12. Did you name the Lincoln? A. I am putting that in last, being less expensive, and the Swan.

Q13. On an average about how many pens will you sell a day; could you tell that? A. I could not tell that because it varies so much. Sometimes I sell five or six pens, sometimes only one or two.

4371

Q14. And then in the season a great many more I suppose? A. Yes, during December and January a great many more.

Q15. How many do you repair on an average; can you tell that? A. The repairs vary so much.

Mr. Watson: I object to all this line of testimony as entirely immaterial to the issues in the case.

A. (Repeated.) From six to fifteen, paid repairs. Of course there are a great many where there are very slight repairs, where pens are bought.

Q16. And when you sell a pen I suppose you keep it in repair for nothing? A. No, indeed, not necessarily I mean.

Q17. If there is anything the matter with the pen from its own defect you would repair it for nothing? A. Any defect is made good.

Q18. But if a repair comes from an accident you do not repair it for nothing? A. No.

Q19. About what proportion of your repairs would be L. E. Waterman goods?

Mr. Watson: This is objected to as entirely immaterial to any issue in this case and I move to strike out the
4373 testimony as having no bearing on the issue.

A. One-third.

Q20. And about what proportion of A. A. Waterman? A. One-third.

Q21. And the remaining third would be of other makes? A. Other makes.

Q22. In your opinion as an expert, in selling and repairing pens, what is the best pen of those that you sell?

Mr. Watson: That is objected to as the witness cannot possibly be competent to answer that question.

A. A. A. Waterman.

Q23. Give your reasons for that, please? A. Because it is less
4374 liable to sweat and leak; it is more easily and neatly filled and it will not drop when it is nearly empty. By construction it cannot have a leaky joint.

Q24. As it has no joint to leak? A. Yes.

Q25. That is the self-filling pen? A. Yes; and in all other respects it is equally good or superior to any other make.

Q26. What fault is usually found with the L. E. Waterman pens that are brought to you for repairs? A. The most frequent defect is a leaky joint.

Q27. Is that common to all pens having joints? A. Yes.

Q28. Why? A. The screw-joint, especially under the finger, may become leaky, because of the nature of the screw, being hard rubber.

4375

Q29. It has to be unscrewed to be filled? A. Yes.

Q30. And every time they are unscrewed and screwed up again the screw is liable to wear? A. To wear and strain.

Q31. What have you to say about the feed of the pens? A. They vary a great deal. I prefer the A. A. Waterman or the reed feed to any other feed. I find it more satisfactory.

Q32. Is the reed feed used in the A. A. Waterman pen? A. It is.

Q33. Is it used in any other pen? A. Yes.

Q34. Which? A. The Sterling.

Q35. What have you to say as to the gold pens in the A. A. Waterman fountain pens? A. They are equal to any other pens of any other make; their fit I think is superior.

4376

Q36. As far as you know they are made in the highest style of the art as known today?

Mr. Watson: Objected to as immaterial and incompetent and also as this witness does not qualify as an expert.

A. Yes.

Q37. Are you familiar with the assembling of the parts of fountain pens? A. Yes.

Q38. Is that a very difficult proceeding? A. That is a matter of degree I should think. I don't know how difficult it would be for other people.

Q39. Is it easy for you? A. I can do it without difficulty.

4377

Q40. You can assemble the whole pen in about a minute and a half? A. If it is apart, certainly.

Q41. If you were selling from your stock to a neighbor, a merchant in Boston, whom you expected to have as a permanent customer what pen would you recommend him to take?

Mr. Watson: Objected to as entirely immaterial and incompetent.

A. The A. A. Waterman Modern Self-filler.

4378

CROSS-EXAMINATION by Mr. Watson:

XQ42. Have you ever manufactured fountain pens? A. May I ask what you mean by manufacturing?

XQ43. I am asking the question and I would like to have you answer it. Have you ever been engaged in the manufacture of fountain pens? A. I never have been in a factory as an employee.

XQ44. Have you ever manufactured the rubber parts of a fountain pen? A. May I ask a question—because I have never been engaged in a factory but I have made a part to supply in repairing?

4379 XQ45. Have you ever been employed or engaged in any way in a fountain pen factory where rubber parts of fountain pens were made? A. Not directly.

XQ46. Or indirectly; if so, what factory? A. No, I have not.

XQ47. Have you ever been employed or engaged in any factory where gold pens are manufactured? A. I have not.

XQ48. You know nothing about the method of manufacturing gold pens? A. I do.

XQ49. How are they made? Tell us how they are made? A. I don't know the alloy. I have watched their construction.

XQ50. That is your only acquaintance with them? A. That is my acquaintance with the manufacture of gold pens.

XQ51. You say it would be an easy matter to fit the parts
4380 of a fountain pen together if it had been taken apart. Would you say that was true if these parts had not been put together before, if they were new parts of a new pen to be assembled? A. If they fitted it would be perfectly simple.

XQ52. But supposing they did not fit? A. I think I could learn to fit them very quickly.

XQ53. Don't you know as a matter of fact that the parts of a fountain pen when they come from the factory have to be fitted to each other? A. Yes.

XQ54. And that that is a work which requires an expert person who is very familiar with that line of work? A. They would have to know how to do it.

4381

XQ55. How long have you sold Waterman's Ideal Fountain Pens? A. Since August, 1903.

XQ56. You usually refer to these as Waterman pens don't you? A. I speak of them always as the Waterman Ideal or the L. E. Waterman pen.

XQ57. If a man comes in and asks for a Waterman pen you understand what he means? A. Not necessarily.

XQ58. How long have you known the Waterman Ideal Fountain Pen? A. I don't know.

XQ59. How long since you first heard of them? A. I don't know; when I heard about fountain pens I presume; when I began to distinguish between the names of fountain pens.

XQ60. And when was that? A. I don't know. 4382

XQ61. Was it before you began to deal in them as a merchant? A. Yes, indeed.

XQ62. How long before? A. I don't know.

XQ63. What fountain pens did you first hear of in the market? A. I don't know.

XQ64. What fountain pens did you first become familiar with? A. The Crocker.

XQ65. And when was that? A. 1899, possibly. No, it could not have been.

XQ66. What is the first fountain pen you ever owned? A. Crocker.

XQ67. When you first began to engage in the sale of fountain pens what pens did you carry at that time? A. The Crocker. 4383

XQ68. Is that the only one? A. Yes, at that time.

XQ69. When did you put in the Waterman Ideal Fountain Pen? A. When I had a store.

XQ70. When was that? A. In August, 1903.

XQ71. How long prior to that had you been handling the Crocker pens? A. One summer previous to my year's canvass.

XQ72. When you opened your store in 1903, did you put in the Crocker pen and the Waterman Ideal Fountain Pen? A. With other makes, yes.

XQ73. What other makes did you put in at that time? A. The Sterling, the Moore, the Parker, the Waterman Ideal, the

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XQ73. What other makes did you put in at that time? A. The Sterling, the Moore, the Parker, the Waterman Ideal, the

Swan; practically the same makes that I carry today; all I think except the Boston.

XQ74. When people come into your store and ask for a Waterman pen do you sell them an A. A. Waterman pen? A. I ask them which they want, an L. E. or an A. A.

XQ75. You don't know what they mean when they say Waterman pen? A. No.

XQ76. You never knew that the general public knew the Waterman Ide Fountain Pen as a Waterman pen? A. Not necessarily.

XQ77. You never knew that? A. Not necessarily.

XQ78. Never heard anybody refer to them as Waterman pen?
4385 A. Certainly but they might be talking about the other pen.

XQ79. When your customers ask for a Waterman pen what do you say to them? A. "Which Waterman pen do you mean, the A. A. or the L. E. Waterman."

XQ80. What do they say then? "I want a Waterman;" "I want a self-filler."

XQ81. Do they say they want a self-filler? A. Very often.

XQ82. You are sure about that? A. Certainly.

XQ83. When they ask you for a Waterman pen you say, "Which one." Let us get this thing very straight now? A. Yes.

XQ84. You say, "Which one"? A. Yes.

XQ85. "A. A." or "L. E."? A. Yes.

XQ86. And then they say to you they want a Waterman? A.
4386 Yes.

XQ87. And then what do you say? A. No, I think if we went back to my previous conversation, that they said they wanted a self-filler.

XQ88. They always say they want a self-filler? A. No, they don't always say it.

XQ89. What do they say? A. They are likely to say that they want a self-filler. I then say, "Well, then, you want an A. A. Waterman."

XQ90. Why do you say that? A. Because it is superior.

XQ91. Does not the L. E. Waterman Company make a self-filler? A. That is what my customers frequently ask and I say yes.

4387

XQ92. And you take it for granted when they say they want a Waterman pen and they say they want a self-filler, that you show them A. A. Wateman Company goods? A. Yes, I do.

XQ93. And you call that a Waterman pen? A. I do not.

XQ94. You don't know that the Waterman Ideal Fountain Pen is usually spoken of by the public as Waterman pens? A. I don't know why it should be. My customers do not.

XQ95. You don't know that? A. No, sir.

XQ96. When the customers ask you for a Waterman pen and you say, "Which do you want, an A. A. or an L. E." What do they say then? A. They are likely to say "A self-filler."

XQ97. What do they say, not what they are likely to say; what do they say? 4388

Mr. Bacon: Objected to as it is impossible to say what everybody says.

XQ98. What do your customers say? A. They don't all say the same thing.

XQ99. What do they say? A. You want several replies?

XQ100. Yes? A. Very well, if you don't stop me when I give you four. Now what is your question?

XQ101. What do they say when they ask for a Waterman pen and you tell them that you have A. A. or L. E.? Which would it be—an A. A. or L. E.? A. I say, "Do you want a self-filler."

XQ102. You say, "Do you want a self-filler"? A. Or if they 4389
say they want a self-filler I say, "What do you want" and they say they want a self-filler and I say, "If you want a self-filler you want an A. A. Waterman Company pen." They reply, "Why"? I say, "Because the self-filler A. A. Waterman pen is superior to any self-filler that the L. E. Waterman people have produced so far." Do you want any more conversation?

XQ103. When they ask for a Waterman pen you try to sell them an A. A. Waterman pen? A. Certainly, when they want a self-filler.

XQ104. Whether it is a self-filler or not if they ask for a Waterman pen, your efforts are to sell them an A. A. Waterman pen? A. If it is for their best good, yes.

4390

XQ105. You are the judge; if you think it is for their best good that they should have A. A. Waterman pens? A. Yes.

XQ106. Therefore, you sell it to them? A. Yes, and ninety-nine times out of a hundred it is for their best good.

XQ107. That is what you do and that is what you try to do? I want to get at the fact, not what your intentions are. When they ask for a Waterman pen you try your best to sell them an A. A. Waterman pen? A. If it is for their best good.

Mr. Watson: I move to strike out the answer as irresponsive and call the attention of the Court to the fact that the witness declines to answer.

4391

Mr. Bacon: The witness' answer is just right.

Mr. Watson: The Court's attention is called to the comment of defendant's counsel in the presence of the witness.

XQ108. (Repeated)? A. Yes.

XQ109. When the customer asks for a Waterman pen and you ask them which, A. A. or L. E. Waterman, don't they express surprise that there are two Watermans? A. Sometimes.

XQ110. They only know one Waterman usually, is not that a fact? A. No.

XQ111. You don't have any cases where they only know one Waterman? A. Yes.

XQ112. What do those people say to you? A. "Are there

4392

two Waterman pens?"

XQ113. They thought there was only one Waterman pen? A. Probably.

XQ114. Don't they say so to you? A. Sometimes.

XQ115. What do you think they mean when they say there is only one Waterman? A. I don't know.

XQ116. You have no idea which Waterman they mean, have you? A. I think they may mean L. E. Waterman. I say, "You may have in mind the L. E. Waterman pen. There are two concerns, A. A. and L. E. Waterman."

XQ117. Do you sell more A. A. Waterman pens than you do L. E. Waterman? A. Certainly.

4393

XQ118. That is because you sell them in answer to the request of the customers for Waterman pens, is it not? A. On their judgment.

XQ119. Is not the reason why you sell A. A. Waterman pens when they ask for Waterman pens, because you make more profit on those pens than you do on the others? A. Not necessarily.

XQ120. Is not that the reason that you recommend them so much to customers? A. Not necessarily.

XQ121. It is the fact that you do make more profit is it not? A. Not always.

XQ122. Don't you pay less for the A. A. Waterman goods than you do for the Waterman Ideal Fountain Pens? A. Not always.

4394

XQ123. What A. A. Waterman goods do you pay more for than you do for L. E. Waterman goods? A. That would go in our discounts.

XQ124. I want to know the whole story? A. The L. E. Waterman people take one of their pens for half. I will illustrate. An L. E. Waterman pen which retails at $2.50 can be bought by me for $1.25, less 40 per cent and a cash discount.

XQ125. What is the cash discount? A. I have forgotten; three per cent or something of that sort. Please don't use that. I have forgotten because I don't usually take advantage of that.

XQ126. You buy the $2.50 pens for $1.25, less 40 per cent? A. Yes.

4395

XQ127. In other words, you buy the $2.50 pen for $.75; is that right? A. Yes, if I have an L. E. Waterman pen to turn in in the way of exchange.

XQ128. When you buy the goods direct, what do you pay? A. Without that one to turn in, that is all.

XQ129. You don't buy them in any other way? A. I usually have some to turn in.

XQ130. You only buy from the L. E. Waterman Company what you turn in in the way of secondhand pens? A. No, I don't mean that. I usually do.

4396

XQ131. You don't buy any goods from them where you pay their regular trade terms? A. I don't wish to make that statement. I usually return the old goods in the way of exchange to A. A. Waterman.

XQ132. How many of those goods do you get and turn in; how many of those goods do you take up a day? A. I get, perhaps, one or two a week.

XQ133. Does that supply you with Waterman Ideal Fountain Pens to satisfy your trade? A. Yes, I always have plenty.

XQ134. You only sell one or two Waterman Ideals a week? A. Yes.

4397 XQ135. What do you pay for A. A. Waterman goods that sell for $2.50? A. I pay the regular price with the regular trade discounts.

XQ136. You never turn any in in that case, do you? A. Sometimes; rarely.

XQ137. You buy those goods direct at the regular trade discounts? A. I turn in what I have.

XQ138. On what basis do you turn those in? A. Forty off.

XQ139. You mean forty off the list price? A. Yes, forty per cent off the list. The L. E. Waterman offer fifty per cent.

XQ140. You get the same trade discount on the balance that you have to pay? A. The regular dealers' trade discounts.

XQ141. What are those? A. Filling to the gross fifty per cent. Do you want all the discounts?

4398 XQ142. Are there any additional discounts? A. On smaller amounts, on a half gross, and three dozen and one dozen.

XQ143. Do you fill the gross stock? A. Yes, I carry gross stock.

XQ144. You get the gross discount? A. Yes, I get the gross discount.

XQ145. That is fifty per cent? A. Fifty per cent.

XQ146. Any other? A. Yes, and the yearly discount on a thousand purchase.

XQ147. How much is that? A. That is an extra ten per cent.

XQ148. What is the regular trade discount to the L. E. Waterman Company? A. I have forgotten. I know what I get.

XQ149. You do not buy any from them on a regular trade discount? A. Yes, I do. There is, to me, on the filling to three dozen—or, I think it is less—well, my discount is forty per cent.

XQ150. Off the retail list price? A. Yes.

XQ151. But practically all the goods you buy from L. E. Waterman Company are on turning in the old pens? A. Yes.

XQ152. That is your main proposition, is it? A. No, not necessarily. I have bought goods of them. I buy them if I want anything.

XQ153. You don't find it necessary to buy very often from 4400
them, do you? A. There is less demand for them.

XQ154. Very few of their pens sold by you? A. Yes.

XQ155. You sell very few pens of the L. E. Waterman Company? A. Yes.

XQ156. What pens do you sell the most of? A. A. A. Waterman & Co. Modern Pen, I call it.

XQ157. Under the regular trade discount, what is the comparative cost of the $2.50 pen to you, between the A. A. Waterman and the L. E. Waterman? A. I will have to figure on it. That cannot be answered, for this reason. May I give it?

XQ158. Go ahead? A. The pen that is turned in to me, the old L. E. Waterman pen or the old Ideal pen costs me something; that is, I did not get my full price for the pen when it 4401
was turned in. That old pen may have been turned in in exchange for a high price or low price pen and I may have allowed one price or another for it; so when it comes to the price on the L. E. Waterman pens, they vary because of the variable price of the old L. E. Waterman pens.

Mr. Watson: I move to strike out the answer as irresponsive and the attention of the Court is called to the simple question which I am unable to get answered, and the question is repeated.

Mr. Bacon: Counsel for defendant calls the attention of the Court to the fact that the witness asked the

4402

counsel if she should answer that question as she did.

Mr. Watson: The Court's attention is called to the fact that no such remarks were made at all; that counsel knew nothing about how she was going to answer the question until she did answer it.

XQ159. What is the average cost, under the regular trade discounts, of the $2.50 pen of the L. E. Waterman Company to you? A. When I turn in an old pen, or when I do not turn in an old pen?

Mr. Watson: The Court's attention is called to the impossibility of this witness understanding the question.

4403

I will repeat it. It is a very simple question. What is the cost to you under the regular trade discounts, of the $2.50 pen of the L. E. Waterman make?

A. The L. E. and the A. A. do you mean?

Mr. Watson: The Court's attention is again called to the answer of the witness and the question is repeated in this form:

XQ160. What is the cost to you when you buy of the L. E. Waterman Company, at the regular trade discount. its $2.50 pen? A. My $2.50 pen costs me $1.50.

XQ161. It was a very simple answer, wasn't it? A. No, because I always turn in an old pen, I most always turn in an old

4404

pen, so that they do not usually cost me that.

Mr. Watson: I move to strike out the answer as entirely irrelevant and irresponsive.

XQ162. Do the A. A. Waterman Company make a pen that corresponds in size and price to the $2.50 pen of the L. E. Waterman Company? A. The A. A. Waterman people make a $2.50 pen, yes.

XQ163. What does that cost you under the regular trade discounts of the A. A. Waterman & Co.? A. That would depend upon whether I turned in an old pen or not.

4405

XQ164. Under the regular trade discounts without turning in an old pen what does it cost you? A. $1.13.

XQ165. You make 37 cents more on that pen than you do on L. E. Waterman pen, don't you? A. It depends upon whether an old pen is turned in for the L. E. Waterman pen or not.

XQ166. When you buy those pens at the regular trade discount, from both places, as you say you sometimes do, you make thirty-seven cents more on the A. A. Waterman pen than you do on the L. E. Waterman, don't you? A. Yes.

XQ167. Is not that the reason you recommend it to your customers when they ask for a Waterman pen? A. No, sir. May I make a statement?

4406

XQ168. If you will confine yourself to answering the question I will be very much obliged. Do the A. A. Waterman & Co. manufacture pens with the joint under the finger that you have complained so much about? A. I think they have an end joint, as we call it, pen.

XQ169. And makes those in several sizes and styles? A. I think they have several.

XQ170. Do you carry those pens? A. I do not.

XQ171. You don't know whether they make several sizes and styles or not, then? A. I don't know about the styles.

XQ172. Do you carry the Lincoln pen? A. I do.

XQ173. Who makes that pen? A. A. A. Waterman & Co.

XQ174. Is not that an end joint pen? A. Yes.

4407

XQ175. Then you do carry A. A. Waterman & Co. pens that have the end joint? A. I do.

XQ176. What did you mean by just saying you did not? A. Because those are called the New Lincoln pens.

XQ177. Are they not called pens of A. A. Waterman & Co.'s make too? A. Yes.

XQ178. They have got their name on them, have they not? A. I think they have; I am not sure.

XQ179. You distinguish between the Lincoln pen and the other pens of the A. A. Waterman & Co.? A. I distinguish between the Modern pen and the New Lincoln pen, just as the L. E. Waterman distinguish between their Pen and Ink pen and their Ideal pen.

4408

XQ180. Do you yourself repair the pens you take in for repair? A. I do nearly all of my repairing.

XQ181. What do you do with those you do not repair yourself? A. Send them to the manufacturers of the pen.

XQ182. What is the nature of the repairs that you yourself do? A. Straightening the point, re-adjusting, supplying feeds and caps and new sacks.

XQ183. What occasion do you have to supply new feeds? A. They are broken sometimes.

XQ184. Did you ever supply a new L. E. Waterman feed? A. Yes.

4409

XQ185. Where did you get it? A. From some old parts that I had.

XQ186. Some old pen of theirs or some other pen? A. Some old pens of theirs.

XQ187. What is the nature of the repairs that you make to the L. E. Waterman pens? A. Straightening the points, where the pen has fallen; cleaning and adjusting. If it has a leaky joint we send it to their factory.

XQ188. How many pens do you send with leaky joints to their factory? A. I think about one-third of the repairs that come in are for leaky joints.

XQ189. How many will that average a day? A. I think on an average I will run across two leaky joints of the L. E. Waterman a day.

4410

XQ190. And all those you send to the factory? A. I recommend them to take them to their place on School Street.

XQ191. Those that you take in your store for repair, of the L. E. Waterman goods, that have leaky joints, you send all of those to the Waterman store? A. I almost always can get the customer to take them up there himself, because there is no profit in it for me. Of course, if the pen is bought from me I make good and take the pen to them.

XQ192. How many pens with leaky joints do you send to the Waterman Company a week? A. I don't know.

XQ193. Do you send one a week? A. At least.

XQ194. Do you send two a week on an average? A. I think you might put that at probably three. Wait a minute! More than that.

XQ195. Where do you send those? A. Wait a minute. Will you let me think a moment on that. I don't know how many I send and I don't want to give an answer on that question.

XQ196. Do you send as many as one a week? A. I do.

XQ197. Do you send as many as two a week? A. I don't wish to give an answer on the number.

XQ198. Where do you send them? A. For leaky joints always to the L. E. Waterman Company.

XQ199. Where? A. School Street.

4412

XQ200. Eight School Street? A. Yes. That is where the L. E. Waterman repairs are taken by me.

XQ201. And you are not willing to say you send as many as two leaky joints a week? A. I am not willing to state the number of pens that I send there

XQ202. You are not willing to say as a matter of fact that you send one a week up there with leaky joints, are you? A. Yes.

XQ203. Are you willing to say that you send two a week up there with leaky joints? A. I am not willing to give an answer.

XQ204. How long have you been selling the Lincoln pens? A. Ever since I had a store.

XQ205. Do you have any leaky joints with them? A. Yes.

4413

XQ206. You do not have much call for Watermans Ideal Fountain Pens, do you? A. Some, yes.

XQ207. How far is your place of business from 8 School Street, the Boston office of the L. E. Waterman Company? A. Less than half a block.

XQ208. People that are familiar with the goods go to their store rather than to other stores, don't they? A. Not always.

XQ209. Don't they carry a bigger assortment than you carry, at their store? A. Yes.

XQ210. They don't sell anything else but their own fountain pens at their store, do they? A. No.

XQ211. They have a larger store than you have, don't they? A. They have a larger line of L. E. Waterman pens.

4414

XQ212. What sign do you carry in your window in front of your store? A. It is a corridor store and hanging on the outside is a pen bearing the name "The Fountain Pen Store, M. I. Ayer." There is a glass sign with my name, the same, hanging out from the store. Inside the store there is a notice of repairing done. Inside the cases that I carry ink in are the individual signs of the individual makes of pens; the Conklin, A. A. Waterman, I did have the Sterling, I have the Boston. I don't know exactly what different signs are there at present.

XQ213. How do you advertise Waterman's Ideal Fountain Pens; what is the sign in reference to those? A. Just what the sign is now I don't know. I think I have their card sign.

4415 XQ214. One that you got from the company? A. Yes.

XQ215. What kind of ink do you carry? A. I carry Carters' Writing Fluid.

XQ216. Is that the only kind? A. It is all Carters. I did have some L. E. Waterman's ink at one time. I think I have none in stock now.

XQ217. Do the Waterman Ideal Fountain Pens that you sell generally prove satisfactory to your customers? A. Those that I sell are as satisfactory as those that are sold by the concern on School Street.

XQ218. How do you know that? A. Because they tell me that they would rather buy of me than at School Street—the customers; else they would go up there.

4416 XQ219. Do your customers tell you that the Waterman Ideal fountain pens that you sell them have proved satisfactory, or otherwise? A. They are not exclusively satisfactory, not always.

XQ220. Are they generally satisfactory? A. Not necessarily. They often come back and change them for other makes.

XQ221. What is the nature of the repairs that you make to the A. A. Waterman pens? A. Bent points and broken parts and lost caps.

XQ222. What parts are broken? A. The feed and the button that screws on; but not often from my customers. Those come from some of the other dealers.

4417

XQ223. You know nothing about what the other dealers' repairs are; the only thing that you know about is the repairs that are brought into your store? A. I do some repairing for other concerns.

XQ224. Do you have any rotten sacks or broken sacks? A. Very few.

XQ225. The principal trouble is with the feed? A. The principal trouble is with the pen point, where they drop them on the floor or thrust them into something. That is the usual repairs we meet any way, on all makes of pens.

XQ226. You do not count in these repairs to leaky pens the Lincoln pens, when you say one-third of the repairs you make are A. A. Waterman & Co., goods, do you? A. I don't sell a great many Lincoln pens.

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XQ227. But you repair all kinds of makes, whether you sell them or not, don't you? A. Yes.

XQ228. Don't you have a good many of the Lincoln pens come in for repair? A. Not many.

XQ229. Do you have more A. A. Waterman makes than of the Lincoln? A. I sell more of the A. A. Waterman, therefore I have more repairs on the A. A. Waterman than I do on the Lincoln.

RE-DIRECT EXAMINATION by Mr. Bacon:

4419

RDQ230. Do you find very many self-filling pens turned in with a button broken? A. No, very few.

RDQ231. In the last few years the button has been very much strengthened, has it not, and enlarged?

Mr. Watson: Objected to as highly leading and the Court's attention is called to the leading character of the question asked.

A. Yes.

RDQ232. Do you find that the middle joint A. A. Waterman pen is weak? A. Not now.

RDQ233. Does it very often leak? A. No.

4420

RDQ234. Did you ever see an L. E. Waterman self-filler with your own eyes? A. Yes.

RDQ235. How many? A. I don't know; not a great many.

RDQ236. They are very rare, are they not? A. They were not at one time. They are not sold very much now.

RDQ237. Their specialty is the end joint pen? A. Yes.

RDQ238. The same kind of a pen that was manufactured twenty years ago? A. Yes.

RDQ239. You said that you sold an A. A. Waterman self-filler in ninety-nine cases out of a hundred, and you also said that you sold them to a customer when it was for their good. What did you mean by that?

4421

Mr. Watson: Objected to as not the testimony of the witness and as immaterial and irrelevant.

A. When he will be best satisfied with the pen; when I can make him the most permanent customer.

RDQ240. How can you tell that he will be most satisfied? A. From the description of his needs.

RDQ241. If a man is going to stay right in Boston, do you make any distinction between him and a man who is going to travel abroad?

Objected to as immaterial.

A. Yes.

4422

RDQ242. Why so? A. Because the L. E. Waterman people have more offices abroad than almost any other make of pens and they might handle any other makes, especially that of A. A. Waterman pens. I have known instances where the gold pens have been filed off and where the button has been broken by the L. E. Waterman people.

RDQ243. At $2.50 Modern and $2.50 Ideal, which is the better pen?

Mr. Watson: Objected to as this witness is incompetent to answer.

A. The A. A. Waterman Modern.

4423

RDQ244. You get a larger discount from the A. A. Waterman people than from L. E. Waterman people by reason of the fact that you get an additional discount for large sales; is that a fact? A. Yes, the larger quantity carried and sold. That is true of all fountain pen concerns. The L. E. Waterman people would give me probably a large discount—I don't know what their greatest quantity discount is—did I carry and sell as many of theirs. I am very glad to make this statement.

RE-CROSS EXAMINATION by Mr. Watson:

RXQ245. Who was it connected with the L. E. Waterman Company that broke the button and filed the pen off? A. I don't know. 4424

RXQ246. How do you know then that they did it? A. Because a dealer in a neighboring town took in an A. A. Waterman Modern self-filling No. 20 or No. 30 and it was afterwards brought to me as having been unsatisfactory, and I said, "Who did you leave it with?" and he told me; and that pen was sent over to New York by a pen dealer who carries only the L. E. Waterman pens. It must have been known to the L. E. Waterman people.

Mr. Watson: I move to strike out all the testimony of this witness regarding the breaking of the button and the filing of the pen.

4452

The Witness: That is only on the filing of the pen. I can testify to the bent point. I saw that done.

RXQ247. Who did it and where? A. It was done by a salesman in the L. E. Waterman store. It was pressed down into an ink bottle.

RXQ248. What store? A. Eight School street.

RXQ249. When was it? A. I don't recall.

RXQ250. Who was the salesman? A. I don't recall. They have a number.

RXQ251. Was it done a month ago or a year ago? A. I don't even recall that; whether it was more or less than a year. It may be about that time.

4426

RXQ252. Is it not a fact that the discount that you have given on Waterman Ideal fountain pens, of forty per cent off, is the regular trade discount? A. For that number of pens carried.

RXQ253. How many? A. Three dozen.

RXQ254. Don't you know it is the same thing? A. I don't know because I have not been personally interested in it.

RXQ255. Don't you know it is the same thing? A. I do not know it.

RXQ256. You don't know that it is different, do you? A. I should assume that it was different.

RXQ257. You don't know anything about it; you have no personal knowledge of it at all have you; what the discount is?

4427 A. I have no recollection. I did know at one time.

RXQ258. The trade discount is forty off, is it not? A. The trade discount on three dozen pens, as near as I can recall, is forty per cent.

RXQ259. And that is the only discount that you know of? A. I know that the others are different.

RXQ260. What others are different? A. On six dozen.

RXQ261. How much is this? A. Wait a minute. I don't know. I don't know whether it is four and eight and twelve, or whether is it three and six and twelve, as it is with the A. A. Waterman. It is a long time since I bought any. I had no desire to have any more than the three dozen.

RXQ262. What is the discount on a three dozen lot of A. A.

4428 Waterman Company? A. Forty and five.

RXQ263. How much does the $2.50 pen, on that discount, cost you? A. That would be $1.375, I think. I want to state that the L. E. Waterman gives a yearly additional discount on three dozen.

RXQ264. Does not the A. A. Waterman give the same yearly discount? A. No, they do not. The L. E. Waterman people give an additional yearly discount, I think. I don't take advantage of it.

RXQ265. You don't know what it is or whether they give it or not? A. I know they do give an additional yearly discount where the stock is filled each month to three dozen.

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RXQ266. What is that discount? A. I don't know. I don't take advantage of it, so I have forgotten.

RXQ267. Is it not a fact that you only carry a very few Waterman Ideal Fountain Pens in stock? A. I carry three dozen.

RXQ268. All the time? A. Yes. The stock may run below that.

RXQ269. If they are such a poor pen, why do you carry them at all? A. Because I prefer to sell an L. E. Waterman pen to a customer who is going to make a gift to a friend, where the pen will go into a far country and away from the repairer, because should I send an A. A. Waterman pen to a distant place, in case a change was needed to be made, the pen would be ruined by the L. E. Waterman dealer—likely to be ruined; you would stand a chance.

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RXQ270. That is your experience with them? A. Yes, that is what I tell my customers.

RXQ271. And how many cases of ruin have you ever known in your experience? A. I didn't lay them up as anything but a lesson.

RXQ272. Do you know the name of any person who was the owner of one of these pens that were ruined in the manner you have described? A. I think I could find the name of one.

RXQ273. Do you know any name? A. I do not recollect.

RXQ274. Will you furnish us at any time the name of any customer of yours, giving the address, whose pen was ruined in the manner you have described? A. I think I could.

4431

RXQ275. We would be very glad to have you do that—where it was ruined. Is it not the fact that you carried the Waterman Ideal fountain pens simply for the purpose of being able to say that you carried the Waterman Ideal pens and when people come in and ask for a Waterman pen you sell or try to sell them an A. A. Waterman pen; is not that the only reason why you carry those pens? A. No.

RXQ276. Don't you use the Waterman Ideal pen as a means of getting people into your store, asking for Waterman pens and then selling them an A. A. Waterman pen? A. No.

4432

By Mr. Bacon:

RDQ277. Do you have one of these signs in your store (showing witness a sign)? A. No, I have not. I depend very little upon signs any way.

Signature waived.

MAX L. BLATZ, a witness called on behalf of the defendant, being duly sworn, testified as follows:

4433 *Direct-examination by Mr. Bacon:*

Q1. State your name, residence and business? A. Max L. Blatz; 15 North Street, Mount Vernon, N. Y.; salesman, for A. A. Waterman & Co.

Q2. How long have you been employed by the A. A. Waterman Company or the Modern Pen Company? A. Going on about five years. I would not say the exact number of months.

Q3. What is your territory? A. My territory has been the State of New York, the New England States.

Q4. Did you receive any instructions from the officers of the Modern Pen Company, any one of them, in relation to how you should sell A. A. Waterman & Co. pens; if so, state what they were? A. I was told to sell the A. A. Waterman pens as being
4434 A. A. Waterman pens, and emphasize the word "A. A."

Q5. Have you ever in any instance sold to any dealer A. A. Waterman & Co. pens without explaining to them that they were the goods of A. A. Waterman & Co.? A. No, always sold them under A. A. Waterman & Co.

Q6. Have you ever sold any just as Waterman Company alone? A. No.

Q7. Have you had any experience recently in Buffalo with your customers who had been told that there was no such firm as A. A. Waterman & Co., and that they had no right to sell their goods? If so, state when it was and give the conversation of the dealer.

4435

Mr. Watson: Objected to as immaterial, irrelevant and incompetent.

A. The exact date I could not state. I should judge it was in the neighborhood of six or eight weeks. I won't say the exact date.

Q8. Six or eight weeks ago? A. Yes. Calling upon my trade there I was informed by Mr. Cohen, whose address is—I don't know the number of his place, I think it is 350 or 330 Main Street—I presented my card and he was surprised to see me in there representing A. A. Waterman & Co., and stated to me that a man was in there with a woman and wanted to buy a pen and he asked if there was any particular make that he wished 4436
and he said no. He was loaded up pretty well with Parkers and Onotos and Conklins; he was trying to dispose of those three makes, as I understood, so as to put in our line of A. A. Waterman & Co. He also carried an L. E. Waterman pen in there and he showed the party the Parker and he did not want that; he showed him the Conklin and he said he did not want that; he showed him the Onoto and he didn't want that and he pulled out one of our pens and showed him that pen and as far as I understood the man did not purchase the pen, but he told him, "Are you aware that you are selling a pen that you have no right to?" The man says, "No, sir, I am not. I am selling A. A. Watermain & Co. pens. Here is the name right on the barrel." I told him I would report to the firm on this case and they would send 4437
him instructions exactly as to his selling A. A. Waterman & Co. pens.

Mr. Watson: I move to strike out the answer as incompetent and hearsay.

A. (Continued.) From there I went to the Whiting Stationery Company on Main Street. The number I don't know. I walked in there and presented my card and the young lady there was surprised; she said, "A. A. Waterman & Co.? There is no such firm." I said, "Oh, yes, there is." She stated that a representative had been there with a woman, a lady, and said they

4438 could not sell any A. A. Waterman pens. She stated to me that I could go all over the city of Buffalo and I would not be able to sell any A. A. Waterman pens as this attorney had been around and stated to all the customers that there was no such company as A. A. Waterman. I had quite a conversation with regard to my goods then, stating about the good quality and all, and tried to get an order, but it was impossible. From there I went to Adam, Meldrum & Anderson and called on Mr. Simons the buyer and Mr. Simons said, "There is no such thing as an A. A. Waterman pen." Mr. Simons said there had been a man there with a woman looking for a pen to purchase, and whether the sale of this pen went through, I don't know in regard to that;
4439 but he stated to me that there was a discussion arose and that they called Mr. Gibson, I think, and they conversed together, the three of them and Mr. Simons asked the attorney whether he could sell A. A. Waterman's pens and he said no. Mr. Simons said to him, "That is funny. Some years ago you said we could sell an A. A. Waterman pen and could sell any other make of pens but a Sterling"—in which they had a case against the Sterling Company, and now they are trying to come forward, after stating years ago that they could sell an A. A. Waterman pen, and saying that they could not sell an A. A. Waterman Company's pen at this time.

Mr. Watson: I move to strike out the answer as in-
4440 competent and hearsay.

CROSS-EXAMINATION by Mr. Raymond:

XQ9. Who else do you sell in Buffalo? A. The Steers Specialty Company.

XQ10. Where are they located? A. On Main Street, I don't know the number. It is in the three hundreds.

XQ11. Who else? A. I sold Schropp there, but he has gone out of business.

XQ12. Where was he located? A. He was located at Ellicott Square.

4441

XQ13. Who else did you sell? A. Do you want the names of the parties? Adam, Meldrum & Anderson.

XQ14. Do they carry any L. E. Waterman pens? A. No, sir, not that I know of.

XQ15. They carry a good many other makes, don't they? A. The only pens that I have seen in their stock are Onotos and Sterling, outside of ours.

XQ16. And Moore? A. I think so. I never have seen them.

XQ17. Who else did you sell? A. Simon Cohen. It is a pretty hard thing to remember the names of customers in the city.

XQ18. How often do you make that trade? A. Twice a year, sometimes three times a year according to how my trips are running.

4442

XQ19. It is a pretty big city is it not? A. Pretty good.

XQ20. Are those the only ones that you remember that you sell to? A. Those are the only ones I remember.

XQ21. What stationers do you sell in Buffalo? A. I don't remember of any stationers in Buffalo.

XQ22. What kind of a store does Simon Cohen keep? A. Jewelry.

XQ23. A large store? A. No, not very large.

XQ24. What kind of decorations and advertisements has he got in his window? A. Fountain pens, diamonds and jewelry.

XQ25. Has he got any A. A. Waterman signs in his window? A. I never noticed any.

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XQ26. Have you ever noticed any L. E. Waterman signs in his window? A. I never noticed any.

XQ27. Didn't you notice a big fountain pen with "L. E. Waterman Company" on it? A. No.

XQ28. You never noticed this big fountain pen displayed across the window? A. No, sir.

XQ29. Covering the window? A. No, there is no such sign there.

XQ30. Watermans Ideal fountain pen? A. No, sir, no such sign there that I have ever seen.

XQ31. Didn't you notice underneath it a lot of trays with pens? A. I saw the trays in the window but no signs.

XQ32. Were there not little signs displayed on those trays? A. I have not noticed the trays in the window except to see them in the window.

XQ33. You don't know what makes of pens were displayed in those trays do you? A. Yes.

XQ34. What makes? A. A. A. Waterman and Parker.

XQ35. Didn't you notice a little sign on top that says "Waterman pens $1 up"? A. No.

XQ36. Where does Mr. Cohen keep his stock of A. A. Waterman pens in the store, what part of the store? A. That I don't
4445 know.

XQ37. You have been in there a good many times? A. Yes.

XQ38. Don't you ever notice these things? A. I wished to put up a show case for Mr. Cohen, a solid plate glass case to display our pens on his case and he said that he would rather give our pens the window display than to put any more show cases on top of his case.

XQ39. Don't you know whether your pens are prominently displayed in his store? A. In his window, at times when I am not there.

XQ40. His store consists of just one side, a case on one side of a narrow store about forty or fifty feet deep does it not? A. Yes, on one side, one window.

4446 XQ41. Didn't you notice where your pens were located when you went into the store? A. He has not our pens located on any show case.

XQ42. In the show case? A. We have a show case there.

XQ43. No, one of his own show cases? A. I have never examined his other show cases.

XQ44. Did you see any L. E. Waterman pens there? A. I saw a small two dozen display of L. E. Watermans at the rear end of the show case. They were with Parker, Onoto and Conklins, three other cases.

XQ45. And the L. E. Waterman case was away at the back of the store? A. At the rear of the store.

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XQ46. What did Mr. Cohen say happened? Did he say who had been in there? A. He said an attorney had been in there.

XQ47. Did he show you a card? A. He could not find the card.

XQ48. He looked for it didn't he? A. He looked in one drawer for it and could not find it.

XQ49. Did he not show you a paper that had been left with him? A. No.

XQ50. What did he tell you about a printed paper that had been left with him? A. Nothing whatever.

XQ51. Did he say he had sent it in to the company? A. No.

XQ52. Repeat the conversation you had with Mr. Cohen? A. In going into Mr. Cohen's store Mr. Cohen told me he was surprised that there was an A. A. Waterman & Co. doing business at present, that an attorney and a woman had been in there. After the conversation went through with regard to the buying of a fountain pen, he presented a card stating he was an attorney. Mr. Cohen did not know him previous to that. 4448

XQ53. Did he tell you under what name he had been trying to sell this pen to this attorney? A. Under the name of A. A. Waterman & Co.

XQ54. He told you that? A. No.

XQ55. He did not tell you that he was trying to sell that pen as a genuine Waterman? A. No, genuine A. A. Waterman.

XQ56. No "genuine Waterman pen"? A. No.

XQ57. How did Mr. Cohen speak of this pen to you? A. Which pen? 4449

XQ58. The A. A. Waterman Company? A. As being a high grade piece of goods, and the best selling pens he has ever had.

XQ59. Under what name did he talk to you about these pens? A. A. A. Waterman & Co.

XQ60. Do you call that pen an A. A. Waterman & Co. pen? A. Always emphasize the words "A. A."

XQ61. Did Mr. Cohen tell you that the man who was in to see him had told him to write to the company? A. Write to which company?

XQ62. To the Modern Pen Company and ask whether he had the right to sell the pens as a Waterman pen? A. No, I told

4450

him I would report on the condition of affairs and that our firm would write to him and tell him in regard to the way he had a right to sell an A. A. Waterman & Co. pen.

XQ63. What did you call these pens? A. A. A. Waterman & Co.

XQ64. That is just the way you speak of it? A. Yes, always show the name on the barrel.

XQ65. A. A. Waterman & Co.? A. A. A. Waterman & Co.

XQ66. Will you spell that name out in full? A. "A. A. W-a-t-e-r-m-a-n & C-o-m-p-a-n-y."

XQ67. In speaking of these pens do you always slur the "and" the way you have been doing to make it sound like A. A.

4451 Waterman Company? A. A. A. Waterman & Co.

XQ68. Do you know that is the first time you have said that, the whole time you have been sitting there?

Mr. Bacon: Defendant's counsel protests on the ground that it is not true that he has slurred the "and" and it would not make any difference if he had.

Mr. Watson: The stenographer's notes will show that he has not mentioned the word "and" prior to this.

Mr. Bacon: The stenographer's notes will not so show.

XQ69. What is this A. A. Waterman & Company that you had been talking about; do you know what it is? A. In what way do I know what it is?

4452 XQ70. Is it a company? A. As far as I know it is.

XQ71. An incorporated company? A. As far as I know it is.

XQ72. You never have been told any differently? A. I never went into the story of the incorporation.

XQ73. Who is A. A. Waterman? A. I don't know Mr. A. A. Waterman. I have been employed since Mr. A. A. Waterman has been out of the firm.

XQ74. Do you know whether he is any relation to Mr. L. E. Waterman? A. No, sir.

XQ75. Didn't you tell Mr. Cohen that he was a brother of L. E. Waterman? A. No.

XQ76. Who ever spoke to you of the relationship between A. A. Waterman and L. E. Waterman? A. Nobody. I don't know of any relationship between the two.

XQ77. Did anybody tell you that they were not related? A. People have asked what the relationship of A. A. Waterman was and I told them I know of no such relationship; that A. A. Waterman used to be connected with L. E. Waterman Company and that is as much as I know.

XQ78. Who pays you? A. A. A. Waterman Company. My checks come from the Modern Pen Company.

XQ79. When you go in to see a man who do you tell him you represent? A. I present my card.

XQ80. Don't you say anything? A. I present my card and 4454
tell them I am in for the sale of A. A. Waterman Modern self-filling fountain pens.

XQ81. Don't you ever tell them who you are? A. Most of my trade know me as being from the A. A. Waterman & Company.

XQ82. You never tried to get any new business? A. Always.

XQ83. What do you do when you go in to see anyone? A. I present my card.

XQ84. You go in and say, "Here is my card" and walk out? A. No.

XQ85. What do you do? Tell them whom you represent? A. They can see on the card who I represent.

XQ86. You never say a word? A. Then I start to talk about
the good qualities of our fountain pens and try to open up a new 4455
account for the sale of our goods. I talk of the class of our stock.

XQ87. When you sell Mr. Cohen pens do you tell him how he shall sell those pens to the public? A. Yes, to be sold under the name of A. A. Waterman & Co.

XQ88. How do you tell him to sell these pens? A. To sell these pens and advertise them under the name A. A. Waterman.

XQ89. Do you do the same thing with Adam, Meldrum & Anderson? A. Yes.

XQ90. Have you ever seen any of their advertisements? A. No.

4456

XQ91. Don't you know they advertise those pens as Waterman? A. If they do I am not in the city and I don't know anything about it.

XQ92. Have you ever talked to the girl at the counter? A. Yes, the girl at the counter tells us our pens are the finest they have ever had and she insisted upon having the pen for herself which our company sent to her as a gift.

XQ93. That is the reason she tells you it is such a good pen? A. Not exactly that but she has used one out of the stock there and she did not care to use the stock.

XQ94. What does she call these pens in talking about them? A. In talking to me she explains them as an A. A. Waterman &
4457 Co. pens.

XQ95. Did you have any talk with her the time that you were there six or eight weeks ago? A. No, I had very little to say to her. Most of my talk was with Mr. Simons.

XQ96. You did not see her? A. Yes, I shook hands with her.

XQ97. Did she tell you she had sold a pen and given a written receipt as a Waterman? A. No, she did not.

XQ98. If she had done that she would have done something wrong wouldn't she?

Mr. Bacon: Objected to as immaterial; it is not for this witness but for the court to say.

Mr. Raymond: I call the court's attention to the fact
4458 that it is extremely material as to the manner in which the salesmen sell these pens to the public and it is entirely competent to show the mental attitude of the salesmen with reference to the goods of the defendant's company and the manner in which they sell them, what they believe is right and what is wrong, tending to show the manner in which they sell pens to dealers and from the dealers to the public.

A. She said nothing to me of the sale of a fountain pen.

XQ99. If she had sold one of your pens as a Waterman pen and given a written receipt for it as a Waterman pen she would have been doing something that was not right wouldn't she?

4459

A. I don't know. That is a difficult question. If she gave an A. A. Waterman Company receipt she would be giving a receipt that read, "A. A. Waterman Company."

XQ100. But if she had given a receipt as a Waterman pen when she in reality sold an A. A. Waterman & Co. pen would she be doing what was right? A. She would be doing what was right, yes.

XQ101. And you approve of such things? A. Yes.

XQ102. If a person that you sell goods to asks you whether he can sell the pen to the public as a Waterman pen you tell him yes? A. No, sir.

XQ103. What is wrong with it? A. Tell him to use the name A. A. Waterman & Co.

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XQ104. But you just said it was all right for them to sell it as a Waterman pen? A. You asked me about signing a receipt as a Waterman pen. Most people abbreviate in writing a receipt, especially girls in a department store.

XQ105. But if a person asks for a Waterman pen and she sells this pen as a Waterman pen, is that right? A. Yes, it is right.

XQ106. And you tell the dealer the same thing don't you? A. No.

XQ107. If dealers ask you, "Is it right for me to sell that pen as a Waterman pen when people come in and ask for a Waterman pen" what do you tell them? A. He has a right to sell it to them as an A. A. Waterman pen.

4461

XQ108. Do you tell them that it is wrong for them to sell them as Waterman? A. Yes, without using the initials A. A. Waterman.

XQ109. You just said it was all right for this girl? A. You asked if it was all right if she signed it on the receipt as the sale of a Waterman?

XQ110. You think there is a difference then between what people say and what they write? A. In a receipt I do.

XQ111. Do you know any pen that is called a Waterman pen? A. A. A. Waterman & Co.

4462 *Max L. Blatz*

XQ112. Is that the only one you know? A. L. E. Waterman Company, a pen that I have run across on the road that the name has been cut off on the barrel by fakirs as a Waterman pen.

XQ113. Under what name do dealers call pens made by L. E. Waterman? A. Some call them L. E. Waterman Ideal. Others call them Waterman Ideal. Others call them Ideal.

XQ114. They don't call them Waterman's pens? A. No, they always say L. E. Waterman or Waterman's Ideal or Ideal.

XQ115. Why don't you when you go in a store say that you represent the Modern Pen Company and are selling the Modern pens? A. Because I always present the card.

4468 XQ116. Don't you say you are selling A. A. Waterman Modern pens? A. I sell A. A. Waterman Modern pens.

XQ117. Don't you use the word Waterman just to get an audience with people who don't know the word Waterman in connection with fountain pens? A. People know the name of Waterman the same as any other pen.

XQ118. They know that name in connection with fountain pens? A. They know them without the name Waterman and they know the name A. A. Waterman & Co.

XQ119. You never find any confusion between them? A. If there is any confusion at any time I always state to the public or the people interested in it that there are two distinct houses A. A. Waterman & Co., and L. E. Waterman Company.

XQ120. Don't you find a great deal of that confusion? A. 4464 Not very much over my territory.

XQ121. When you go in to see a man just opening up business and you say, "I am selling A. A. Waterman & Co. pens" does he ask you which Waterman pens you are selling? A. I always state A. A. Waterman & Co.

XQ122. Does he ever ask you whether there is any other Waterman in the business? A. Yes.

XQ123. A man new in the business? A. A man new in the business, if he is opening a store he has had connection with business in some way.

XQ124. You find that they universally know that there are two concerns A. A. Waterman & Co. and L. E. Waterman Co.? A. Yes.

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XQ125. No matter where you go you find people know that? A. People know it. The territory that I am in, New York State and New England, is known as being the two houses, the A. A. Waterman & Company and the L. E. Waterman & Company, both doing business in the City of New York. That is the way it is always stated by me and if I covered that ground again they always know me as being the representative of A. A. Waterman & Co. In the City of Boston I never use the card stating who I am as I am well known there and our line is well known.

XQ126. What did they tell you at Adam, Meldrum & Anderson's? A. They told me there had been an attorney in there and said to them that they had no right to sell A. A. Waterman & Co. pens.

4466

XQ127. Did they not tell you that the attorney who was in there bought a pen and had a written receipt for it as a Waterman? A. No.

XQ128. They did not tell you that was what was complained of? A. No, I did not know anything about that.

XQ129. Did they show you a copy of an injunction that had been left there? A. No.

XQ130. Did you see Mr. Bushnell? A. No.

XQ131. You did not see the head man? A. Yes.

XQ132. Who? A. Mr. Simons.

XQ133. You saw Mr. Simons? A. I saw Mr. Simons.

XQ134. Did they still have A. A. Waterman & Co. pens there when you were there? A. Yes, I sold them another order.

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XQ135. Did you tell them how they should sell those pens? A. As A. A. Waterman & Co. and advertise them as such and I am to put in a window display at Adam, Meldrum & Anderson to be advertised as A. A. Waterman & Co.

XQ136. Did Mr. Simons tell you they had also advertised those pens as Waterman pens? A. No.

XQ137. Did he ask you if he could advertise them as Waterman pens? A. No, he knows better. He advertises them as A. A. Waterman & Co.

XQ138. It would be wrong for him to advertise them as Waterman pens? A. We always advertise them as A. A. Waterman & Co.

XQ139. It would be wrong to advertise them as Waterman pens?

Mr. Bacon: Objected to as it is not for this witness to speak on the question of morals.

XQ140. Where is Mr. Schropp? A. He has opened up in the manufacture of jewelry. His location in Buffalo I don't know.

XQ141. Didn't you sell a man down on Exchange Street who had a big window display of pens? A. None that I can remember.

XQ142. You don't remember that? A. No.

XQ143. You would remember if you sold him wouldn't you?
4469 A. I don't know that I would remember exactly the people I sell. I cover a big territory. It is hard to remember every person that I sell.

XQ144. Do you sell a single high class store in Buffalo? A. Yes.

XQ145. Which one? A. Adam, Meldrum & Anderson.

XQ146. That is the only one? A. Steers Company.

XQ147. What kind of a store do they keep? A. Specialties and novelties.

XQ148. What do you mean by novelties? A. Fancy special hat pins and stick pins. They have got an assortment of goods in there.

XQ149. Did you speak to the young lady in there? A. No,
4470 I talked with Mr. Dodge, the president of the company.

XQ150. Did you tell him how he should sell the pens to the public? A. Yes, always sell them A. A. Waterman & Co.

XQ151. You told Mr. Dodge, "Mr. Dodge, you must sell these pens to the public only as A. A. Waterman & Co. pens"? A. A. A. Waterman & Co.

XQ152. "You must not sell these pens as Waterman." You told him that? A. Yes.

XQ153. "You must not sell these pens as L. E. Waterman pens or Ideal pens"? A. Our pens are never sold as L. E. Waterman pens.

XQ154. Did you tell him that? A. That he must not sell them as L. E. Waterman?

XQ155. Yes? A. He would not sell them as such. They are not marked as such.

XQ156. Did you tell him not to sell them as that? A. No, not to sell them as L. E. Waterman pens.

XQ157. You did not tell him that? A. No.

XQ158. But you told him not to sell them as Waterman? A. Not to sell them as Waterman; to sell them as they are marked A. A. Waterman & Co.

XQ159. And not to speak of them to the customer as Waterman pens? A. Not as a Waterman pen, but as an A. A. Waterman & Co.

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XQ160. Do you know that they sell pens in the store as Waterman pens? A. As A. A. Waterman and as L. E. Waterman Ideal pens.

XQ161. Do they carry L. E. Waterman pens A. Yes.

XQ162. How many stationery houses are there in Buffalo? A. I don't know.

XQ163. Don't you call on them? A. I couldn't tell the number.

XQ164. Don't you call on them? A. Yes.

XQ165. Just name some of those that you call on? A. I can't name them.

XQ166. Did you ever call on the Vosburg Whiting Co.? A. Yes.

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XQ167. Do they carry A. A. Waterman pens? A. No, they carry L. E. Waterman and Paul E. Wirt.

XQ168. Do you ever call on the Whiting Stationery Company? A. Yes.

XQ169. Did you ever sell them any goods? A. No.

XQ170. These two concerns I have just mentioned are about the largest concerns in Buffalo are they not? A. Not that I know.

XQ171. Are they not two of the largest stationery concerns in Buffalo? A. I don't know that the Whiting Stationery Company is so big.

XQ172. You know Vosburg & Whiting? A. Fairly good.

XQ173. They are only fairly good? A. I should consider them so.

XQ174. Who is the leading stationer in Buffalo? A. I don't know.

XQ175. Do you know anybody bigger than Vosburg, Whiting & Company in Buffalo? A. No, I do not.

XQ176. Do you sell any of the leading jewelers in Buffalo? A. Not outside of Adam, Meldrum & Anderson and Simon Cohen.

XQ177. Who do you sell in Rochester? A. Scranton, Wetmore & Company.

4475 XQ178. Is that the only concern in Rochester? A. The only one. We have a contract with them.

XQ179. Do you know how they sell the pens to the public? A. While I am there, yes.

XQ180. That is all that you do know is it not? A. They are instructed to sell them as A. A. Waterman & Co. fountain pens.

XQ181. Who gave them those instructions? A. I did.

XQ182. Who gave you those instructions? A. My firm.

XQ183. Did you ever run across any dealers that are sold by Scranton & Wetmore? A. Yes.

XQ184. Where? A. Medina, N. Y.

XQ185. How about Sodus, N. Y.? A. I have never been at

4476 Sodus.

XQ186. Do you run across many dealers who are sold by Scranton & Wetmore? A. They cover smaller towns than I do and I would not come in contact with their trade.

XQ187. Whom did you find in Medina, N. Y., that were sold to by Scranton & Wetmore? A. A drug firm. I don't remember the name; two men, partners.

XQ188. How do they sell the pens to the public? A. I suppose they sell them as A. A. Waterman & Co. as the show case and the goods calls for and their advertising.

XQ189. Did you tell them to sell pens as only A. A. Waterman & Co. pens? A. No.

XQ190. You don't know how they sell goods to the public? A. As far as I know as A. A. Waterman fountain pens.

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XQ191. Whom did you talk with of the Modern Pen Company with reference to how you were to sell the pens to the public? A. Mr. Martling and Mr. Geyer.

XQ192. When did you have that conversation? A. When I first went to work for the firm. I have always had my instructions.

XQ193. Have you ever had any written instructions? A. I don't remember.

XQ194. You would remember if you had them wouldn't you? A. I have had quite a little correspondence and written questions to state to the public. I don't remember just exactly what they were.

4478

XQ195. Have you ever had any stock of pens returned to the Modern Pen Company on the ground that they had been bought under the apprehension that they were L. E. Waterman pens? A. Never in my territory.

XQ196. Never have known any case like that? A. No, all the people that buy our pens always contended that they know the A. A. Waterman.

XQ197. Have you had any complaint so that you had to go and see people and explain the pens? A. No, sir.

XQ198. Never had that occur at all? A. No.

XQ199. You are sure of that? A. Positive.

XQ200. When did you have your last conversation with Mr. Geyer with reference to how these pens should be sold? A. I have always had instrutcions about that.

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XQ201. How long ago was it—a year ago? A. I don't know any exact date. I could not say whether it was a year ago or six months ago.

XQ202. You had some instructions just a few minutes ago didn't you? A. From whom?

XQ203. From Mr. Geyer? A. As to what?

XQ204. As to the name under which you sell these pens? A. No.

XQ205. Did not have any conversation with him about it at all? A. Not with regard to how to sell these pens, no. I have always sold them under the name of A. A. Waterman & Co.

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ever since I went to work with the firm. I never sold them under any other name. I knew that was my business and followed my first instructions.

XQ206. Do you sell these pens on commission? A. Yes.

XQ207. Salary? A. No.

XQ208. Altogether commission? A. Yes.

XQ209. The more you sell the more you make? A. Yes.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ210. You have a drawing account I suppose, so much a week? A. Yes.

4481

RDQ211. Have you one of your cards with you? A. I don't know. They are all in my overcoat.

RDQ212. Where is your overcoat? A. Over in the office.

RDQ213. Your card gives your name, representing the Modern Pen Company, sole selling agents for A. A. Waterman & Co. does it not, or something similar to that? A. Yes. (Witness produces a card.)

Mr. Bacon: The witness produces a card. On the upper left-hand corner of it is Max L. Blatz. In the middle of the card "Modern Pen Company, 22 Thames Street, New York." On the lower right-hand corner, "Sole selling agents for A. A. Waterman & Co." On the lower left-hand corner "Modern self-filling and middle joint fountain pens."

4482

Objected to as incompetent, irrelevant and immaterial.

RDQ214. If a girl in some department store sells a man an A. A. Waterman pen and tells him it is an A. A. Waterman and then he inveigles a receipt out of her, and she puts on it "1 Wat. pen," you would not consider that an unpardonable sin, would you? A. No.

4483

DEWITT C. VAN VALER, a witness called on behalf of the defendant, being duly sworn, testified as follows.

Direct-examination by Mr. Bacon:

Q1. State your name, residence and business? A. DeWitt C. Van Valer; residence, 134 Oak Street, Richmond Hill, Long Island; business, gold pen maker by trade; superintendent for A. A. Waterman & Co. at present.

Q2. How long have you been in the manufacture of gold pens? A. Over twenty-five years.

Q3. How long have you been engaged in the manufacture of fountain pens complete? A. About ten years, I should judge.

Q4. You are superintendent of the factory of A. A. Waterman & Co.? A. Yes. 4484

Q5. And have been for how long? A. Since they have been in existence I guess. I can't tell you exactly.

Q6. That is, you were with the old firm of A. A. Waterman & Co. and Frazer & Geyer Company? A. Yes.

Q7. Have you ever been familiar with the manufacture of pens in other factories than that of Frazer & Geyer Co. or A. A. Waterman & Co.? A. I have, yes.

Q8. What were they? A. What makes?

Q9. Yes, what factories have you been connected with? A. William S. Hicks, John Foley, Sr., Edward Todd & Co. For a matter of a few months I was with a man named Davidson. I went there with a view of taking a partnership and dropped him. 4485

Q10. Have the Frazer & Geyer Company and the present firm of A. A. Waterman & Co. manufactured the complete fountain pens at all times since you have been with them?

Mr. Watson: Objected to as immaterial.

A. They have.

Q11. Are you familiar with the L. E. Waterman Company make of pens? A. In a general way.

Q12. Hundreds of them come into your factory every week for repair? A. They do.

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Q13. What proportion of those L. E. Waterman Company pens that come in to be repaired have the joint under the finger, the end joint I believe it is called? A. Ninety per cent; in fact one hundred per cent. I don't know anything about any other holder that they make other than that with their name on it.

Q14. If they do they are very few? A. They are very few if any.

Q15. What is generally the matter with the fountain pen holders of the L. E. Waterman Company make? A. As a usual thing they leak at the joint and what we call in the factory sweat, due to faulty construction.

Q16. Have the L. E. Waterman Company been making the
4487 same form of end joint pens ever since you can remember? A. They have.

Q17. Has there been any substantial change in the make of their pens in the last twenty years? A. Not that I have been able to see.

Q18. As far as you can judge from an examination of the pens that come in they make the same pens today that they did twenty years ago? A. There might be some slight variation in the shape of the holder, that would not hardly attract attention unless examined closely.

Q19. Can an A. A. Waterman & Co. self-filling pen leak at any part of the holder? A. No.

Q20. There is no joint in it at all is there? A. No, there is
4488 not a joint properly speaking.

Q21. The section is joined to the barrel by cement, is it not? A. Yes.

Q22. And you do not have to unscrew it in order to fill it? A. You do not.

Q23. As you do with the ordinary Ideal pen? A. You do not.

Q24. And with the ordinary Ideal fountain pen, the end joint pen, every time the pen is filled it wears out the screws in the section, does it not? A. It has a tendency to wear them.

Q25. And as the pen gets older it begins to leak? A. Undoubtedly, it will mar the facing.

4489

Q26. Have you ever heard a complaint of the L. E. Waterman Company pens leaking when nearly empty? A. Yes.

Q27. That is a universal complaint? A. It is general.

Q28. Will you explain in your own words the different processes in the manufacture of gold pen points beginning with the preparation of the gold?

Mr. Watson: Objected to as immaterial to any issue in this case.

A. The pure gold is purchased from the Government through a broker. I take it and alloy it by the use of copper and silver, C. P., to 14 karat or 583-1/3 fine. It is then passed through a set of rolling mills to a pre-determined gauge or thickness.

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Q29. And is put into bars? A. After it is alloyed it is then passed through the rolling mill. I have skipped the melting of it.

Q30. It is first melted? A. It is first melted into a bar and then it is passed through a rolling mill, down to the gauge required for the thickness of the blank. The blanks are then cut from the bar.

Q31. I show you a card and ask you if this shows the different steps in the procedure of the manufacture of a pen (showing witness a large card with portions of pens fastened upon it)? A. It does.

Q32. The blank, technically so-called, is the first step that you have indicated on the card? A. Yes.

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Mr. Bacon: I will letter it A.

Q33. What is the next step? A. The notching of the blank.

Mr. Watson: I move to strike out all this line of testimony as immaterial and irrelevant.

Q34. That is done by machinery? A. Yes.

Q35. Skilled or unskilled labor? A. It requires skilled labor.

Q36. Then after the blank is notched what is next? A. It is then ready to receive the iridium point.

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Q37. Tell us about the selection of the iridium? A. We employ a man who is perfectly competent to judge as to the various qualities of the iridium which may be handed to him and he selects either one or two pieces which are perfect in every respect and places them on this blank which has been prepared for that purpose.

Q38. Is he a man of the highest skill and the highest wages? A. He is.

Q39. He is a skilled workman of the very highest degree is he? A. He is.

Mr. Watson: I move to strike out all this testimony as

4493 immaterial and irrelevant.

Q40. And he uses a magnifying glass in selecting these points? A. He does.

Q41. Of the ordinary iridium of commerce what proportion will he retain and what proportion reject?

Mr. Watson: Objected to as immaterial and I move to strike out all this line of testimony as immaterial to any issue.

A. We will reject probably between 50 and 60 per cent of that which can be furnished at the present condition of the market.

Q42. Then after the iridium is put on the point what is done next? A. The blank is then rolled to the thickness the finished

4494 pen shall be.

Q43. Always taking care not to disturb the iridium I suppose? A. Yes, the iridium is protected throughout all these operations.

Q44. How is the iridium put on the point? A. It is selected under a magnifying glass and laid in position, and a blank then laid on to a piece of prepared charcoal; a fine point of flame brought in contact with the end of the blank that contains the iridium; by the aid of a blowpipe the gold being melted. As it hardens the iridium becomes embodied in it.

Q45. And whether this work is well done or not depends upon the personality of the operator? A. Yes.

Q46. Then comes the rolling? Is that done by skilled or unskilled labor? A. Skilled labor.

Q47. And by machinery A. By a machine, yes.

Q48. How many machines do you use in that process? A. Three or more.

Q46. Then after the rolling what comes next? A. The blank is then tempered.

Q50. How is that done? A. In our case by a process of hydraulic pressure.

Q51. In other factories is it usually done in that way? A. It is not.

Q52. Have you ever known it to be done in that way in any other factory? A. I have not.

Q53. Is this hydraulic press your invention? A. I brought the idea out. Yes, it is my invention. 4496

Q54. How do other poeple usually temper the gold? A. By what is known as hammering—planishing.

Q55. Is it hammered by hand or by triphammer? A. Some manufacturers use a triphammer. Some of them use a hand hammer.

Q56. Is it possible to get a pen as homogeneous by that method as by the hydraulic press? A. It is not.

Q57. What comes next? A. The pen is then cut out of this blank.

Q58. How much ton pressure do you get in this tempering by the hydraulic press? A. It ranges from fifteen to twenty tons exerted on each individual blank as recorded by gauge on the press. 4497

Q59. And that makes it very dense and homogeneous does it not? A. Yes.

Mr. Watson: Objected to as immaterial and the Court's attention is called to the unnecessary padding of the record; also to the leading character of the questions.

Q60. What comes next? A. The pen is cut from this blank?

Q61. Is that done by machinery? A. Yes.

Q62. What is next? Go right on? A. After the pen is cut from the blank it is taken to machines and the name is stamped on, certain pierce holes are pierced in. From that point it is

4498 taken to what is known as the raising machine and is raised into shape.

Q63. Does each set of pens have its individual set of tools? A. Yes.

Q64. Each separate pen? A. Each separate pen has its own individual set of tools.

Q65. After the raising? A. It goes to the setting up bench and is put through a series of hand burnishers. From that point it goes to the slitting machine and a slit is cut in.

Q66. In the slitting is there anything peculiar in your factory that is not found elsewhere? A. We start the slit from the pierce hole and cut forward towards the iridium point for a
4499 short distance, making it possible for the man doing the slitting to have the slitter enter the pierce dead center and without this aid there is great danger of having crooked slits in pens.

Q67. And this partial slit from the pierce hole outwards is individual to your factory is it? A. So far as I know.

Q68. How thick is the copper disc that does the slitting? A. About four and a half one-thousandths (.0045) of an inch in thickness.

Q69. Then after the pen is slit what happens? A. The pen goes back to the setting up bench and goes through a series of hand burnishing and what is commonly called setting. From that point it is partly polished and then given to the grinders. They grind the iridium point into the shape that a gold pen
4500 should be, thereby removing all gold from the surface of the iridium. After doing so they make use of certain well established cuts, known as face cuts, side cuts, shamper cuts and end cuts.

Q70. There are eight of them in all? A. There are eight cuts, properly speaking.

Q71. After the grinding what is done? A. The pen is then smoothed, which consists of polishing the iridium in such manner as to so dull the edges of these cuts that there is no possibility of their scratching, cutting or digging into the paper. The pen is then submitted for inspection to myself; then sent for a final polish; returned to me for further inspection, consisting of

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trying each one individually on paper. If found all right, it is ready then for use.

Q72. How often is the pen tried on paper before it is passed? A. It is tried numerous times by the man doing the work and finally by myself; two different persons trying it at numerous times.

Q73. And you turn out how many a day on an average? A. About six hundred.

Mr. Watson: I move to strike out all the testimony in regard to the details of manufacture as in no way material or relevant to this action.

4502

Q74. How many distinct classes of machines do you use in the operation of manufacturing a pen point?

Mr. Watson: The same objection and motions.

A. Without running all over them in my mind, I think there are about fifteen; that is distinct, different machines.

Q75. Now kindly describe in your own language the manufacture of the fountain penholder; begin at the first and go right on.

Mr. Watson: Objected to as immaterial.

A. The rough stock is furnished to the factory. It is a vulcanized hard rubber in the form of a long tube or barrel, a certain length, and with a cap of a certain length. For the pur- 4503
pose of making the sections it is in tube form, of certain lengths.

Q76. It comes to you all cut? A. No, the feed rod we receive in the same manner. Such of this as we are going to use we cut into proper lengths.

Q77. You buy it by the pound? A. Yes.

Q78. Of the American Hard Rubber Company? A. Yes.

Q79. Can any better be bought in the market? A. No.

Q80. It is the best known, is it? A. It is the best hard rubber there is produced.

Q81. And the highest grade? A. Yes.

4504 *DeWitt C. Van Valer*

Mr. Watson: Objected to and a motion to strike out as immaterial and irrelevant; there is nothing to show that this witness is qualified to judge of hard rubber.

Q82. You have dealt in hard rubber a good many years? A. I have handled it for the last ten years.

Q83. Buying and selling it all the time? A. Not in purchasing it but handling it as it came from the factory.

Q84. You have had it from different sources? A. Had it from different sources.

Q85. Kindly go on. Begin with the turning? A. The barrels are given to a man who is a competent rubber turner and
4505 he turns the barrel with the aid of a properly constructed turning lathe and such hand tools as he finds necessary to use, to a stated size and shape. The cap is likewise turned. The sections are given to men trained to do that kind of work and they shape the sections and cut the threads thereon and fit the sections to the barrels, each barrel being fitted individually and no attempt made to have the sections interchange.

Q86. The section is the part into which the feed and the pen are inserted? A. Yes.

Q87. The lower end of the pen? A. Yes.

Q88. It is generally less than an inch long? A. Yes.

Q89. And is either screwed or cemented on to the barrel? A. Yes.

4506 Q90. In the case of end joint pens such as the Ideal, it is screwed on? A. Yes.

Q91. In the case of the A. A. Waterman self-fillers it is cemented? A. Yes.

Q92. And never comes off? A. Not unless it is taken off.

Q93. But in the factory each section is fitted individually to its barrel? A. Yes.

Q94. So as to have the contact perfect? A. Yes.

Q95. And that is essentially necessary is it, in end joint pens? A. It is.

Q96. You do not make up a thousand barrels and a thousand sections and then have somebody assemble them and put them together? A. No.

4507

Q97. The man who makes the section makes it with special reference to a particular individual barrel? A. Yes.

Q98. Is that the usual way that sections are joined to the barrel in ordinary factories? A. They are not so particular in the matter.

Q99. In factories where they assemble parts only is each section manufactured with reference to any particular barrel?

Mr. Watson: Objected to as incompetent and not shown to be within the knowledge of this witness?

A. I don't exactly understand the question.

Q100. What do you mean by assembling parts—putting the section on to the barrel and the feed into the section, or simply taking a completed barrel and putting the feed in it? A. Mechanically assembling, to me, consists in placing the pen and the feed into the holder. 4508

Q101. After the section is manufactured what is the next step? A. The turned holder is then ready for polishing. After being polished they are reamed for the fitting of the feed and also for the fit of the pen, and got ready for assembling.

Q102. Then the manufacture of the feed is a special department by itself? A. Yes, the feed is made from the feed rod spoken of before, cut the proper length. They have very accurate tools for that purpose and require highly skilled labor.

Q103. What do you mean by chasing? A. That is working a design on the side of the holder by the aid of automatic machines. 4509

Q104. It has appeared in evidence that the L. E. Waterman Company after receiving the completed penholders from Day's factory in Connecticut, sometimes do chasing. Will you explain to the Court just what that consists of? A. There is an automatic machine used for the purpose, on which you can place six fountain pen barrels or six caps, as the machine is set. A lever is thrown, by anybody, either experienced or inexperienced, and the machine does the work. When it has completed its work it stops automatically. Anybody can remove the work and put another lot on.

4510

Q105. Then an unskilled boy or girl can use this automatic machine and can do the chasing? A. Yes.

Q106. It simply means putting decorating figures on the outside of the barrel? A. Yes.

Q107. What do you mean by a shoulder cap, having a two-point contact? A. That is for the purpose of preventing the cap from having any shaking after it is placed on the barrel. It is used to make a perfect fit; peculiar I believe to our manufacture alone.

Q108. Does it take any machinery to do the assembling? A. No.

4511

Q109. And does it take skilled workmen of the highest class or a mediocre class to do that work? A. We ourselves use skilled labor but I suppose it could be taught, but personally I think it requires a gold pen maker to put pens in holders and properly safeguard the gold pen which is the foundation of the whole article, after all is said and done.

Q110. After the pen is completed and tested and inspected at these various times what test do you make as to its being all right? A. After the holder is completed?

Q111. Yes. Do you have a testing machine? A. Yes, we have a machine upon which we place the holders and subject them to at least six pounds pressure, to prove that they are perfectly tight and will in no way leak around the joints, or anywhere else.

4512

Q112. Do you know of any other factory that uses this testing machine? A. Not in the form we have it; I have never heard of anybody using it.

Q113. Is that a comparatively new invention of your own? A. It is.

Q114. How does the self-filler vary structually from an end joint pen? A. From the fact that it has no threaded section; and it is composed of a head screw-plug and a pin to hold the head on and a soft rubber tube and is necessarily constructed very much differently from an end joint.

Q115. And it is absolutely impossible for it to leak and get on your fingers? A. Yes. The ink is contained in a soft rubber sack.

4513

Q116. It also has the barrel, cap and section like an ordinary pen? A. Yes.

Q117. Have there been any improvements made in the self-filling pen of recent years so as to make it stronger and better; if so state what they were. How about the button? A. Yes, in the matter of the button, it has been slightly enlarged and made to conform more to the shape of the holder in general, to make the whole article more strong and symmetrical.

Q118. That is, you have made the button longer and you have made the section shorter? A. The section has been made shorter and the button longer.

Q119. And the casual observer would not know that there was any section there at all? A. No.

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Q120. There is no screw and the cement is such that it is not possible for it to leak? A. No.

Q121. How long do you warrant these inside rubber sacks? A. Two years.

Q122. How long do they usually last? A. Six or seven.

Q123. Do you have any complaints as to those sacks breaking? A. A very small percentage.

Q124. If the sack is kept filled, that is, moist with ink, it will last very much longer than if it is neglected I suppose? A. Yes.

Q125. Do you have many complaints of the button being twisted off by people who are careless in the use of the pen? A. We do not. They are very strong.

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Q126. Have they been improved in that respect of late years? A. In so far as I have stated before; they have been made larger thereby giving them a greater wall and more strength, but it was done principally to improve the general appearance as well as to strengthen.

Q127. Then the complaints from twisting off the barrel are very rare indeed are they? A. We have very few of them.

Q128. What do you have to say as an expert of twenty-five years experience in the manufacture of pen points and completed fountain pens, whether in the present state of the art a

4516 better pen can be made or ever has been made than the present self-filler and middle joint made by A. A. Waterman & Co.?

Mr. Watson: Objected to as incompetent; there is nothing to show that this witness has had any experience with any other pens except the ones that he has made himself.

A. I cannot conceive of any way that any fountain penholder could be made any better than that which is made by A. A. Waterman & Co. at the present time.

Q129. In their highest grades? A. In their highest grades.

4517 Q130. When you get down to low grades, very cheap pens, you use manufactured iridium? A. We do.

Q131. In some of the cheap grades, the less carefully selected iridium? A. Yes, not the care exercised in selecting it.

Q132. Then pen that you sell at wholsale for 25 or 30 cents does not have the same quality of iridium as one that would sell for 50 cents or 75 cents? A. No, not at this present time or within the last few years back.

Q133. Do you ever have any complaints of the middle joint pen being weak at that joint? A. I cannot recall any complaint. I have seen one or two broken but out of the quantity manufactured it is hardly worth speaking of.

Q134. And the middle joint pen and the self-filler pen are the specialties of A. A. Waterman & Co.? A. They are.

4518 Q135. And what is the object of having the joint in the middle instead of on the end under the finger? A. Because of the fact that some people prefer it; they want something a little different from the old style end joint; it appeals to a great many people.

Q136. Is it apt to leak under the finger? A. It is not for the reason that the joint being so far from the finger, should a leak occur there is no danger.

Q137. You have compared the A. A. Waterman self-fillers and the middle joint pens with the best quality of the L. E. Waterman pens and what have you to say as to a comparison?

Mr. Watson: Objected to as incompetent and improper in form.

A. That I consider the A. A. Waterman pen superior from the standpoint of a mechanic and would undoubtedly prefer the A. A. Waterman for my own personal use because of the general differences in them. The A. A. Waterman & Co. pens are undoubtedly better constructed; that more care has been exercised, as is very apparent.

Q138. And the style of construction, of the self-filling pens especially, do you consider that preferable to the end joint? A. I consider it the highest type of fountain pen that has ever been produced. 4520

Mr. Bacon: I will introduce in evidence this card which shows the different processes, through which the pen is put in its manufacture.

Marked Exhibit A-67.

Mr. Watson: Objected to as immaterial and irrelevant.

Mr. Bacon: I also offer in evidence six cards showing the methods of manufacture.

Marked Exhibit A-68.

Mr. Watson: The same objections.

CROSS-EXAMINATION by Mr. Watson:

XQ139. Seventy-five per cent of the pens that A. A. Waterman & Co. make are what you call end joint pens are they not? A. No. 4521

XQ140. What percentage is it? A. I don't know.

XQ141. The testimony in this case is that more than fifty per cent of the pens you make are end joint pens; is that correct?

Mr. Bacon: Objected to.

XQ142. If there is testimony in this case that there are more than fifty per cent of the pens of A. A. Waterman make end joint pens, is that correct? A. I don't know. I would have to have the books to tell you that.

XQ143. A very large percentage of your pens are end joint pens aren't they? A. We make quite a lot but I don't know anything about percentage.

XQ144. All your Lincoln pens are end joint pens, aren't they? A. We don't make them.

XQ145. You don't make any pens marked Lincoln? A. No.

XQ146. How long since? A. We make them, yes; but not many of them.

XQ147. All of those are end joint pens are they not? A. Yes.

XQ148. You are not prepared to say that fifty per cent of the pens that you make are not end joint pens? A. No, I cannot say anything about it because my mind is not clear on the matter of percentages at all.

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XQ149. Have you ever had anything to do with the manufacture of rubber? A. No.

XQ150. Do you know anything about the constituents of hard rubber? A. No.

XQ151. Never had anything to do with the manufacture of hard rubber in any shape? A. No.

XQ152. Do you have any pens returned to you that are discolored and sunburnt, etc.? A. Very few of our own make. We very often have lots of other people's that come in that turn green and yellow and one thing and another.

XQ153. Do you buy the hard rubber yourself or does somebody else connected with the firm buy it? A. It is ordered generally. I generally hand a ticket to Mr. Geyer and he orders it.

4524

XQ154. You do not know the grade of hard rubber that is ordered? A. It is always the best that can be produced.

XQ155. I asked you if you knew the grade of hard rubber that is ordered? A. It is the best that can be produced.

XQ156. The question is repeated. I want an answer? A. I know it by seeing it surely, but I don't understand the nature of the question.

XQ157. You do not personally order the hard rubber from the American Hard Rubber Company? A. No.

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XQ158. You see the rubber that is furnished? A. Yes.

XQ159. That is all you know about it? A. Yes, if it is not right I know it.

XQ160. Did you ever use any other rubber except that which you get from the American Hard Rubber Company? A. Only as sample lots that salesmen will naturally force on to us to try out.

XQ161. Where does that come from? A. I have had sample lots sent in to me. I don't know where it comes from.

XQ162. Did you ever have any rubber from H. P. & E. Day's factory at Seymour, Connecticut? A. I don't know.

XQ163. As matter of fact you don't know where it comes from except as you are told, do you? A. Yes, that is right. 4526

Adjourned to Thursday, April 20, 1911, at 10:30 A. M.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

L. E. WATERMAN COMPANY,
Plaintiff,
vs. 4527
MODERN PEN COMPANY,
Defendant.

Met pursuant to adjournment at the office of Alexander S. Bacon, 37 Liberty Street, New York, April 20, 1911, at 10:30 A. M.

Appearances:

Samuel S. Watson and Walter B. Raymond, for Complainant.
Alexander S. Bacon, for Defendant.

DEWITT C. VAN VALER, resumed the stand:

Cross-examination continued by Mr. Watson:

XQ164. When did you first begin to work for A. A. Waterman & Co.? A. When they were organized, with the Frazer & Geyer Company. I presume that was the first.

XQ165. About 1901? A. I could not state as to the date.

XQ166. Was that the approximate time, 1901? A. Yes, it was.

XQ167. And you have been with them ever since? A. Yes, ever since.

4529 XQ168. And all this time in charge of their factory? A. Yes.

XQ169. Were you in charge of the factory when you first went with them? A. No, I was not; that is, with the Frazer & Geyer Company I was not.

XQ170. The factory where the pens stamped A. A. Waterman & Co. were made when you first went with them was the Frazer & Geyer factory was it not? A. I should have to think for a minute about that. I worked for William G. Frazer & Co. first and I don't know just when A. A. Waterman & Co. came in.

XQ171. Do you recall when you first went to work for William G. Frazer & Co.? A. Yes.

XQ172. When was it? A. It was in 1897.

4530 XQ173. And you continued with William G. Frazer & Co. for how long? A. As long as it remained in business, as far as the factory was concerned.

XQ174. And then with whom did you go? A. I presume it was A. A. Waterman & Co. that followed them.

XQ175. Did you ever work for Frazer & Geyer Company? A. Yes.

XQ176. When did that come in? A. Between the period of William G. Frazer and the organization of Frazer & Geyer Company.

XQ177. What periods have you worked for A. A. Waterman & Company? A. From the time that they established themselves as such in New York to the present time.

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XQ178. And when did they establish themselves in New York to your best recollection? A. It must have been prior I think to 1900.

XQ179. During what period if any did you work for the Frazer & Geyer Company? A. From 1897 until the Frazer & Geyer Company went out, if they are out; I don't know.

XQ180. You have given the names of the factories of William S. Hicks, John Foley, Sr., and Edward Todd and a man named Davidson for whom you worked. Will you state in what order you worked for these people? A. I went to work first with William S. Hicks, learned my trade there.

XQ181. When was that? A. I think it was either in 1884 or 1885. I cannot fix the exact year. It was either one or the other.

4532

XQ182. How long did you stay with Hicks? A. About five years.

XQ183. Where did you go next? A. I went with John Foley, Sr., and remained with him for a period of close to two years, I should judge.

XQ184. Then with whom? A. With Edward Todd in Brooklyn.

XQ185. How long with him? A. I remained with him I think between six and seven years. From there I went with Davidson and remained but a short time. I don't think it was in all a year. Then I entered the employ of William G. Frazer. I don't know whether it was a company or whether it was just William G. Frazer; I cannot tell you that. It might have been the Frazer & Geyer Company at that time. I cannot say.

4533

XQ186. What was your position with Edward Todd? A. I entered their employ as a grinder and afterwards was given the repair work to do and that carried with it a sort of honorary position as assistant foreman.

XQ187. Have you ever been in other pen factories, gold pen factories, than these you have mentioned? A. Except Armeny & Marion.

XQ188. When were you in their factory? A. It must have been either 1898 or 1899 or somewhere about that period.

4534

XQ189. That was the period you were working for Mr. Frazer or Frazer & Geyer Company as the case may be? A. No.

XQ190. Before that? A. I think in 1888 or 1889. That was about the time I was finishing my trade.

XQ191. And you have not been in any other gold pen factory except these you have named? A. Except Armeny & Marion; that is all.

XQ192. When were you last in Edward Todd's factory? A. It must have been in 1895 or 1896, somewhere along there as near as I can fix it.

4535 XQ193. You have not had any occasion to go to the Edward Todd's factory since that time? A. I do not recall ever visiting it.

XQ194. Have you ever been back to Mr. Davidson's at any time since you left his employ? A. No.

XQ195. Have you ever been back to the Foley factory since you left his employ? A. No, not to his factory. He sends for me about once a year to go and see him at his office.

XQ196. Have you ever been back to Mr. Hicks' factory since you left his employ? A. I think I have been in their office, called there.

XQ197. But never have been in their factory? A. No.

XQ198. Then you have not been in any other gold pen factory since you first went with Mr. Frazer in 1897 until the

4536 present time, except this factory where you are employed? A. That is right.

XQ199. And you do not know what method or machinery is employed in other gold pen factories since 1897 except from hearsay? A. That is right.

XQ200. You have never been in the gold pen factory of the L. E. Waterman Company? A. No.

XQ201. Nor in the gold pen factory of the Fairchilds? A. Not in the factory.

XQ202. You know that there is such a concern as Fairchilds that make gold pens? A. Yes.

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XQ203. And the present Fairchilds and his father have been in that business as long as you have been in the business, have they not? A. Yes.

XQ204. A well known concern? A. Yes.

XQ205. Who are the other well known gold pen manufacturers that you know of in the United States? A. In addition to those that I worked for?

XQ206. Yes. A. Mabie, Todd & Company.

XQ207. They are a concern of long standing and good repute? A. Yes.

XQ208. The reputation of their gold pens is among the best in the market is it not? A. Up to five years ago they were. I guess John Holland of Cincinnati is one of the well known gold pen manufacturers of the country. P. D. Collins of New York have a very fair reputation. I think that is about all that I would care to classify, except the A. A. Waterman & Company. 4538

XQ209. A. A. Waterman & Co. make gold pens for sale on the market generally? A. We would manufacture for anybody, yes.

XQ210. Have you sold gold pens to any extent separate from the completed fountain pen? A. We have sold some.

XQ211. A very small part of the business is it not? A. As compared to our own make, yes.

XQ212. The method of manufacture which you have described in so much detail is the general method of the manufacture of gold pens that is in use generally? A. There is quite considerable difference in our method over what I have seen or heard of in other people's makes. 4539

XQ213. What is the distinguishing difference between your method and those pursued by other gold pen manufacturers? A. The matter of our system of polishing; of our making of the slit; of our tempering of the gold; and of our system of grinding and smoothing.

XQ214. Outside of these particulars that you have mentioned the general methods are the same in all factories, that you know of? A. Yes.

4540 *DeWitt C. Van Valer*

XQ215. And outside of the particulars that you have mentioned the same machinery is in general use in all well equipped gold pen factories? A. Yes.

XQ216. Do you know how the L. E. Waterman Company tempers its gold pens? A. I have never seen the work in operation.

XQ217. You do not know how Fairchilds or Mabie, Todd & Bard do it? A. Mabie, Todd & Bard, although I have never seen them do the work, still I am quite positive that they use a trip hammer.

XQ218. You do not know how they temper it in the Fairchilds factory, to your personal knowledge? A. I have never
4541 seen them. I have never entered the factory.

XQ219. You have never seen them temper pens in the Mabie Todd & Company's factory? A. No, but in all cases I am willing to state on my knowledge and belief that they do it by a process of hammering, either a trip hammer or by hand.

Mr. Watson: I move to strike out the answer as incompetent.

XQ220. Will you tell us with a little more particularity how your tempering process of the gold pens is done? A. We take the pen in blank form and place it between jaws which are constructed for the purpose and, with the aid of a hydraulic press subject it to a pressure which shows upon the gauge to
4542 range from 15 to 25 tons.

XQ221. Do those jaws come absolutely together, or are they set to a gauge to come within a certain distance of each other? A. They came absolutely together.

XQ222. And that process is accomplished by one movement of the jaws? A. No.

XQ223. Is the pen blank subjected to several different pressures of the jaws? A. Not several different pressures but to a series of impulses.

XQ224. A series of pressures of the jaws? A. The same pressure; a series of the same pressure.

XQ225. Are the jaws released between the impulses? A. Yes, what you may call momentarily.

XQ226. Momentarily released? A. Yes.

XQ227. And then the pressure is again applied? A. It is controlled by the stroke of the pump.

XQ228. How long is that series of impulses kept up on the pen-blanks? A. Until the finger of the pressure gauge registers to what the press has been set for, which in turn is controlled by a safety valve.

XQ229. Does that constitute five impulses or fifty impulses or five hundred impulses or how many generally speaking? A. I have never made any note of that.

XQ230. How long does that continue on a single pen-blank? A. Until the pressure has been applied which the press has been set for. 4544

XQ231. Does it take one minute or five minutes or how long? A. Perhaps two or three seconds.

XQ232. And how rapidly do the impulses occur? A. I should judge about two in each second.

XQ233. So that generally speaking there are four to six impulses applied to each blank? A. It figures out that way, under this pressure.

XQ234. In making the slit in the gold pen do you use a knife cutter or a saw cutter? A. We do not use either one.

XQ235. Describe the nature of the cutter that you use to cut the slit in the gold pen? A. A round copper disc four and one-half one-thousandths of an inch thick, about four inches in diameter, perfectly smooth on the edge, no teeth in it. 4545

XQ236. A sharp cutter is it not? A. It necessarily would have to be sharp being so thin.

XQ237. A sharp knife blade cutter? A. Not in the form of a knife blade. It is a perfect disc.

XQ238. A sharp circular cutter? A. Yes, a sharp circular cutter. The starting of the slit from the pierce hole is done by a small shear tool.

XQ239. And this circular cutter immediately follows the shear tool to complete the slit? A. It starts from the iridium and is cut down to and meets the sheared slit.

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XQ240. Then as far as the pen points are concerned the portion of the pen points that are slitted first are at the iridium point? A. The slit is started from the pierce.

XQ241. What proportion of the slit is made by the shear and the tool? A. From one-eighth of an inch to three-sixteenths.

XQ242. That would be substantially one-third of the distance between the pierce hole and the point of the pen? A. It depends entirely on the size of the pen.

XQ243. In what proportion, in the pens that you describe as medium points No. 2, would the shear tool cut the slit? A. A scant one-third.

4547 XQ244. And the balance of the slit of the pen is made by the circular disc you have described, beginning with the iridium point and running up to the place the shear tool starts; is that correct? A. Yes.

XQ245. You have no personal knowledge of how the slits are made in the Mabie Todd factory? A. Never having entered their factory I only know from hearsay and belief.

XQ246. You have no personal knowledge of how L. E. Waterman Company makes its slits in its pens? A. The same answer.

XQ247. And the same answer as to how the pens are slitted in the Fairchilds factory? A. Yes.

4548 XQ248. The alloying of the gold and the preparation of the blanks is in your factory done substantially in the same way that all gold pen makers prepare their blanks? A. So far as I have any knowledge. The proportions of alloy used are peculiar to each manufacturer.

XQ249. Have you ever been in H. P. & E. Day's factory at Seymour, Connecticut? A. No.

XQ250. What other factories have you been in where they manufacture rubber pen holders except those where you are now employed? A. This man Davidson that I spoke about, that I entered the employ of.

XQ251. That was the first one, was it? A. Yes. I have been in touch with rubber turning to some extent as long as I have

4549

been engaged in manufacturing gold pens, in some one form or another, either repair work or preparing holders for mounting.

XQ252. What factories have you been employed in where rubber holders for fountain pens were turned? A. Davidson, Frazer & Geyer, A. A. Waterman.

XQ253. Did Hicks make rubber holders while you were employed by them? A. They did not. They prepared them for mounting, receiving the completed holder and doing such work on them as was found necessary for the purpose.

XQ254. Did Edward Todd or Foley turn rubber holders? A. John Foley, Sr., did. He made the complete holders.

XQ255. Did Edward Todd? A. They did not.

XQ256. Have you visited any of the factories where rubber pen holders were turned, since you were first employed by William G. Frazer & Co.? A. Not to see the work done, other than Heath's. 4550

XQ257. When were you in Mr. Heath's factory? A. Within the past year.

XQ258. Mr. Heath is a comparatively new man in the manufacture of rubber holders, is he not? A. I think he has been turning holders to my knowledge for the last four years, and may have been turning them before that.

XQ259. You never heard of him doing that prior to four years ago? A. I don't recall.

XQ260. Do you know, have you personal knowledge, whether or not the largest concerns that manufacture rubber holders for fountain pens manufacture the parts so that they will fit each other, that is, they make them in conjunction and not as interchangeable parts, or not? A. That is their intention. 4551

XQ261. Their intention is not to make them necessarily interchangeable, but to make the parts fit each other? A. Yes.

XQ262. Do you know that the L. E. Waterman Company makes all its rubber holders for fountain pens in parts to fit each other, at the factory? A. I have never been into their factory.

XQ263. You have no personal knowledge of whether they do or not? A. I have no personal knowledge as to what they do.

4552

XQ264. The assembling of the parts, meaning by that the adjustment of the gold pens, the feed and the point and section, is an operation requiring considerable skill and experience, is it not? A. It requires to be learned.

XQ265. The adjustment of the feed to the gold pen is a part of the manufacture that has to be carefully looked after, is it not? A. It requires care.

XQ266. And the manner in which this is done is a large element in making a satisfactory writing pen, is it not? A. It enters largely into it.

XQ267. The adjustment of the nibs on the gold pen and smoothing of the point, are important elements to make up a

4553 satisfactory writing pen, is it not? A. Yes.

XQ268. All that work is done by what we term skilled labor, is it not? A. It does not require skilled labor, but we employ skilled labor for the purpose.

XQ269. Do you know whether other manufacturers employ skilled labor for this work or not? A. Not as I understand the term skilled labor as applied to each rubber turner or gold pen maker.

XQ270. Who does this work, what you term unskilled labor? A. What manufacturers?

XQ271. Yes? A. Having never worked for, or been in the factory of any other excepting those I have mentioned, I cannot state.

4554 XQ272. You do not know as a matter of fact, of your personal knowledge, whether they use skilled labor or not, the other manufacturers? A. Only from hearsay and belief.

XQ273. Do you know what the alloy is in the gold pens manufactured by the L. E. Waterman Company and put in their fountain pens? A. I do not.

XQ274. Do you know of any other concerns that manufacture the so-called middle joint pens, except A. A. Waterman & Co.? A. Not of my own knowledge.

XQ275. Have you ever seen any of them on the market? A. I believe I have seen a middle joint that was other than our make.

XQ276. The middle joint parts shown on one of the cards, marked Exhibit A-68, is marked "Patented December 12, 1899." Do you know what the invention claimed to be covered by that patent is (showing witness the exhibit)? A. No.

XQ277. Do you know whether that refers to the feed or to some other part of the pen? A. I don't know what it refers to.

XQ278. I call your attention to the card, Exhibit A-68?

Mr. Bacon: I wish to note on the record that it has been exactly forty seconds since the last question was asked and the time consumed between questions is very nearly that on an average.

Mr. Watson: Counsel for plaintiff states that that is 4556
not a fact; he was examining a large number of exhibits which were first produced this morning in the middle of the examination of this expert witness.

XQ279. I call your attention to another of the cards, marked Exhibit A-68, the so-called self-filling pen, which is marked "Patented November 17th, 1903, and October 11, 1904," and ask you if you know what inventions are covered as claimed by those patents? A. The patent under date of October 11, 1904, covered the hydraulic tempering of the gold pen. The other I do not know.

XQ280. I find the patent marked October 11, 1904, on the exhibit, the end joint holder, on one of the cards, Exhibit A-68. Do you know what that patent claims to cover? A. That covers 4557
the gold pen.

XQ281. Then you were mistaken in your answer to the previous question, were you not? A. What was the previous question?

XQ282. I asked you what the patents marked November 17, 1903, and October 11, 1904, referred to? A. I told you the one of October 11th, 1904, related to the hydraulic tempering of the gold pen. The other one I do not know.

XQ283. You have produced a lot of sample cards here which have been marked in evidence as Exhibit A-68. Have you produced here any of the samples of so-called blown rubber? A. No.

XQ284. These are all what kind of rubber? A. American hard rubber, wrapped stock.

XQ285. Have you ever seen any fountain pens of other manufacturers than A. A. Waterman & Co., made similar to the so-called self-filling pen, parts of which you have produced and shown on one of the cards, Exhibit A-68? A. I have never seen any other manufacturer make that holder.

XQ286. How long has it been since you have been making feeds similar to the feeds which are in Exhibit A-68? A. There are two styles of feed shown here. Both have been made for the last ten years.

XQ287. What distinction do you make between these feeds?
4559 A. One we call a reed feed and the other is a fissure duct.

XQ288. Are you familiar with the fissure feeds that were formerly put into the fountain pens by the L. E. Waterman Company? A. In a general way.

XQ289. Is this fissure duct feed that you refer to very similar to that? A. It is not.

XQ290. What is the difference? A. They use two or more fissures, whereas we use one and the shape of the duct is entirely different.

XQ291. What is the difference in the shape of the duct? A. In the L. E. Waterman & Co. feeds, those that I have seen, the duct is perfectly square with an open top and contains a certain number of fissures at the bottom; whereas our feed is
4560 made up of two square sides and a V-shaped fissure in the bottom.

XQ292. These ducts run longitudinally along the side of the feed piece which is next to the writing pen in both cases? A. Yes.

XQ293. And the fissures in both cases are longitudinal fissures, extending the length of the duct? A. Yes.

XQ294. And the V-shaped duct of the A. A. Waterman feed has in its bottom a single longitudinal fissure? A. Yes.

By Mr. Bacon:

Q295. Are you describing the reed feed now or the other? A. The Federal, not the reed.

4561

By Mr. Watson:

XQ296. The reed feed consists of a longitudinal duct or groove along one side the feed bar which is next to the writing pen, does it not? A. It contains a V-shaped duct.

XQ297. The reed feed also contains a V-shaped duct? A. Yes.

XQ298. And this feed has a reed or finger which lies in this duct? A. Yes.

XQ299. Is there any advantage or utility in having the feed bar or feed pieces broad and flat as they appear under the pen in the finished fountain pens, as they are shown in the Exhibit A-68? A. They must conform to the size of the pen they are made for, in that respect.

4562

XQ300. Is there any advantage in having the exposed part of the feed bar, after the pen has been assembled, in the completed pen, broad and flat, as shown in the feed pieces on Exhibit A-68? A. There is no material advantage other than they must be in proper proportion mechanically and scientifically.

XQ301. Referring to the flat appearance of the feed, as shown in the finished pen which I now show you; is there any advantage in having that broad and flat? A. There is no advantage in having it flat. The width must be determined by the size of the pen used.

XQ302. Must the feed bar or feed piece be as broad as the gold pen to which it is the feeding mechanism? A. I would like to have that repeated.

4563

XQ303. (Question repeated.) A. No, it must not be as broad.

XQ304. In the pen I have shown you the feed piece appears to be broad enough to fill the concave side of the writing pen; is that necessary? A. It is the proper width for this pen.

XQ305. Does it serve as a function of utility to have the feed bar broad enough to fill the concave side of the writing pen?

Mr. Bacon: I wish to register an objection to the last question but one, because an examination of the pen shows

that the feed bar is not as broad as the pen; not much over one-half as broad; there is a wide space on each side.

A. It does not serve any particular purpose that I know of.

XQ306. Why do you make it that way then? A. Because it is a better proportion and is more satisfactory.

XQ307. Then it does serve as a function of utility, does it not? A. Not as I understand the meaning of the word utility.

XQ308. Do you know that the L. E. Waterman Company own an existing patent which covers that feature of a fountain pen? A. I do not.

4565 XQ309. How long have you made feed bars of the general appearance and shape that appears in the pen I now show you (showing witness a pen)? A. I think this style of feed, that general shape, has been used by us for the last eight or nine years.

XQ310. You are prepared to say that you have used that shape for the last eight or nine years? A. That along with others. There has been a variety of feeds. Just when this particular shape was adopted I have no recollection.

XQ311. Do you know that L. E. Waterman Company formerly made a feed bar for their fountain pen very much narrower at and near the point than appears in the pen which I now show you, which is Exhibit No. 1? A. I don't think that the point

4566 of any feed made by A. A. Waterman & Co. was reduced any material amount over what that is on the extreme end, as they must all conform to the width of the nib of the gold pen, which that exhibit does.

XQ312. You evidently did not understand my question. I will ask the examiner to read it again to you.

XQ313. (Last question repeated.) A. What name heads that question?

XQ314. L. E. Waterman Company? A. You asked me if L. E. Waterman Company made a pen with a narrow feed?

XQ315. I am asking you if you know that they made feeds which were narrower, very much narrower, than the one ap-

pearing in Plaintiff's Exhibit 1? A. No, I don't know that L. E. did.

Mr. Bacon: Defendant's counsel gives plaintiff's counsel notice that unless this line of examination is closed speedily he will direct the witness not to answer and will take the matter to the Court and ask the attorney to be reprimanded for simply killing time with useless questions that have nothing to do with this case and using up defendant's two weeks needlessly while he had over six months to present his case.

XQ316. I show you Plaintiff's Exhibit No. 33 and ask you if the knob or screw end and at the head end of the holder does not 4568
turn in the opposite direction from what the screw threads usually turn? A. In view of the fact that it does not work, I cannot answer. I don't know how it turns. It is not our make of holder.

XQ317. Whose make of holder is it? A. It is a very old date, a very old make of holder, not the present make.

XQ318. It is one of the pens made by A. A. Waterman & Co., is it not? A. It is so stamped. The thread on the back end is known as a left-handed screw.

XQ319. Which is the opposite kind of a screw to that used in screw threads? A. Yes.

XQ320. The feed bar in Plaintiff's Exhibit No. 33 is of a very much narrower character than those appearing on Exhibit 4569
A-68, is it not? A. Yes.

XQ321. The pen which I have called your attention to and to which I have referred, I will now pass to you and ask if that is a fountain pen of the defendant's manufacture (handing witness the pen)? A. Yes.

The pen identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 141.

XQ322. The Davidson that you referred to in your testimony was a very small manufacturer of fountain pens in Brooklyn? A. He did a fair trade.

4570 *DeWitt C. Van Valer*

XQ323. How long since you made a feed bar like that appearing in Plaintiff's Exhibit 33? A. It is some years, but I cannot give the exact time. I cannot fix the time when the form was changed exactly, although we still have occasion to make for the purpose of repair work, and should it be desired, feeds of that description.

XQ324. Is there any invention of utility or benefit between the feed bar contained in Plaintiff's Exhibit 33 and that contained in Plaintiff's Exhibit 141? A. I should not say so because the formation of the back is more a matter of beauty.

XQ325. Then you want to change your testimony to the effect that it is not necessary for the feed bar to fill the con-
4571 cave side of the gold pen? A. It must be a proper width for that purpose. It cannot, necessarily, fit the whole pen.

XQ326. It does not necessarily have to fit the whole pen? A. No.

XQ327. Is it not a fact that as far as making an actual writing instrument, all that is necessary, so far as the feeding is concerned, is to have the space for the grooves and ducts sufficiently wide to cover the slit and pierce hole? A. It would be necessary to regulate that width to give the result wished for. The width which you enumerate would not be sufficient.

XQ328. In your opinion then the width of the feed as shown in Plaintiff's Exhibit 141 is an unnecessary width? A. No, it is not an unnecessary width. It is proper for that size pen.

4572 XQ329. Is not the size of the pen in Plaintiff's Exhibit 141 and the size of the pen in Plaintiff's Exhibit 33 substantially the same? A. Yes.

XQ330. One has a narrow feed bar and the other has a broad flat feed bar? A. The actual width by caliper or micrometer would vary but very little. It is only a matter of shape.

XQ331. Do you think that the pen, Exhibit 141, is made to appear more similar to plaintiff's pens shown in Plaintiff's Exhiibt No. 1, by having a broad feed? A. There is no attempt to copy the style.

XQ332. (The question is repeated)? A. It necessarily looks like it, but is very dissimilar.

XQ333. Do you know that the L. E. Waterman Company have extensively advertised the last several years the broad character of the feed, its appearance, and called it the spoon feed? A. Yes, I know that fact.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ334. Have you ever imitated their feed in any way or have you kept just as far away from them as you knew how? A. As far as it was possible to do so.

RDQ335. And you have made yours under the terms of your own patent? A. Yes.

4574

RDQ336. You mean you have kept away from them as far as possible, or that you have imitated them as far as possible? A. Kept away from them as far as possible.

RDQ337. Do you employ men that have been employed in other factories? A. Yes.

RDQ338. Did you employ anybody that has been employed in the L. E. Waterman factory?

Same objections.

A. Yes.

RDQ339. And you know from them what is going on in the other factories?

Mr. Watson: Objected to as incompetent.

4575

A. Yes.

RDQ340. Do you know from them what kind of men are employed, whether they are union men or non-union men, or high grade or low grade?

Mr. Watson: Objected to as incompetent, irrelevant and immaterial.

A. Yes, I know that.

RDQ341. Is your shop what is called a union shop?

Mr. Watson: Objected to as immaterial.

A. It is.

4576

RDQ342. Is the L. E. Waterman shop what is called a union shop?

Mr. Watson: The same objections.

A. It is not.

RDQ343. They use inefficient and scab labor?

Mr. Watson: Objected to as incompetent and immaterial.

A. Yes, although I don't like the word scab.

RDQ344. I show you this circular, Exhibit A-63, and call your attention to the quotation at the bottom of it, "If it isn't
4577 an A. A. it isn't a Modern," and ask you for how many years circulars of that character, with that legend, have been used by the Modern Pen Company?

Mr. Watson: Objected to as immaterial.

A. This circular, to the best of my knowledge, has been in common use by us for the last eight or ten years.

Mr. Watson: I move to strike out the answer as immaterial and incompetent and irrelevant.

RDQ345. You spoke in relation to the machine for the hydraulic pressure of the pens to make them strictly homogeneous, as exerting a pressure from 15 to 25 tons. Did you mean that
4578 that was an irregular pressure or that there would be fifteen tons on one style of pen and twenty-five tons on another style of pen? A. Fifteen on one style and twenty-five, more or less, on another.

RDQ346. That each pen of its particular grade is subjected to exactly the same amount of pressure and same number of impulses?

Mr. Watson: Objected to as highly leading and incompetent and immaterial.

A. Yes.

4579

RDQ347. Is it possible for any factory using trip hammers or other kind of hammers, to get as homogeneous a pen as you do by this patented machine?

Mr. Watson: Objected to as it is shown by this witness that he has had no experience in this kind of work for many years, if ever.

A. It is not possible for them to do so.

RDQ348. How long has this pen been patented and used by you?

Mr. Watson: Objected to as immaterial.

4580

A. Since 1904.

RDQ349. And before that did you use trip hammers? A. No, had hand hammers.

RDQ350. In the large number of L. E. Waterman pens that come in to you for repairs, do you find that the holders are always uniform in color? A. They are not.

RDQ351. In what way are they discolored? A. They show a green color and I have seen them with a yellow color; generally discolored.

RDQ352. That shows unhomogeneous rubber?

Mr. Watson: Objected to as highly leading and improper.

4581

RDQ353. Does it show defective rubber? A. It would show that the rubber was not properly cured, I should judge, in my opinion.

Mr. Watson: I move to strike out the answer as this witness is not qualified as a rubber expert.

RDQ354. Do you O. K. all the bills for rubber that come in from the American Hard Rubber Company?

Mr. Watson: Objected to as immaterial.

A. I do.

RDQ355. Then do you know what is ordered and what you get?

Mr. Watson: Objected to as the witness has already testified to this on cross-examination.

A. I do.

RDQ356. In your opinion is the rubber that goes into the L. E. pens of as good quality as that which goes into the A. A. pens?

Mr. Watson: Objected to as the witness has shown that he is not a rubber expert.

A. The evidence which comes to me, through the repairs received of the L. E., lead me to believe that the grade of rubber
4583 which we use is equal to if not superior.

RDQ357. Mr. Lancaster, being examined, states that our pens did not have as smooth a point as the Fairchild pen; and we have two of those pens that are produced and I ask you to explain the difference in the points (showing witness pens)?

Mr. Watson: Objected to as immaterial.

(The witness examines the pens through a small microscope produced by the examiner.)

A. The pen stamped "A. A. Waterman & Co., New York, No. 7," is, in my opinion, a smoother writing pen than the one stamped "The Lancaster No. 7."

RDQ358. Are they different grades of point? Is one designated a needle?

4584

Mr. Watson: Objected to as leading and immaterial.

A. The A. A. Waterman point is much finer; it conforms more to the accepted idea of a needle point than the Lancaster.

RDQ359. The reed feeds are put on expensive pens only? A. Yes.

RDQ360. Never put on cheap pens? A. No, what we call No. 1.

RDQ361. Very cheap goods? A. Very cheap goods.

4585

RE-CROSS EXAMINATION by Mr. Watson:

RXQ362. What do you mean by cheap goods? A. I mean pens that retail for $1.

RXQ363. Do you put the reed feed in any of the pens you make which have the end joint? A. We have at times used them.

RXQ364. Those pens retail at what prices? A. They retail I think from $1 to $3.50 or $4.

RXQ365. And you do at times use the reed feed in that class of pen? A. In the larger sizes of them we do.

RXQ366. Did you make the pens Exhibit No. 140; were they made in your shop, the A. A. Waterman & Co.? A. You are speaking of the gold pens?

4586

RXQ367. Yes? A. No, sir.

RXQ368. Did you ever stamp any holders like the one I now show you, Plaintiff's Exhibit 141? A. I don't recognize that holder.

RXQ369. Did you ever stamp any pens as that pen is stamped on the barrel? A. I have a recollection, that they either were stamped or there was some question asked me as to whether I could stamp them; but it was a matter of a very small quantity.

RXQ370. You did make a few of them, didn't you? A. I think we did make something less than one hundred, or a small quantity.

4587

RXQ371. And sold them to Mr. Lancaster? A. I believe they went to him, as far as I know.

The pen identified by the witness is offered in evidence and marked Plaintiff's Exhibit No. 140.

RXQ372. The holders of the L. E. Waterman Company that come to your attention are holders that have been in use and come in for repairs, are they not? A. In some cases, and in other cases they are sent to us by dealers.

RXQ373. How does it happen that dealers send them to you? A. That I cannot answer.

4588 *DeWitt C. Van Valer*

RXQ374. Do you know from what dealers you have received them? A. I do not.

RXQ375. When did you receive any from dealers? A. They come in frequently. I cannot state.

RXQ376. In what quantity? A. I cannot say as to what quantity, as they are placed with quantities of our own and any manufacturer's goods that are sent to us for the purpose of repair and exchange or credit; that is, anything in that line that enters into the business.

RXQ377. The discolored holders that you referred to in your direct-examination were pens that had been in use already? A. Not necessarily in use; sometimes simply lying in stock.

4589 RXQ378. Do A. A. Waterman & Co. exchange their stocks of pens with dealers and take up in exchange L. E. Waterman pens? A. I cannot answer that question.

RXQ379. Have you ever known any case of that kind? A. No, because my duties do not bring me in touch with that department.

RXQ380. On your re-direct examination you said that you made the feeds like those shown in Plaintiff's Exhibit No. 141, in accordance with the patent. Does the patent you referred to have anything in it which claims a broad feed which fills the concave side of the pen, as appears in Plaintiff's Exhibit 141? A. I cannot give any answer to questions covering the matter of the patents. That does not come within the scope of my

4590 duties.

RXQ381. You don't know anything about it? A. I don't know anything about that end of the business.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ382. Plaintiff's Exhibit 140 was not made by A. A. Waterman & Co.? A. No.

RDQ383. You are not willing to say they ever made a pen that was stamped "Idea"?

Mr. Watson: Objected to; the witness has carefully examined the pen and said they had made about a hundred.

Mr. Bacon: No, he did not say anything of the kind.

RDQ384. I show you the word Idea (indicating)? A. When I made that answer I did not see any such word on this. I was looking at the name Lancaster.

RDQ385. Did you ever manufacture a pen stamped Idea inside of a star? A. No.

Mr. Watson: The Court's attention is directed to the answer of this witness regarding this exhibit, and his previous examinations, and the Court is asked to compare with his present answer his answers to questions 368-371.

4592

Deposition closed.

Signature waived.

DEWITT C. VAN VALER, recalled on behalf of the defendant.

Direct-examination by Mr. Bacon:

Q386. I show you Exhibits No. 1 and No. 10. What does No. 10 retail for? A. That is a $1 pen.

Q387. Manufactured by A. A. Waterman & Co.? A. Yes.

Q388. I show you Exhibit No. 1, manufactured by L. E. 4593
Waterman Company and ask you what that retails for? A. That is their $2.50 pen.

Q389. Are they substantially the same in quality and size? A. Yes, the weight is about the same in them. One is rounded up a little closer that the other.

Q390. Have you handled a great many of those $2.50 L. E. Waterman pens in the last eight or ten years? A. I have; I have seen large quantities of them.

Q391. Would it amount to thousands in that time? A. I think I can safely say that there would be at least 5,000 in the last eight years that have passed under my scrutiny.

4594 *DeWitt C. Van Valer*

Q392. Do you know of your own knowledge from an examination of these $2.50 L. E. Waterman pens what points they have? A. The quality of the iridium?

Q393. Yes, the iridium? A. Yes, I can tell without any hesitation that during that period sixty per cent of those which I have seen have had what is known as manufactured iridium; that is, of the $2.50 up—from the $2.50 grade up.

Q394. Does A. A. Waterman & Co. manufacture any pen to retail above $1 that has ever contained manufactured iridium? A. They do.

Q395. What? A. They manufacture a $1 pen which has the
4595 manufactured iridium on it.

Q396. Any other? My question was above $1. A. No, they do not. I did not understand your question.

Q397. I show you a pen holder with a mark and a stamp, made for Mr. Lancaster and ask you if you ever stamped any pens with any other stamp than that one? A. No, we have never stamped any pens for Mr. Lancaster with any other stamp, excepting this.

Q398. That stamp is a circular piece of metal, is it? A. Yes.

Q399. Did you ever have any other stamp with his name on it in your possession? A. No, I do not recall ever handling any of Lancaster's stamps. I have no recollection of ever doing so.

Q400. Other than the one that you have? A. Other than this
4596 one here.

CROSS-EXAMINATION by Mr. Watson:

XQ401. How did you happen to handle 5,000 Ideal fountain pens in the last eight years? A. By having been returned to the firm that I worked for, for various reasons, and taken up in general trade. I don't know how they got them, but they pass into what we call our repair department and some of them are dismantled and thrown away and the gold pen melted up, what we call stock repairs.

XQ402. And some you sell again? A. Those that I destroy are not sold again.

4597

XQ403. Would you repolish or clean up some of these pens and put them on the market again? A. No; dealers may send them where they want. As a usual thing, L. E. Waterman pens or any other outside make of pens which come in to us, we cut the point off and put it into a melting pot.

XQ404. You are talking about the gold pens now? A. I am.

XQ405. When you compared Exhibits No. 1 and No. 10 you had reference entirely to the gold pen? A. No, I had reference then to the whole complete article.

XQ406. Why did you say one was rounded and one was something else? A. The Colonel asked me a question in regard to the gold pen while I held it in my hand.

4598

XQ407. You said that when you were asked to compare the size of the pen and quality of the pen? A. No, the size of the pen.

XQ408. Have you ever taken the respective weights of those two pens? A. Yes.

XQ409. Which is the heavier pen, Plaintiff's Exhibit 1 or No. 10? A. I never weighed those two. I have weighed others just like them, made from the same dies.

XQ410. What is the price that you pay for native iridium? A. They vary.

XQ411. What are you paying for the last you bought? A. I O. K.'d the bill, but I don't know what it was per ounce. I will have to figure it out from the bill.

4599

XQ412. Do you know the price per grain? A. It is not bought that way.

XQ413. How is it bought? A. Bought by the ounce.

XQ414. Well, per ounce? A. The usual figure for native iridium at the present time will range from $75 to $125 an ounce. The present market for iridium, you may buy some for $75 and you may have to pay as high as $125.

XQ415. Did you not testify on your examination the other day that you had a stamp in your place like the stamp which appears on Plaintiff's Exhibit 140? A. No, sir, I did not.

XQ416. Are you willing to swear now that you did not say that in your examination? A. I did not say that. You took an adjournment before I had finished my answer to that question. If you will refer back to it I will be glad to finish it now.

Mr. Watson: The Court's attention is called to the witness' answer to questions No. 368-371.

XQ417. Do you buy the $125 grade of iridium at the present time? A. If we needed it we would.

XQ418. Is that the grade that you use now? A. There is no question of grade about it. It does not run by grade.

4601 XQ419. Do you mean to say that the same grade sells by one dealer at $75 and by another dealer at $125 an ounce? A. Yes, I will say that, because very few dealers know the quality. It takes a pen maker to know that.

XQ420. You can buy the same grade at one dealer's for $75 and at the same time another dealer is asking $125 for the same grade? A. Yes.

XQ421. That is the case today? A. You will find that is so, I presume.

XQ422. How do you test to tell whether the point on the pen is soft or hard iridium? A. The color denotes it. The degree of density. The positive sure way is by the way in which it feels when you are grinding it. It requires a mechanic

4602 to work it as well as to look at it to determine.

XQ423. You would not say as an expert that a man by looking at a point of a gold pen could determine whether it was hard or soft iridium would you? A. I would say that he can.

XQ424. Why is it necessary to test it by grinding? A. That is not necessary. I did not say that. I said it was a good way to determine that, the best way to determine it by the use of both. by working it and looking at it.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ425. When you buy a quantity of iridium you turn it over to your expert Mr. Newman? A. After I have examined it, yes.

4603

RDQ426. And he picks out the first quality does he and rejects the rest? A. He does.

RDQ427. Within what limits will he reject parts of the purchased iridium? A. Three-fourths of the iridium that we purchase we do not use for points; that is, native iridium.

RDQ428. That is, you take the very choicest? A. Yes.

RDQ429. And leave out the rest? A. Yes.

RDQ430. What do you do with that that you reject? A. We sell it.

RDQ431. So it does not make any particular difference what grade you buy; you pick out the best and the difference will be in whether ten per cent is rejected or seventy-five per cent is rejected; is that it? A. Yes, if I understand the question.

4604

RDQ432. That is, you buy on lot of iridium and Mr. Newman will reject ten or fifteen per cent and in another lot he would reject seventy-five per cent? A. Yes.

Mr. Watson: I move to strike out the testimony of this witness as immaterial to any issue in this case.

JOHN W. KAISER, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct-examination by Mr. Bacon:

4605

Q1. Please state your name, residence and occupation? A. John W. Kaiser; residence, 372 Elm Avenue, Brooklyn. Business, repair clerk, fountain pens.

Q2. How long have you been employed by A. A. Waterman & Co.? A. Eight years.

Q3. How long have you been repairing pens? A. Eight years.

Q4. Your whole experience in the pen business has been with them? A. No, that was just on the repair line, steady, continual repair.

Q5. What was your business before that? A. Rubber turning.

4606 *John W. Kaiser*

Q6. How long have you been a rubber turner? A. Close to fourteen years.

Q7. Do all the pens that come into A. A. Waterman & Co. for repairs pass through your hands? A. Yes, all of them do.

Q8. You are the head repair man? A. Yes.

Q9. About how many pens come in a week on an average, of all kinds? A. About four hundred on an average now the way we are running.

Q10. Is that a low or a high average? A. That is a pretty high average.

4607 Q11. About how many of those represent A. A. Waterman pens? A. I should say about sixty per cent of those would be A. A. Waterman pens.

Q12. And the forty per cent would be various makes? A. Yes.

Q13. About what proportion of them would be L. E. Waterman pens? A. About fifteen per cent of those would be L. E. Waterman pens, the remainder would be various other makes.

Q14. What is generally the matter with L. E. Waterman pens when they come in for repair? A. There are different things. They sweat, they leak and flow too free; the usual complaints that I get; outside of going through the pen shop and then coming back to me.

4608 Q15. Do substantially all the L. E. Waterman pens that come in for repair have the end joint? A. Yes.

Q16. Do you very often see a self-filler on any of their fancy makes? A. Very seldom they come there for repair—the self-filler.

Q17. The L. E. Waterman self-filler is wholly different in its construction from the A. A. self-filler? A. A whole lot of difference.

Q18. When they leak what is the cause of the leaking? A. I find as a rule that they do not seem to be worked up properly, when they leak; do not seem to me as though they were worked up by a workman who seems to understand.

4609

Q19. The screw becomes worn out? A. It is not faced off properly.

Q20. During your fourteen years of experience have you become familiar with different qualities of rubber? A. Quite so. I think in all that time I ought to be a little bit.

Q21. Do you know the difference between good and bad rubber in the pen manufacture? A. I think I do. When I put a tool up against it I can tell in a hurry.

Q22. In your opinion is the rubber employed by A. A. Waterman & Co. good rubber? A. To my knowledge it is pretty fair, what I have handled of it.

Q23. Have you ever known any better? A. Not any better, no. 4610

Q24. How does it compare with the L. E. Waterman rubber? A. In my estimation I think it is pretty good, just as good as theirs, every bit of it, the way I find it.

Q25. Is there any better grade of rubber in the market than that used by the A. A. Waterman people?

Mr. Watson: Objected to as it is not shown that the witness is competent to answer the question.

A. No, not that I know of.

Q26. Did you ever see or ever hear of a higher grade for pen purposes than that used by the A. A. Waterman people? A. No, sir.

Q27. Do you ever have any trouble with the A. A. Waterman pens that come in for repair in that the rubber is discolored? A. Some of them come in—unless a dealer has them lying very long in stock, and they come back; they may have been exposed to a lot of strong light. 4611

Q28. When they are discolored what color do they show? Light green, dark green, brownish.

Q29. Yellowish? A. Yellowish, brownish.

4612

CROSS-EXAMINATION by Mr. Watson:

XQ30. How long have you been in the pen business altogether? A. About fourteen years.

XQ31. And the eight years you have been a repair clerk was included in the fourteen years you speak about? A. Yes.

XQ32. Have you ever had anything to do with the manufacture or rubber? A. No, sir.

XQ33. You don't know anything about the ingredients of rubber or how it is made or anything about that part of it? A. No.

4613 XQ34. Have you ever been in H. P. & E. Day's factory at Seymour, Connecticut? A. No.

XQ35. Have you ever been in the L. E. Waterman Company's factory? A. No, sir.

XQ36. The A. A. Waterman pens that have been lying in the sun become discolored and brownish don't they? A. They will occasionally, yes, if there is a very strong light.

XQ37. Does that show that it is bad rubber? A. No, it does not. The strong light will have an effect on all kinds of rubber in fact.

XQ38. Have you ever manufactured rubber penholders for fountain pens from rubber that came from H. P. & E. Day's factory? A. Not that I know unless when I worked for M. T. Horn. They were making the Remex holders there. I

4614 don't know where they got their stock.

XQ39. You consider that the rubber in the Waterman Ideal fountain pen is just as good as any rubber on the market? A. Yes, just as good, to my knowledge, that I have seen.

XQ40. Are you prepared to say that all the L. E. Waterman Company pens that come into your shop, all the self-fillers, leak, flow too freely? A. Not all of them, no. I did not say all them. I said what I get outside of going through the pen shop and have the pen itself repaired.

XQ41. A good many pens that come to you have met with some accident, broken? A. Yes, occasionally a section broken, caps.

XQ42. You say forty per cent of the pens you repair are various makes? A. Various makes.

XQ43. I understood you to say fifteen per cent of that forty were L. E. Waterman. That would be about six per cent of all the pens you get as I figure it, is that right? A. No, that would be about fifteen per cent the way I put it; about fifteen per cent of all we get. Forty per cent would be various makes and twenty-five per cent of that would be various makes outside of the L. E. Fifteen per cent would be L. E., of the total. 4615

XQ44. What per cent of all these are broken and have some accident or other happen to them, apparently—the L. E. Waterman pens? A. I don't think it would be any more than ten per cent of that total, if there would be that many, broken pens. 4616

XQ45. How many of these pens have had some accident happen to their gold pen? A. I could not very well answer you that because I don't have much to do with gold pens. They are repaired and sent back to me. I don't take particular notice. I just set them up and let them go through.

XQ46. But those pens are included in the fifteen per cent you have referred to? A. Yes, they are included in the fifteen per cent but they are divided up between the gold pen department and the rubber department.

XQ47. The L. E. Waterman Company self-filling pen cannot leak at the joint any more than the A. A. Waterman pen can it? A. Which one do you mean? There are two that I know of. 4617

XQ48. Either one of them? A. They cannot leak?

XQ49. I ask you if they can leak at the joint? A. They can leak at the joint.

XQ50. The self-filling pen of the L. E. Waterman Company? A. The pump pen cannot leak at the joint because there is no joint there to leak.

XQ51. Well, can the other pen leak at the joint? A. Yes, if there is a defect in the reaming it naturally will leak. If you ream the hole too large there is chances of leaking, or if the sack happens to break away.

4618

XQ52. Is not that true of an A. A. Waterman self-filler? A. It is possible, but not in the same way.

XQ53. There is no more chance of the L. E. Waterman Company self-filling pen leaking at the joint than there is of the A. A. Waterman Company pen? A. No, not if properly adjusted.

XQ54. They are cemented together in substantially the same way? A. I don't know. I don't think theirs are cemented together. The self-filling pen is not cemented; those that I have seen are not cemented—from the L. E. Waterman.

XQ55. I show you an L. E. Waterman Company self-filling pen and ask you if you think that joint is cemented together
4619 (handing witness a pen)? A. No, sir.

XQ56. You don't think it is? A. No, sir. It is only forced in tight. There is not a bit of shellac on it. If my hands were not so sweaty may be I could take it off entirely.

XQ57. There is no chance for this pen to leak, the L. E. Waterman self-filler, unless the sack breaks? A. Unless the sack breaks away, or the feed happens to be loose inside.

XQ58. There is no more chance of that pen leaking, unless the sack breaks, than there is of an A. A. Waterman self-filler? A. No.

XQ59. What proportion of the A. A. Waterman pens that you repair are so-called end joint pens? A. I don't think there would be more than about twenty per cent of them now.

4620 XQ60. Most of your trouble is with the self-filling pens? A. That is in reference to the sacks worn out, or accident.

XQ61. About seventy-five per cent of the A. A. Waterman & Co. pens that you have sent in to you to repair, are self-filling pens; is that right? A. No, not the whole seventy-five per cent.

XQ62. What kind are they? A. We have middle joint, that come in occasionally.

XQ63. What is the matter with the pens when they come in? A. They may have met with some sort of accident; a man has broken the cap or broken the feed off.

4621

XQ64. This same thing happens to L. E. Waterman pens? A. We don't get many of those. They send them back to L. E. Waterman, from what I can see.

XQ65. What is the matter with A. A. Waterman & Co. pens that are sent back to you that have the end joint? A. It may be that some of those flow a little too free or it may be a man has tried to fix the pen himself and has taken it apart and could not put it together again. Then again, some that we get might leak at the joint.

RE-DIRECT EXAMINATION by Mr. Bacon:

4622

RDQ66. Do you very often have a broken sack in the self-filler? A. Not unless it is a very old one.

RDQ67. And the self-filler cannot leak? A. Not that I can see, no.

RDQ68. If an L. E. Waterman self-filler should leak in the sack, and the joint was loose where it is not cemented it might leak on to his fingers? A. If it would leak in the sack?

RDQ69. Yes, if the sack should break and the uncemented end joint was loose would it leak upon the fingers? A. Naturally it would have to work down between the joint, if it broke in the barrel, and come out somewhere. The ink would have to come out somewhere.

RDQ70. Do you very often have trouble with the button on the A. A. Waterman self-filler breaking? A. No, not breaking off unless they break them off by force; if they use pliers to try to see how they are made. 4623

RDQ71. In the last two years that button has been made much larger and stronger? A. Yes, much stronger

RDQ72. Do you ever have any trouble with the sack separating from the plug? A. No.

RDQ73. The plug is connected with the head? A. Yes.

RDQ74. Have you ever assembled pens and adjusted them?

Mr. Watson: Objected to as not proper re-direct examination.

A. Yes.

RDQ75. If you get the barrel and section and feed from one party and the pen from another how long would it take you to assemble the parts and adjust the pen ready for the market?

Mr. Watson: Objected to as not proper re-direct examination and as absolutely immaterial and irrelevant.

RDQ76. How many could you do in a day? A. I don't know. That would be pretty hard for me to answer just now for I have not done that for quite a long while. I never timed myself on any of that sort of work.

RDQ77. When you were doing that sort of business couldn't you assemble and adjust four hundred or five hundred a day?

4625

Mr. Watson: The same objections.

A. I could not if I got the barrel and caps and feed and all that separate.

RDQ78. I find that I am mistaken about one point; in assembling they get the holder and feed and barrel and section complete, do they? A. I call it the setting up.

RDQ79. Then assuming that you get the holder complete and the assembling consists in merely putting in the pen and the feed and adjusting it properly, ready for the market, how long would it take then to assemble and adjust a pen? A. I don't think it would take more than a minute.

RDQ80. It requires no machinery? A. No, a little strength

4626 in the fingers.

RDQ81. Then the assembling of the parts and the adjustment is a matter of a short time? A. A very short time.

RDQ82. Does it require men of the highest skill? A. It certainly does; as I said, if you don't have the strength in the fingers and you don't understand which way to set it up, you are lost.

RDQ83. The men who do that do not get as high wages as the man who selects the iridium? A. No.

RDQ84. He is the highest paid man in the shop, is he not? A. That is what I understand. It is something that don't worry me very much.

RDQ85. You formerly worked for Horn & Co.? A. Yes.

RDQ86. And they made the Remex? A. Yes.

RDQ87. And that is sold by L. E. Waterman Company? A. Yes, and they made also the Pen and Ink. I was the first man to make a sample for it.

RDQ88. Then you have worked on the goods that the L. E. Waterman people sell, have you? A. Yes, only it was under this name of M. T. Horn. I don't know whether L. E. Waterman have an interest in the firm or not.

RDQ89. You are not prepared to say that they did not get their rubber from Day of Connecticut?

Mr. Watson: Objected to as immaterial and incompetent. 4628

A. No, I could not say that.

RDQ90. Was the rubber that went into those pens any better than that which goes into the A. A. Waterman pens? A. No.

RDQ91. Of all the L. E. Waterman Company pens that come in for repair did I understand you to say about one-tenth had broken? A. About that.

RDQ92. Generally speaking when parts are broken they send them around to the L. E. Waterman people? A. I think so. We don't seem to get those easy jobs; we only seem to get the hard jobs.

RDQ93. They are largely the leaky pens that you get hold of? A. It seems so to me. 4629

RE-CROSS EXAMINATION by Mr. Watson:

RXQ94. When did you work for Horn? A. Eight years ago.

RXQ95. How many Remex pens did you make? A. I was turning on the lathe for three years and in those three years I made up eleven hundred every week and fitted the section.

RXQ96. All Remex? A. The Remex and the Pen & Ink.

RXQ97. Did you set up pens there? A. No.

RXQ98. You did not assemble gold pens and the holders at all? A. No.

4630

RXQ99. Never did? A. We made up the holders and reamed out the feed and pushed the feed in and the L. E. Waterman people set it up themselves.

RXQ100. You furnished the gold pens yourself? A. No, they made the gold pens in this place.

RXQ101. None of those pens had the name Waterman's Ideal Fountain Pen on them? A. No.

RXQ102. None had the name Waterman on them? A. No, not on those holders.

RXQ103. Did you ever see an L. E. Waterman Company self-filling pen that had the sack broken and that leaked at the nozzle? A. I have never seen them unless it came through in

4631

the repair, that is, that the sack had broken inside the barrel.

RXQ104. You never saw one leaking at the nozzle did you? A. No, unless the sack was broken.

RXQ105. Did you ever see one with the sack broken that did leak at the nozzle joint, the L. E. Waterman self-filler? A. Unless it came through the repairs.

RXQ106. You don't remember ever seeing one? A. Not on the outside, no.

RXQ107. It leaked on the inside? A. It may have leaked in the barrel but it had to go through the nozzle if it did leak.

RXQ108. You never saw one that leaked through the joint? A. I have never seen any outside, no.

RXQ109. Is it not a fact with a great many of the self-

4632

filling pens of the A. A. Waterman Company; that people don't know how to operate them? A. No, I don't think so.

RXQ110. And they use pliers to try to open the screw end on the holder? A. I think they do it for curiosity's sake to try and see what is in the inside. The directions are plain enough. There is an arrow mark plain enough for any man to see.

RXQ111. You have seen a good many where they show signs that pliers had been used? A. Yes. I have seen several of them where they have been broken off by force.

RXQ112. When you set up, as you call it, a pen do you test the pen to see if it is in good working order, smooth etc.? A. I don't test them for the smoothness of the pen. I test them for the writing part and see that they don't leak.

4633

RXQ113. You do not adjust the nibs though at all when you set them up? A. You have to adjust them. You cannot set a pen so that the nibs will be lying one over the other.

RXQ114. You have to examine every one of them under glass? A. I do before they go out.

RXQ115. And when you are setting them up? A. Or setting them up, and they are polished, and they generally come back to me and I look at them with a glass to see that they are O. K. before they go back to the cutsomer.

RXQ116. In putting the gold pen into the holder with the feed you heat the feed and shape it to the pen? A. If it has to be.

4634

RXQ117. Don't you have an alcohol lamp or some other means of heating the rubber, at hand all the time? A. I have a small gas lamp that I use.

RXQ118. That is needed constantly, frequently? A. Yes, we need them every day, to get the feed to lie nice and flat for the pen.

RXQ119. It is quite an art to properly adjust the gold pen and feed and holder together, is it not? A. Yes, it certainly is. It is not everybody that can set up a pen.

RXQ120. If it is not adjusted and set up properly it will not write? A. No.

RE-DIRECT EXAMINATION by Mr. Bacon:

4635

RDQ121. You spoke of two kinds of L. E. Waterman's self-filler; one is what they call the pump pen? A. Yes.

RDQ122. Is that a success or a failure? A. As far as I know it has been a failure. They have never seemed to push it in any way.

RDQ123. And the other one is a side bar that you push in? A. A sort of cap on the barrel that you have to work up and down.

RDQ124. And it rots the rubber? A. I don't know that it would rot the rubber but it is a very bad thing. If it happens

to break in the pocket and you put your hand on it you naturally press the sack and you get ink over yourself.

RDQ125. Nobody takes the L. E. Waterman self-filler pen seriously, do they?

Mr. Watson: Objected to as incompetent.

A. I don't know. I don't think they do.

RDQ126. What you have testified to in relation to setting up and adjusting pens relates to your repair work only? A. Yes, only to my repair work. I don't bother with the regular work at all.

4637 *RE-CROSS EXAMINATION by Mr. Watson:*

RXQ127. Have you ever set up new pens for the A. A. Waterman Company? A. No, not to any extent. I may have set up a few when there happened to be nobody around and I have set them up for them.

RXQ128. Did you set them up at Horn's? A. No, I never had to set any up for Horn.

RXQ129. The L. E. Waterman self-filler is very easily filled, is it not? A. There is nothing very hard about filling it.

RXQ130. It is a very simple operation, is it not? A. If people understand how to pull the cap down and put it back again in a proper way.

4638 RXQ131. And if the cap is adjusted in place there is no chance of ink getting in the pocket from pressing the rubber sack, is there? A. Not if the cap was on tight enough.

RXQ132. The cap fits tight, doesn't it? A. Not on all that I have seen. I have carried one myself and every time I went to look at it the cap was down at the bottom.

RXQ133. That is because you were careless? A. No, I would put it in my pocket the same as I would any other.

RXQ134. What experience did you have with the L. E. Waterman pump pen? A. Not much experience. They come in to me to be adjusted, probably a new pen. I have never seen very many of them come through in our repairs.

RXQ135. You don't know whether Horn has made any Remex or Pen & Ink pens for L. E. Waterman Company in the last eight years, do you? A. No, sir.

RXQ136. You have never been in the L. E. Waterman Co. factory? A. No, sir.

By Mr. Bacon:

RDQ137. Will an L. E. Waterman self-filling pump pen stay filled after it is filled? A. Providing you hold the pen down in the ink and then screw the little top on it. If you don't do that, if you pick up your pen after you think it is filled and don't put the little top on, you will lose all your ink. 4640

Deposition closed.

Signature waived.

Adjourned to April 21, 1911, at 10:30 A. M.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY, 4641

vs.

MODERN PEN COMPANY.

Met pursuant to adjournment at the office of Alexander S. Bacon, 37 Liberty Street, New York, April 21, 1911, at 10:30 A. M.

Appearances:

Samuel S. Watson and Walter B. Raymond, for Plaintiff.
Alexander S. Bacon, for Defendant.

4642

MRS. LOUISE S. WILSON, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct-examination by Mr. Bacon:

Q1. Please state your name? A. Mrs. Louise S. Wilson.

Q2. Your residence? A. 9 West 91st Street.

Q3. Your business is housewife? A. Yes.

Q4. How long have you been married to Mr. Wilson? A. Three years, just.

Q5. Before that you were a widow? A. I was.

Q6. Mrs. Hooper? A. Yes.

Q7. And then you were in business? A. I was.

4643

Q8. What was the business? A. Fountain pen business.

Q9. For how many years were you in the business? A. I was in the business even before I was a widow. Mr. Hooper and I were engaged in the same business.

Q10. Mr. Hooper was a fountain pen man? A. Not as much as I was a fountain pen woman.

Q11. How many years were you in the fountain pen business? A. I should have to go back and count up. I was with A. A. Waterman when they first started in business, and before that I was with the L. E. Waterman two years.

Q12. From about 1900? A. Yes.

Q13. Until 1908? A. Yes. I don't know just how many years I have been with them. You know when A. A. Water-

4644

man first started in business.

Q14. For himself? A. Yes. It was not in 1900. I don't know anything about it as far back as that. It must have been about 1904.

Q15. Were you with the old firm of A. A. Waterman & Co. before the reorganization? A. Yes, I was from the start, from the beginning.

Q16. Were you in the firm when Mr. Gibson was a partner? A. Yes, I sold the first pens that were ever made by the company. It was A. A. Waterman & Co.

Q17. Instead of 1904, you mean 1894 or 1895? A. Yes, 1894 or 1895.

Mr. Watson: Counsel for plaintiff objects to all these answers and moves to strike them out, as the witness does not know when any of these facts occurred.

Q18. The A. A. Waterman Pen Company manufactured no pens under that name when you first went with them? A. No.

Q19. Then the firm was changed to what? A. A. A. Waterman & Co.

Q20. Did they manufacture and sell pens then marked A. A. Waterman & Co.? A. Yes, from that time on.

Q21. And from that time were you with him when he was alone? A. How do you mean, alone? 4646

Q22. Was there a time when he was not in company with somebody? A. No. Mr. Gibson was his partner.

Q23. After Mr. Gibson died didn't he have some connection with the Colonial Pen Company? A. The Colonial Pen Company were the selling part; A. A. Waterman & Co. were the manufacturers.

Q24. You were with them then? A. I had charge of the factory office at that time.

Q25. Then when he went in with Frazer & Geyer Company you were still connected with them? A. Yes.

Q26. Were you a saleswoman on the road, or demonstrator? A. I was in the office for awhile, and then I was on the road, as demonstrator, after that. 4647

Q27. Did you also repair pens? A. Yes, I repaired many pens.

Q28. You were with L. E. Waterman Company for how long? A. Just about a year, I should think.

Q29. And when Mr. Waterman went out from that company you went with him? A. I did.

Q30. In the course of your business from about 1894, to say 1908, did you handle many L. E. Waterman pens? A. Do you mean did I sell them?

Q31. Handle them? A. In my demonstrating business I came across a great many of them and I had to handle them.

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Q32. And in demonstrating you also sold A. A. Waterman & Co. goods? A. I sold the A. A. Waterman & Co. goods.

Q33. And did you take L. E. Waterman pens in exchange? A. I took all kinds in exchange, also L. E. Waterman.

Q34. How many pens did you handle a week on an average, of the L. E. goods? A. I should say in some places I would have fifty in a week, some places only ten, some only three or four. It depends on the size of the town.

Q35. For how many years were you repairing pens personally? A. When I made the repairs my own self?

Q36. Yes? A. About four years.

4649 Q37. Will you explain the troubles that had usually occasioned the necessity for repairing the L. E. pens; what was usually the matter with them? A. I did not repair as many L. E. Waterman pens—I did not repair many pens; most of them I would take in exchange for the A. A. Waterman & Company pens.

Q38. What was the matter with those that you took in exchange? A. Most of them on account of the joint being under the finger inking the finger from this joint.

Q39. That leak was at the end joint? A. Yes.

Q40. Was there any question about the flow? A. The flow was always very well. Most jointed pens will flow too freely when they are nearly empty, and drop ink.

Q41. That is the universal complaint of an end joint? A. Yes.

4650 Q42. What have you to say of the self-filling middle joint A. A. Waterman & Co. pens in comparison with the very best goods put out by the L. E. Waterman? A. So far as grade and quality goes I should think they were equal, but in the mechanism of it, any joint that is away from the finger is better than under the finger; and the self-filler having no joint at all it is far the best.

Q43. Did you hear any complaint about the sacks in the self-fillers breaking? A. No, I had rare occasion to find it in a sack.

Q44. How long were they warranted? A. Two years. If any sack gave way in that time they would give them another one free of charge.

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Q45. How long did they usually last? A. That is, the life of the sack?

Q46. Yes? A. If it was perfect, there was practically no limit to the use of it.

Q47. As long as it was kept filled and moist it would keep good? A. I have seen them tried for a year and worked.

Mr. Watson: I object to that question as horribly leading.

CROSS-EXAMINATION by Mr. Watson:

4652

XQ48. These sacks in the self-filling pens, if made all right when they are put in never do give out? A. They would last any length of time. You don't keep track of a pen more than five or six years anyway.

XQ49. All self-filling pens that you ever saw, as you testified, flow too freely? A. When you say all, do you mean every one?

XQ50. Within a dozen or two? A. I think most end joint pens.

XQ51. Does that apply to the end joint pens of the A. A. Waterman & Co.? A. Yes, any end joint pens. The heat of the hand will draw out the ink under the joints.

4653

XQ52. Does the heat of the hand expand the ink in the self-filling pens and cause that to flow too freely? A. The ink in the self-filling pen is so well protected from the heat and from the cold that it does not affect it in the same way. It is twice protected. It is in the holder and also in the sack.

XQ53. So that is never affected by the heat of the hand? A. No.

XQ54. Do the self-filling pens all leak around the feed at the end of the holder? A. Do you mean to drop the ink out at that point?

XQ55. Does the ink all come out around the end of the nozzle of the holder in the self-filling A. A. Waterman & Co. pens? A. All pens kept moist around the pen itself should feed all the time if it is a well working pen.

4654

XQ56. Does the ink in the self-filling A. A. Waterman & Co. pen come out on the back of the feed around the nozzle? A. Yes, it might come out there sometimes. You are not asking me whether it drops ink, are you?

XQ57. No. When it comes out around the nozzle and on the back of the feed it gets on the inside of the cap? A. Very rarely. It does it less than any pen I have ever had my hand on.

XQ58. Have you ever seen the self-filling pen put out by the L. E. Waterman Company? A. I have seen one.

XQ59. Does the heat of the hand force the ink out of the pen? A. This particular pen that I saw had no sack in it; it

4655 was as faulty as the other ones were. It was a pump pen, not a sack pen.

XQ60. You are not familiar with the sack pens, self-fillers, made by the L. E. Waterman Company? A. No.

XQ61. How long since you have been in the business? A. Three years. There are a few dealers that had L. E. Waterman self-filling pens. The pump pens that they tried were not satisfactory, and dealers did not keep them.

XQ62. Are you familiar with the safety pen put out by the L. E. Waterman Company? A. I am not.

XQ63. What year were you with the L. E. Waterman Company? A. It must have been 1895. I did not look up any date. It might have been 1895.

4656 XQ64. You don't know when you were with the L. E. Waterman Company? A. Not exactly, but it was the year the A. A. Waterman Pen Company was started in St. Louis, where I started the business.

XQ65. What were your duties with the L. E. Waterman Company? A. I sold the city trade, also at retail.

XQ66. Did they have a store in St. Louis at that time? A. No, I was representative.

XQ67. Do you know that A. A. Waterman had no partners after Mr. Gibson dropped out in February, 1899, for a considerable period? A. Yes.

XQ68. He was doing business during that period under his own personal name, A. A. Waterman? A. "A. A. Waterman & Co., manufacturers."

XQ69. Don't you know he was doing business during that period without any partner, under his own name? A. He had no partner.

XQ70. And he marked his pens "A. A. Waterman, Maker, Boston"? A. Yes.

XQ71. He had no partner at that time? A. No.

XQ72. Were you with Mr. Waterman when he and Mr. Gibson dissolved partnership in February, 1899? A. Yes.

XQ73. Do you know that all the stock he had on hand was turned over to Rhodes Lockwood at that time? A. Yes. 4658

XQ74. And Lockwood, to satisfy his claim, took everything that Waterman and Gibson had? A. I was not in Boston at the time and I don't know just how much they did take.

XQ75. You know they took everything they had? A. I know they formed a company then themselves, as the Sterling Company.

XQ76. Do you know when A. A. Waterman made his arrangements with the Colonial Pen Company and became an officer of that company? A. Do you mean the date?

XQ77. Yes. A. I cannot tell you the date. I am not strong on dates unless I look them up.

XQ78. Were you employed in the office of the Colonial Pen Company in Boston? A. I did some outside work first, then some soliciting in the town. I did some work for them and also was at the factory for the Colonial Pen Company and also at the factory for A. A. Waterman & Co. 4659

XQ79. Do you remember that the factory you refer to was in Somerville? A. West Somerville.

XQ80. Do you remember it was owned by the Colonial Pen Company? A. I did not know that it was owned by them.

XQ81. Don't you know that the Colonial Pen Company supplied all machinery and all the parts that were used in the manufacture, except what few were made in the factory? A. That they supplied what?

4660

XQ82. All the parts of the pen they bought outside, except the parts that were made in the factory itself? A. All rubber turning was done there.

XQ83. The Colonial Pen Company furnished the gold pens? A. I don't know. I know they were shipped to the A. A. Waterman Company.

XQ84. Who were Mr. Waterman's partners in that factory? A. There was nobody in the factory.

XQ85. He did not have any partners in the factory, did he? A. Some of the Colonial Pen Company may have been his partners in the factory.

XQ86. Don't you know he was simply an employee of the
4661 Colonial Pen Company and running the factory for them? A. No, I do not.

XQ87. Do you know that Mr. Waterman himself personally had never invested any money at all in the factory? A. I don't know anything about his personal investments.

XQ88. And for all you know that factory was owned by the Colonial Pen Company? A. I could not say whether it was.

XQ89. When you were repairing pens—what period was that? A. From 1903 on.

XQ90. That is when you were connected with the Frazer & Geyer Company in New York? A. That was A. A. Waterman & Co.

XQ91. You were never connected with the Frazer & Geyer
4662 Company? A. No.

XQ92. Who paid you at that time? A. I made drafts when I was out on the road on the A. A. Waterman Company.

XQ93. You drew drafts on A. A. Waterman & Co.? A. Yes.

XQ94. And that was the period when you were repairing pens? A. I was repairing pens then and demonstrating. Doing an advertising business.

XQ95. This period when you were repairing pens was when you were on the road? A. Yes. I also had charge of the repairs in the office before I went on the road.

XQ96. And when you were doing repairs how many pens a week were you repairing? A. I don't know how many a week. I was not repairing very many. I used to take them in exchange, more than repairing.

XQ97. You took all kinds? A. All kinds and I repaired all kinds. If a man wanted his own pen repaired I repaired it for him irrespective of what make it was.

XQ98. As matter of fact, if you repaired ten or fifteen pens a week, Ideal pens, it was a small proportion of the repairs you did? A. I made very few repairs.

XQ99. That would be considered very few repairs, wouldn't it? A. Yes, but we had a method of taking in exchange.

4664

XQ100. What did you do with those pens you took in exchange? A. I would take the gold pens out and weigh them up if they were my own. If they were not I would send them in to the company.

XQ101. You disposed of the pens as old gold? A. Sometimes pens of my own I would dispose of the gold pens. What I mean by that is that I was in business here for awhile taking pens in exchange and with those pens I did that. Of course the other pens belonged to the company and if I had taken any in trade I would bundle them up and take them in, because I had to report on those.

XQ102. Those pens that you refer to now that you took up were A. A. Waterman & Co. pens? A. Any kind of pens.

4665

XQ103. Did you exchange any Waterman Company pens for the stock of the dealers in L. E. Waterman Ideal? A. All kinds.

XQ104. Did you exchange A. A. Waterman & Co. goods for the stock of dealers who had Waterman Ideal pens? A. Do you mean to take theirs in exchange for ours?

XQ105. Yes. A. At first I did; not of late years. It was in the early part of the business.

XQ106. Did you do that as late as 1904? A. No.

XQ107. When did you stop doing that? A. I should say that I probably did that only the first or second year in business.

XQ108. How long have you known of the L. E. Waterman Company pen on the market? A. About 1894, I should say.

XQ109. Is that about the time you went to work for the L. E. Waterman Company? A. Even before that, a little before that. A little while I was in the stationary business where they sold L. E. Waterman pens.

XQ110. They were well known fountain pens on the market at that time, were they not? A. They were at that time I should say the well known fountain pens. Of course the pens were not known as well as they are today by any means.

XQ111. They were about the best known on the market at that time? A. It and the Wirt.

XQ112. Those were substantially the only well known pens on the market at that time? A. There were very few others.

4667 XQ113. Fountain pens were usually sold on the market at that time; dealers generally in the stationary line carried fountain pens at that time? A. They carried them. They were not as prevalent as they are today. They had to be educated up to it. Of course at that time I knew more about the western business.

XQ114. When you were employed by the L. E. Waterman Company, what was the name they usually called the L. E. Waterman goods on the market? A. They called them Ideal.

XQ115. Did not call them Waterman pens? A. Yes, some people called them Waterman pens. A great many people called them Ideal.

4668 XQ116. Waterman pens at that time were well understood to mean L. E. Waterman pens? A. They were the only ones then. The trade-mark was used a great deal.

XQ117. What was the trade-mark? A. Ideal.

XQ118. "Waterman's Ideal Fountain Pen" was on the pen at that time? A. Yes, a little different from now.

XQ119. What is the difference? A. At that time they were only marked with the letters. Now they have the *world* with a ring around it.

XQ120. The only difference or change in marking is the addition of the figure of the globe? A. I could not say that. That is the marked difference.

XQ121. Do you know what was on the gold pen at that time? A. On the Waterman Ideal pen?

XQ122. Yes? A. I would not like to swear to it. I know there was Waterman on it, and I think there was Ideal on it.

XQ123. Do you recall that the Waterman gold pen in every case had "Waterman's Ideal Fountain Pen"? A. On that make. They had other makes, too, that they did not have it on.

XQ124. Do you remember a concern called the Franklin Printing Company of Toledo, Ohio? A. I do.

XQ125. You demonstrated at that store? A. I did.

XQ126. The very last part of your employment by A. A. Waterman & Co., was it not? A. I have not been with them since three years. 4670

XQ127. 1906 or 1907, was it not, when you were demonstrating at the Franklin Printing Company of Toledo? A. About that time.

XQ128. How long were you there? A. I should say a matter of a week or ten days.

XQ128. Do you remember having any difficulty with the Franklin Printing Company? A. No, no difficulty that I remember.

XQ130. Do you remember that after you had demonstrated at that store, they sent back their stock of A. A. Waterman & Co. pens? A. I don't remember it; it did not come into my business, I could not say. I know that when I left there they were well satisfied. 4671

XQ131. Didn't you take up Waterman's Ideal fountain pens from customers of the Franklin Printing Company and give them in exchange A. A. Waterman & Co. pens which you told them were the same make? A. Why should I? I was not advertising the L. E. Waterman line; I was advertising the A. A. Waterman line.

XQ132. You never knew that the Franklin Printing Company of Toledo, returned their stock of A. A. Waterman & Co. pens soon after you demonstrated at that store? A. They did not come into my line. I don't know anything about it. If I heard it I don't remember it.

4672 *Louise S. Wilson*

XQ133. When you were demonstrating fountain pens for A. A. Waterman & Co. did you call an A. A. Waterman fountain pen a Waterman pen? A. Never.

XQ134. That name belongs to the L. E. Waterman Company, does it not?

Mr. Bacon: Objected to, as this witness cannot know.

A. I will tell you why; because we distinctly wanted to advertise the A. A. Waterman line. There would be no conflict with any other kind of pen.

XQ135. You found a lot of confusion, though, between the
4673 two kinds of goods, didn't you? A. No, not such a lot. If any one came in the store and did not know the difference they knew it when they went out.

XQ136. If they came in and asked for a Waterman pen you gave them an A. A. Waterman pen, didn't you? A. Not on their asking that way. If they came in and asked for a Waterman pen—most of the store I saw, they had both lines and probably standing right next to each other, and in that way I should always ask them which Waterman they wanted, whether they wanted an L. E. Waterman or an A. A. Waterman pen, and if they wanted to know the difference I would explain it to them. Any one that insisted on an L. E. Waterman pen always got it.

XQ137. They always had to insist on it, though, to get it?
4674 A. No, I would explain it first to them. If any one insisted on having anything I would sell it to him.

XQ138. What was the explanation you used to give? A. I would show them the difference in the mechanism and the difference of the self-filling pen over the old joint pen. Besides, when I advertised in a town it was natural that they would come and look at my pens, and sometimes they would make a mistake and not say A. A. Waterman pens, meaning ours all the time, and I would not leave them under the impression that they were getting something that they did not want.

XQ139. Did you advertise the A. A. Waterman Company pens as Waterman pens? A. Never.

4675

XQ140. When did the A. A. Waterman & Co. first make the self-filling fountain pens; when did you first sell self-filling pens for A. A. Waterman & Co.? A. It was when the Colonial Pen Company was the selling agent in Boston.

XQ141. That was not the character of pens they are selling now? A. No, it is improved now. It was a sack pen at that time.

XQ141. Entirely different in construction from the one they sell today? A. Not so different, only improved.

XQ142. What was the difference? A. At that time the sack had to be taken out of the holder and stripped with the fingers, and they afterwards made it automatic by just turning the button.

4676

XQ143. Didn't you have a good deal of difficulty that the button used to break off? A. No, not much.

XQ144. Did you know that A. A. Waterman & Co. found that that button was so defective they had to strengthen it, in the last year or two? A. I don't know that.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ145. Has there been any substantial change in the leading pens manufactured by L. E. Waterman & Co. since you first knew it, in about 1894 or 1895?

4677

Mr. Watson: Objected to as this witness has shown that she was not familiar with the goods as at present put out.

A. I know that the original pen—not speaking of the self-filler, because I am not acquainted with the self-filler pens—has been changed in the matter of the feed; I know that.

RDQ146. In any other respect has it been changed? A. As to the holder, no.

RDQ147. When was the change in feed made, about when? A. I could not tell you that.

RDQ147*a*. Was it eight or ten years ago, or less? A. It does not seem to me it is ten years.

4678

RDQ148. This L. E. Waterman self-filler with a sack has come on the market since you left the business? A. I think there was some before then, but I had never seen them.

RDQ149. You had a store of your own for a long time before you were married? A. Just a year.

RDQ150. And you were always employed by Mr. A. A. Waterman? A. What do you mean by always?

RDQ151. During all of this time. You represented him especially? A. Did I represent him personally, especially?

RDQ152. Yes. A. What do you mean by that. I always represented the company as far back as I have told you.

4679

RDQ153. He originally employed you? A. Yes, he did originally.

RDQ154. And you can say whether or not he was a successful salesman of pens? A. Wonderfully so. I have heard people say he was the best there is.

RDQ155. Your own opinion confirms that judgment? A. It does.

RDQ156. And you believe that there is no one in the country who can sell pens like A. A. Waterman? A. Yes.

Mr. Watson: I move to strike out the answer as incompetent, irrelevant and immaterial.

RDQ157. That is the general reputation in the trade? A. Yes.

4680

RDQ158. And after he began to manufacture did people very frequently call the A. A. Waterman pens the Waterman? A. Do you mean dealers?

RDQ159. No, people in general? A. Do you mean right away?

RDQ160. At any time? A. Do you mean all during that time?

RDQ161. Yes, after he began to manufacture A. A. Waterman & Co. pens did the people frequently call them Waterman? A. Yes, they did, many times.

RE-CROSS EXAMINATION by Mr. Watson:

RXQ162. Because they were mistaken? A. No, I don't know that they were mistaken sometimes both ways.

RXQ163. The L. E. Waterman Company, while you were familiar with their goods, made a great many different styles of holders and fountain pens? A. Not many styles, no.

RXQ164. When you first were connected with them did they make a holder like the one I now show you, Plaintiff's Exhibit No. 1, a chased holder in this style (showing witness Exhibit No. 1).? A. At the first, do you mean, the very first?

RXQ165. Yes. A. No, I don't think they looked just like 4682
that.

RXQ166. Was it not the fact that they did not make any pen at that time with what is known as the cone cap? A. The overcap; they made the overcap in 1894.

RXQ167. Are you prepared to swear that in 1894 the L. E. Waterman Company made a cone cap pen? A. Yes, by all means.

RXQ168. In 1894? A. Yes. They have been ever since I have known anything about their pens; they have had one of those caps, because I understood A. A. Waterman first improved and made the caps for L. E. Waterman Company.

Mr. Watson: I move to strike out the answer as incompetent and immaterial. 4683

RXQ169. You had no personal knowledge of that fact, did you? A. No, I just heard it.

Mr. Watson: I move to strike out the answer as incompetent.

RXQ170. When you were selling L. E. Waterman pens they had a good reputation on the market as fountain pens, did they? A. They always had a good reputation.

RXQ171. A good reputation today? A. Yes.

RXQ172. Among the best on the market? A. Among the best what?

4684

RXQ173. The best fountain pens on the market? A. Yes, they are among the best.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ174. You demonstrated for Scranton & Wetmore of Rochester? A. Yes, a number of times.

RDQ175. Are they one of the largest stores of their kind? A. They are.

RDQ176. In Rochester or Western New York? A. Yes.

RE-CROSS EXAMINATION by Mr. Watson:

4685

RXQ177. Are you familiar with Vosburg & Whiting, of Buffalo? A. No.

RXQ178. You don't know that concern at all? A. No.

RXQ179. Do you know the Willis P. Whiting Stationery Company of Buffalo? A. No.

RXQ180. You are not prepared to say that Scranton & Wetmore are the largest dealers in Western New York? A. They are among the largest that I have seen.

Deposition closed.

Signature waived.

4686

JAMES T. NAULT, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct-examination by Mr. Bacon:

Q1. Please give your name, residence and business? A. James T. Nault; my residence is 58 Grand Street, Union Course, Long Island. My present employment is at 159 Leonard Street, with Mr. P. D. Collins & Co.

Q2. What is your business? A. Gold pen manufacturing.

Q3. How long have you been in the manufacture of gold pens? A. I have been twenty-five years; going on twenty-six.

Q4. Will you state with what concerns or corporations you have been during this time? A. I have been with E. Wiley, between eight and nine years.

Q5. Did you learn the business from him? A. I did. After that I became connected with Aiken-Lambert Company for close on to two years; and in my present place, P. D. Collins, fourteen years.

Q6. What is now your special duty in connection with the manufacture of pens? A. Grinding gold pens.

Q7. Is that the most important part of all in its manufacture? A. It is, in my estimation. 4688

Q8. And commands the highest skilled labor? A. Yes.

Q9. Are you familiar with the pen points manufactured by A. A. Waterman & Co.? A. I am familiar with the pens in this respect, that I have seen some of them and those that I have seen are A-No. 1 pens.

Q10. You have been in their factory? A. I have been in their factory.

Q11. Is their machinery of the latest and most improved pattern?

Mr. Watson: Objected to as immaterial and incompetent.

A. I can say that their machinery is the same as used in all first-class shops. 4689

Q12. Do they have any machines that are not used in other shops, calling especial attention to the hydraulic press? A. Yes, there is one, that is the hydraulic press.

Q13. Is that used by Collins? A. No.

Q14. How do they make the gold homogeneous? A. By the hand hammer.

Q15. In your concern they do not make holders at all? A. No.

Q16. Are you connected with a union? A. Yes.

Q17. What union? A. Gold Pen Makers Union.

4690

Q18. How long have you been connected with it? A. Ever since they have organized. It must be 12 or 14 years. I could not exactly say.

Q19. Have you been an officer? A. I have.

Q20. What officer? A. I have been connected with the Executive Board and also President of the Gold Pen Makers Union.

Mr. Watson: I move to strike out all this testimony as immaterial and irrelevant.

Q21. Is it one of the duties of the Union to see to it that their men are of the first class in efficiency? A. Yes.

Q22. What were your duties as executive member?

4691

Mr. Watson: The same objection.

A. The duties of an executive member is to see that all men are treated fairly. If there is any grievance arises they are to handle all such cases.

Q23. You are practically a judge in case of trouble? A. Yes.

Mr. Watson: I move to strike out all this testimony as immaterial and irrelevant.

Q24. Is the A. A. Waterman shop what is termed a union shop?

Mr. Watson: The same objection and motion.

4692

A. Yes.

Q25. Do you know Mr. Newman who selects the iridium? A. I do.

Q26. What have you to say as to his qualifications?

Mr. Watson: The same objection, as immaterial and irrelevant.

A. From my personal knowledge he is considered one of the best in the business.

Q27. And his specialty is the selection of points from commercial iridium? A. Yes.

4693

Q28. What can you say of the workmen employed by the A. A. Waterman & Co? A. From observation and what I know of the men employed there, they are skilled mechanics.

Q29. Are they of the highest grades in their respective tasks? A. Yes.

Q30. Have you been in the present factory of L. E. Waterman Company? A. I have.

Q31. When was that? A. During the time of the opening.

Q32. When was that? A. In the month of August, I believe; I could not tell you the exact date.

Q33. Last year? A. Last year.

Q34. Then they have been in their new factory only since last August? A. I believe they were in the factory prior to the opening, but what length of time I could not really say. 4694

Q35. Did you go through the factory at that time? A. I did.

Q36. Is that what is known as a union shop?

Mr. Watson: Objected to as immaterial.

A. No.

Q37. How many of the grinders are experienced men?

Mr. Watson: The same objection.

A. To my own personal knowledge, there is possibly in the neighborhood of say 12 or 15 men.

Q38. Did they employ others that were not first-class men? A. To my knowledge they have. 4695

Q39. About how many grinders did they have that were boys and young people? A. In the neighborhood of probably 30 or 40.

Q40. Inexperienced workmen? A. As I classify inexperienced, yes.

Q41. How many of their grinders belong to the union?

Mr. Watson: Same objection.

A. In the neighborhood of probably four or five at present.

4696

Q42. What kind of a pen do they turn out in their present factory? A. In my judgment I classify the work of poor quality.

Q43. Do they also get pens from other sources? A. They do.

Q44. From whom? A. From Fairchild.

Q45. Are those good pens? A. Yes.

Q46. But the pens manufactured in Waterman's own shop you would classify as inferior? A. I would.

Mr. Watson: I move to strike out the testimony of this witness as immaterial and irrelevant to any issue in this case and largely hearsay, and matters of opinion, which have no weight or bearing as evidence; and subject to this motion I will cross-examine.

4697

CROSS-EXAMINATION by Mr. Watson:

XQ47. Have you been in the present pen manufacturing shop of Aiken-Lambert Co.? A. I don't know whether such a shop exists under the name of Aiken-Lambert at the present time.

XQ48. You don't know of any such shop? A. No.

XQ49. Did they ever have a shop to your knowledge? A. They did.

XQ50. When was that? A. When I was employed in Aiken-Lambert, about 14 years ago, between 14 and 15 years ago.

4698

XQ51. You have not known of their having a shop since that time? A. Yes, prior, until L. E. Waterman connected the two shops together.

XQ52. When was that? A. I couldn't exactly tell you. That is probably in the neighborhood—I know Mr. Ferris had been in control of the Aiken-Lambert Co. four or five years prior to the shop moving into the large building down here.

XQ53. Was that a union shop or non-union shop? A. That was classified as an open shop at that time; partly union men and partly not.

XQ54. Your idea of a skilled workman is largely determined by the fact whether he is a union man or not, is it not? A. Not necessarily so, no.

4699

XQ55. How are you able to judge whether a man is a skilled workman or not if he does not belong to the union? A. By the class of work that he turns out; by his ability, in other words.

XQ56. How do you know what class of work he is turning out? A. I see it.

XQ57. Do you see the pens that the non-union workmen turn out in the L. E. Waterman shop? A. Yes.

XQ58. Where? A. Right in the shop.

XQ59. When? A. The day of the opening.

XQ60. That is the only time? A. And other times that I have come across friends that have purchased pens, knowing that they have been turned out there.

4700

XQ61. You have no personal knowledge of whether they were purchased there or not; you don't know whether they were made in the L. E. Waterman shop, personally? A. No, I cannot take an oath to that because there are pens being made on the outside.

XQ62. Are you able to tell in what shop the pen I now show you was made (handing witness a pen)? A. No, I could not, not with the naked eye. I presume I could not positively if I had a glass.

XQ63. Perhaps the Commissioner will supply you with a glass?

(The witness examines the pen, Plaintiff's Exhibit No. 1, with a small glass.)

4701

A. No, sir; I cannot see with this glass.

XQ64. I show you Plaintiff's Exhibit No. 8, and ask you if you can tell in what shop that gold pen was made (handing witness the exhibit)? A. No, sir; I could not.

XQ65. Were you ever in the L. E. Waterman shop when it was in Rose Street? A. No.

XQ66. Before it was moved to its present place? A. No.

XQ67. You knew that it had a shop there for a number of years? A. I did.

XQ68. For how many years? A. That I could not say. Probably in the neighborhood of four years.

4702

XQ69. You did not know that they had a shop there for ten or twelve years? A. Possibly it might have been ten or twelve; I could not say. I know it was some time.

XQ70. And you have no personal knowledge of the grade or quality of the pens made in the Rose Street shop? A. Only from the past experience, knowing the conditions that existed down there, through hearsay.

XQ71. How many gold pens of the A. A. Waterman Company have you examined? A. Personally I might say that I have never examined any of them thoroughly, with the exception of just looking them over and possibly using them occasionally, now and then.

4703

XQ72. Do you find the hand method of making the gold homogeneous satisfactory? A. We do. Mr. Collins has always.

XQ73. You consider as an expert penmaker that you can make a gold pen as good that way as by any known process, known to you? A. From what experience I have had; of course I am not in a position to say that the hydraulic press will not do the work probably better than the hand hammer. I have not had experience.

XQ74. But with a hand hammer to make the gold homogeneous you can make as homogeneous a pen as can be made by any process known to you? A. Not exactly, because I have never had any experience otherwise.

4704

XQ75. Can you make a first-class gold pen by using the hand hammer instead of a hydraulic press? A. Exactly so.

XQ76. Your answer is yes? A. Yes.

XQ77. The factory of the L. E. Waterman Company that you speak of as visiting, is located here in New York City? A. It is.

XQ78. Describe the size or character of the building, of that factory? A. The size of the building is quite large. The character of the building is very fine in my estimation.

XQ79. It is a ten story large factory building, is it not? A. Yes, if it is ten stories. I don't know how many stories there are.

4705

XQ80. A great many stories? A. Yes, quite a number of stories.

XQ81. And it is all devoted to the manufacture of the products which are sold by the L. E. Waterman Company? A. I think that is so; to my hearsay it is so.

XQ82. When you went through it you did not see any products which were not sold by the L. E. Waterman Company? A. No, I think not.

XQ83. Is this building probably 75 feet by 80 or 90 feet deep? A. I should judge in that neighborhood, yes.

XQ84. How many pens of the L. E. Waterman Company have you examined critically to determine whether it was a good pen or not? A. I can state that I have not examined any of them critically, outside of probably a few that I have seen and looked at them. They have been A-No. 1 pens.

4706

XQ85. I am referring now to the L. E. Waterman? A. Pardon me. What I have seen I can readily say that from my standpoint of view they were not what I classify as A-No. 1 pens.

XQ86. I ask you how many of the L. E. Waterman Company's pens you have examined critically? A. Possibly in the neighborhood of a dozen.

XQ87. And that extends over what period? A. Since I have seen them, or the make of them?

XQ88. Since you have been familiar with the L. E. Waterman Company pens? A. That question is entirely different. I have been familiar with the L. E. Waterman goods for a number of years, but I may say through that period of time the number of pens that I have seen would amount probably to a great deal more than a dozen.

4707

XQ89. How many of these pens did you examine critically as to their quality? A. Pretty near all that I have seen I have examined critically.

XQ90. Some dozen or so? A. Yes.

XQ91. When did you examine them? A. Some of them I examined right there in their own factory. Others I have had given to me to see what trouble there was with them, and ex-

amined them at home, as well as in my own place of employment.

XQ92. Have all those examinations been made recently or have they extended over the period of your business career? A. They have extended over the period of my business career.

XQ93. During that time you possibly have examined some dozen or so pens? A. Yes, possibly several dozen.

XQ94. And you never found any first-class pens? A. Oh, yes; occasionally you come across a good pen.

XQ95. Only occasionally? A. Only occasionally.

XQ96. What is the reputation of the Waterman Ideal Fountain Pen in the market? A. Of course that is something that
4709 I cannot answer, what the reputation is. What the general public estimation is of the Waterman fountain pen I am not at liberty to say.

XQ97. How long have you known the Waterman Ideal fountain pen? A. I guess ever since they manufactured the pen. I remember Mr. Waterman when he started on Fulton Street.

XQ98. That was close to thirty years ago, wasn't it? A. Oh, no; not as long as that; I don't think so; no, I guess not. Thirty years ago would be before my time. Possibly he may have been there before I had been in the business and I remember his being there when I was quite a boy.

XQ99. He afterwards removed to 157 Broadway? A. I could not say where he moved to; it is so long ago I have for-
4710 gotten.

XQ100. Do you remember the L. E. Waterman Company having a place of business on Broadway between Cortlandt and Liberty Streets? A. I guess they did. That was prior to the place they are in at the present time.

XQ101. They were there for a good many years? A. Yes, I guess they were.

XQ102. And those pens made by the L. E. Waterman Company are generally spoken of in the trade as the Waterman fountain pens? A. Yes.

XQ103. That is the name by which they generally refer to them? A. Yes.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ104. And since A. A. Waterman came into the field how were his pens spoken of? A. From my own observation they were spoken of very highly.

RDQ105. Were they spoken of as Waterman pens or A. A. Waterman pens? A. A. A. Waterman pens.

RDQ106. Do you know the reputation of the L. E. Waterman goods in the trade? A. Yes, I do.

RDQ107. Among the manufacturing operators? A. Yes.

RDQ108. What is it? A. Their reputation is that they turn out—you understand me, when I say reputation; do you mean of their own manufacture? 4712

RDQ109. Yes, their own manufacture?

Mr. Watson: Are you speaking of the fountain pens?
Mr. Bacon: I am speaking of the gold pens.

A. The gold pen manufactured by L. E. Waterman throughout the trade, is poor class work.

RDQ110. Did you see a very large quantity, going into the thousands of pens in one bunch, if I may so term it, when you visited the factory in August last? A. Yes, I did.

RDQ111. How many were there in the parcel? A. That would be a very hard thing to make a guess upon; a great number.

RDQ112. Many thousands? A. I should presume from 20,000 to 30,000 pens. 4713

RDQ113. Did you examine them to find out what kind of iridium they were? A. Those that I looked at were soft iridium.

RDQ114. And manufactured iridium? A. Known as manufactured iridium.

RDQ115. And you took samples of this large quantity that they had there on exhibition? A. Yes.

RDQ116. Is it not a fact that no one else can use this new hydraulic machine excepting the A. A. Waterman people; that it is a patented machine? A. As a patent of the A. A. Waterman Company I should suppose not.

4714

RDQ117. Is it your opinion as an expert manufacturer of 25 years' experience, that gold, if subjected to hydraulic pressure from 15 to 20 tons, by a series of rapid impulses, would be more homogeneous than gold hammered out by hand? A. As I stated before, I have never had any experience, but it seems practical enough that it should be a better proposition than the hand hammer.

RDQ118. In this factory of the L. E. Waterman Company do they manufacture ink and all sorts of things, besides pens? A. I believe they do.

RDQ119. Show cases? A. I don't know whether they manufacture show cases or not.

4715

RDQ120. Do you know how many floors they had devoted to the manufacture of fountain pens? A. To the pen proper or the fountain pen itself?

RDQ121. The whole business, the pen and the handle? A. I might state possibly three floors; no, probably four floors.

RE-CROSS EXAMINATION by Mr. Watson:

RXQ122. What was done on the rest of the floors in the ten stories and two basement building? A. I believe that had a floor for storing ink, a show floor, where they exhibited their goods, as regards ink and pens; and if I am not mistaken there were floors there probably for manufacturing ink. I tell you candidly

4716

I was not interested in the other floors outside of pen making.

RXQ123. As matter of fact you are not prepared to say that eight of these floors are used exclusively for the manufacture of fountain pens, in some of its processes? A. No, I am not.

RXQ124. The ink that you speak of was manufactured entirely in the basement, was it not? A. I did not go down in the basement.

RXQ125. Do you make a first class pen in Mr. Collins' factory? A. I presume we do.

RXQ126. Do you make as good a gold pen in that factory as is on the market? A. Yes.

RXQ127. And you make your pens by hand hammer, don't you? A. Yes.

4717

RXQ128. And you consider those as good as any on the market, don't you, in your opinion? A. Yes.

RXQ129. In your opinion are not those pens as good as those put out by the A. A. Waterman & Company? A. As good?

RXQ130. Yes? A. The writing quality, I should say they are, and possibly the whole get-up.

RXQ131. When you examined these thirty or forty thousand pens you just picked up one or two pens at random? A. I picked up probably a dozen.

RXQ132. You examined the iridium? A. Through a glass.

RXQ133. Can you distinguish whether iridium is soft or manufactured, as we call it, or hard, by a glass? A. Yes, very readily. 4718

RXQ134. Please look at the pen I now show you, Plaintiff's Exhibit No. 8, and examine it with a glass? A. That glass (referring to small pocket glass) is absolutely useless to me. I could not see anything.

RXQ135. You are not able to determine? A. With a glass of that kind, no.

Mr. Bacon: I wish it to appear on the record that this is a hand glass produced by the Commissioner, that he carries in his pocket.

RXQ136. Would you be surprised to know that the L. E. Waterman Company use no manufactured iridium whatever in the manufacture of their gold pens for the Waterman Ideal fountain pen? A. For how long—or at the present time? 4719

RXQ137. At the present time and since they have been running their factory? A. Yes, I would be very much surprised to hear it.

RXQ138. That in the pen that they manufacture they use nothing but the native iridium? A. I should be very much surprised to find out that they had any native iridium, or hard iridium.

RXQ139. What is the price today of native iridium? A. I am not in a position to state the prices of hard iridium today because I am not a purchaser of that material.

RXQ140. It is the purpose of the pen maker's union to force all pen makers, which you consider skilled, to join the union, is it not? A. No, we absolutely don't force anybody to become connected with the union.

RXQ141. You use every effort to induce them to join the union? A. No, sir, we do not; we simply approach them and ask them if they wish to become members, and if not we never bother them.

RXQ142. Do you call any strike in the open shops? A. No, there are several open shops at present.

RXQ143. You never call a strike for that reason, because
4721 the shop is an open shop? A. Not to my knowledge.

RXQ144. You are unable to determine without a glass whether the iridium is soft or native iridium? A. Yes, I am unable.

(A glass is produced and handed to the witness.)

RXQ145. I show you Plaintiff's Exhibit No. 8 and ask you if you will tell us whether that is soft iridium or hard iridium, on the point of that gold pen? A. That is hard iridium.

RXQ146. I show you Plaintiff's Exhibit No. 1 and ask you the same question? A. That is hard iridium.

Mr. Bacon: We ask the complainant to produce any $2.50 Ideal pen No. 12.

Mr. Watson: Here is one right here. I just showed
4722 it to him, Plaintiff's Exhibit No. 1, and he has said it is hard iridium.

RXQ147. I show you Plaintiff's Exhibit 14 and ask you whether that is hard or soft iridium? A. I should judge that that was hard iridium.

RXQ148. I show you Plaintiff's Exhibit No. 10 and ask you the same question? A. That is practically a hard point.

RXQ149. I show you Plaintiff's Exhibit No. 33 and ask you about that one? A. That is hard iridium.

RXQ150. Do you find the gold pen in Plaintiff's Exhibit No. 1 better or poorer than the pen in Plaintiff's Exhibit No. 10? A. I shall state that both these pens are distinctly hard; one

is medium point, I would classify; the other is narrow and broad. There is no comparison in regard to the marks, because one is a medium mark and the other a broad mark.

XQ151. What about the quality of the pen? A. The same thing; they are both practically hard points, but one pen has got a larger piece of iridium on than the other.

RXQ152. Which one has the larger piece of iridium? A. No. 1 has got the largest piece of iridium.

RXQ153. And that you consider an advantage or disadvantage? A. There is no disadvantage or advantage, because hard iridium will stand wear. This has more possibilities of breaking off than the small piece.

4724

Mr. Bacon: I wish it to appear upon the record that No. 1 is an L. E. Waterman pen that retails for $2.50, and the No. 10 is an A. A. Waterman pen that retails for $1.

Mr. Watson: Objected to as positively improper and an incompetent statement, and not in accordance with the testimony.

RXQ154. I show you Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 141, and ask you to compare the pens in those two fountain pens? A. As regards to the iridium?

RXQ155. Yes? A. The iridium is practically the same.

RXQ156. Are the pens substantially the same size? A. No, they are not. 4752

RXQ157. Which one is the larger or heavier pen? A. I presume, judging from the size, the No. 1 ought to be the heavier pen. One is a stub and one is a long head. They always make a stub a little heavier than they do a long pen.

RXQ158. Otherwise they appear to be the same size? A. No, they do not; they are different in size, I think.

RXQ159. Which is the larger in size? A. The No. 1.

Mr. Watson: Let it appear on the record that No. 1 is a Waterman Ideal fountain pen that retails for $2.50 and No. 141 is an A. A. Waterman & Co. pen that retails for $3.

4726

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ160. I show you two pens and ask you what kind of pens those are (handing witness pens)? A. There is so little on one of these pens—I might say that that is not practically a hard point.

RDQ161. Are they not both manufactured iridium? A. I should say they might be, yes.

RDQ162. And they are both marked Ideal? A. I don't know. I have not looked at the marking.

Mr. Bacon: They are offered in evidence, both marked Waterman's Ideal.

4727

Mr. Watson: Objected to as incompetent.

RE-CROSS EXAMINATION by Mr. Watson:

RXQ163. The two pens that you have examined last, produced from some unknown source, I would like to have you examine and tell me if you do not think those pens have been repointed since they were originally made? A. It is a pretty hard matter to distinguish whether a pen is repointed after it is ground. Practically one point is broken off of one of these.

RXQ164. Both of them show that some accident or some repair has been made, don't they? A. No, I am not in a position to say that there has been a repair made to both those pens. There may not have been any repair made to either one of these pens. One is all battered up. The other one I should say was never repointed.

4728

RXQ165. Do both the pens show use? A. From their appearance they show use.

RXQ166. A good deal of use? A. I cannot say a good deal. They might have been lying in ink some time. That pen (indicating) has been in ink. I could not say how long it has been used.

RXQ167. Both of them have been used? A. Yes, I should think so.

RXQ168. You are not prepared to say positively that they never have been repointed? A. One of them has never been touched. Of course, if they were repointed there would be a mark of some description. The other one, the point is off that one side. I am not in a position to say.

By Mr. Bacon:

RDQ169. Does not the fact that one of these pen points is broken indicate that it has not been repointed? A. No, I cannot say that.

The two pens referred to are offered in evidence and marked Defendant's Exhibit A-69. 4730

TIMOTHY SWEENEY, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct-examination by Mr. Bacon:

Q1. State your name, residence and business? A. Timothy Sweeney; residence, 292 Vermont Street, East New York, Brooklyn; business, rubber turning.

Q2. How long have you been engaged in the business of turning rubber? A. Seven years and a half.

Q3. Where were you employed? A. D. W. Beaumel; and Sanford and Bennett. 4731

Q4. Who next? A. Langill.

Q5. Who else? A. L. E. Waterman.

Q6. Are you at work for L. E. Waterman now? A. No, now A. A. Waterman, after L. E. Waterman.

Q7. How long have you been working for A. A. Waterman? A. Ten months.

Q8. How long were you working before that for L. E. Waterman? A. Three years about; three years and ten months; close on to four years.

Q9. Where was their factory when you were working for them? A. Rose and Duane Streets.

4732

Q10. Have you been into the new factory? A. I have not worked there, but I have been in there.

Q11. Where is that? A. 40 Fletcher Street.

Q12. What are your duties with A. A. Waterman & Co.? A. Turning barrels.

Q13. Have you turned all parts of the fountain pen handles? A. Everything; the cap and the barrel and the section.

Q14. What kind of men does A. A. Waterman & Co. employ in their factory?

Mr. Watson: Objected to as immaterial.

A. All first class turners.

4733 Q15. All experienced men?

Mr. Watson: The same objection.

A. Yes.

Q16. Any boys or girls? A. No boys or girls.

Q17. Any learners? A. No, they have not got any learners there at all.

Q18. What kind of rubber do they use?

Mr. Watson: The same objection.

A. American hard rubber.

Q19. What is called Akron? A. Yes, Akron, Ohio.

Q20. You have used other kinds of rubber? A. There may

4734 be different names. I don't know the names of the rubber but I have turned Butler's rubber. That is what they used in the L. E. shop, for the Aiken & Lambert work.

Q21. Which is the better rubber, the Aiken-Lambert or the A. A. Waterman? A. The A. A. Waterman & Co. rubber is better.

Q22. The Akron is better than the Butler? A. Yes.

Q23. A higher price? A. I don't know about the higher price, but it is better.

Q24. Were the Aiken-Lambert people and the L. E. Waterman people together in any way when you were working for them?

4735

Mr. Watson: Objected to as immaterial and incompetent.

A. That is something I could not exactly tell. They were supposed to be together. It was in the one firm, but one minute you could be working with L. E. Waterman Company and the other minute working for Aiken-Lambert. You could not figure that out at all.

Mr. Watson: I move to strike out the answer.

Q25. How many men did they employ in the making, repairing and handling of the fountain pens in the L. E. Waterman shop? A. Do you mean the rubber part?

4736

Q26. The rubber part? A. About nine turning rubber.

Q27. How many of them were experienced men?

Mr. Watson: Objected to as incompetent, irrelevant and immaterial.

A. I could not tell whether they were experienced because they did not do such good work over there, so you could not judge on that.

Q28. Was not their work of the first grade? A. No, it was not as good as the L. E. work, the work they were doing over there.

Q29. Was the work that they were doing largely Aiken-Lambert work? How were the pens marked? A. Aiken-Lambert and Mercantile and they had a Capital pen.

4737

Q30. Did they make any pens over there that were marked Ideal? A. No.

Q31. They got all that work where? A. I don't know where.

Q32. Did they formerly use the American Hard Rubber? A. They had been using it but they changed off and used Butler.

Q33. Do you know why they did it? A. The boss said that rubber was going up in price and they could not pay what they demanded.

Q34. Did they have any learners over there in turning rubber when you were there?

4738

Mr. Watson: Objected to as immaterial and irrelevant.

A. Yes, we had a couple of learners.

Q35. How often have you been in this new factory? A. Twice.

Q36. How many floors are there used in the fountain pen business? A. Do you mean in just the rubber or the pen part?

Q37. Either or both? A. I was only on one floor. That was the rubber department. I have not been in any other floor.

Q38. Did you ever have to work on any material that came from the Day factory in Seymour, Connecticut? A. Yes.

4739 Q39. What did you do to it? A. There were about fifteen thousand holders turned over again, for what purpose I don't know.

Q40. They were not satisfactory? A. I don't know if they have been used or not. Some have been used and some have not.

Q41. Was it material that had come from the Day factory? A. It must have been. They never did it over there.

Q42. Was it marked Ideal? A. Ideal and Waterman. It had a number, and all that.

Q43. What can you say as to the comparative quality of the Day rubber and the Akron rubber? A. It is hard to tell after the holder has been made and has been lying around for a while; it is hard to tell; still, there was nothing extra in it when I

4740 did turn it.

Q44. Is the Day rubber any better than the Akron rubber?

Mr. Watson: Objected to as incompetent, irrelevant and immaterial, and it is not shown that the witness is competent to answer.

A. Not the work that I turned; I didn't see any difference.

Q45. In the new factory do they employ girls? A. Yes, they have girls working on buffing pens.

Q46. What kind of labor do they use in chasing? A. A girl does all the chasing. More or less of it the girls do the chasing.

Q47. Very cheap labor? A. I don't know what they paid them. They pay them about $9 a week, I guess. 4741

Q48. Who does the assembling? A. In what way?

Q49. What kind of laborers assemble the parts?

Mr. Watson: Objected to as incompetent and immaterial.

A. I don't know; they don't do them down there.

Q50. Putting the pens in the holders? A. They have men doing that.

Q51. Are they experienced men?

Mr. Watson: Objected to as immaterial and irrelevant. 4742

A. To my knowledge they ought to be; they are working at it long enough.

Q52. Have they not got a number of boys and girls in the assembling of parts?

Mr. Watson: Objected to as highly leading and improper in view of the answers of the witness to the previous questions, and the Court's attention is called to the highly leading character of the question and the attempt to discredit his own witness.

A. Everybody they have got, they put them right in; they don't know nothing and they learn them. They don't take outsiders in there, experienced people. 4743

Q53. Do you know how much they pay people who assemble the parts?

Mr. Watson: Objected to as not within the knowledge of the witness.

A. It is hard to tell that, but from what I have heard, they make around $16 a week.

Mr. Watson: I move to strike out the answer as incompetent.

4744 *Timothy Sweeney*

Q54. Why did you leave the L. E. Waterman Company and go to A. A. Waterman & Co.?

Mr. Watson: Objected to as immaterial.

A. They promised me more money and I never got it, and I left and got more money than I got over there.

Q55. Are they all experienced men in the factory of the A. A. Waterman & Co.?

Mr. Watson: Objected to as immaterial and irrelevant and not within the knowledge of this witness.

A. Yes.

4745 Q56. What do you say about A. A. Waterman & Co. insisting on the quality of the work being better than what you had done before?

Mr. Watson: The same objections.

A. Because they are paying a better price and they can demand better work.

CROSS-EXAMINATION by Mr. Watson:

XQ57. As a matter of fact you were always employed by Aiken-Lambert, weren't you? A. That is a hard thing to tell. One minute Mr. Ferris was supposed to be the boss and the next

4746 minute Hays was supposed to be the boss.

XQ58. Didn't you know Mr. Ferris was the manager of the manufacturing department of the Aiken-Lambert Company while you were there? A. I heard Mr. Hays was head man.

XQ59. You did not know that Mr. Ferris was in charge of the manufacturing department of the Aiken-Lambert Company all the time you were employed there? A. I was told that and then I was told something else. I was told both things. I never went into details to find out who was the head one. When it came down to the money part, they said Ferris was the head man.

XQ60. You did not know that Mr. Ferris was in charge of the manufacturing department of the Aiken-Lambert Company and

has been ever since they had any interest in this concern? A. When I came there first, that is when they got hold of him, and they said it didn't come true until the following year, in May; so the following year they put the time clock in there and it was said to be Waterman's.

XQ61. That is when Mr. Ferris took charge of the factory? A. I suppose so.

XQ62. All the pens that you manufactured were marked Mercantile or Capital or some special name? A. Yes.

XQ63. You never made any pens marked Waterman's Ideal Fountain Pens? A. No, nobody else ever did down there.

XQ64. They did not make any of those pens down there at all? A. No. 4748

XQ65. These pens that you re-turned, those were some damaged parts that had to be re-turned, weren't they? A. I don't say that they were damaged. The casing was too far down and the cap would go over the casing.

XQ66. Don't you know as matter of fact that these were all rejected holders that had to be re-turned? A. I don't know. We had to do them all over again.

XQ67. You made the Mercantile and Capital pens out of them? A. I couldn't say that, because I never saw the pens done up; I saw them turned and sent back.

XQ68. Do you know what price the Mercantile and Capital pens sell for, retail? A. $1 and $1.50.

XQ69. That is called the cheaper grade of pen? A. It is a small pen. All their pens are the same way only the larger pens are dearer than the small ones. 4749

XQ70. You never bought any rubber for A. A. Waterman & Co., did you? A. No.

XQ71. You don't know where it came from, do you; you have no personal knowledge? A. I saw cases come in. It was marked on in black.

XQ72. That is the only knowledge you have of the matter? A. That is the only knowledge.

XQ73. You never saw any bill for it? A. I saw the bill, sure.

4750

XQ74. Where were those from? A. They were on slips that came in the boxes, American Hard Rubber.

XQ75. Where is Mr. Beaumel now? A. He was on Jones Street and now he is up on Ann and Nassau.

XQ76. He makes a low price pen, doesn't he? A. Yes.

XQ77. Sanford & Bennett make a low price pen? A. They make all kinds of pens. They make plain pens turned by machinery and they make all kinds, hand turned pens.

XQ78. Do you know what the Sanford & Bennett pens sell for in the market? A. I cannot tell.

XQ79. They are mostly a pen that retails for 75 cents and $1? A. Not down as low as 75 cents; about $1 or $1.50.

4751 XQ80. $1.50 is for the larger size? A. Yes. They run up to $5 or $6.

XQ81. Where is Langill? A. He was down on Broad and Front. Now he is up on Barclay.

XQ82. Who does he make pens for? A. I don't know; I couldn't tell you that. He makes the holder and does not make the point. He just does contract work.

XQ83. That is a low grade cheap pen, is it not? A. Yes.

XQ84. The Waterman Ideal fountain pen is a pen of excellent quality, is it not? A. Yes.

XQ85. He makes the highest on the market, doesn't he? A. Yes, it is a good pen, but there are others as good as it.

XQ86. How long have you known about the Waterman Ideal

4752 fountain pen? A. When I went there to work.

XQ87. You never knew anything about it before that? A. Knew about the place?

XQ88. Knew about the pens? A. I have seen the pens.

XQ89. How old are you? A. Twenty-six.

XQ90. How long had you been a rubber turner when you went with Aiken-Lambert Company? A. About two years and a half.

XQ91. You were very young in the business then; you did not consider yourself an expert turner at that time, did you? A. No, but I got the money though.

XQ92. When were you in the factory at 40 Fletcher Street? A. I was there twice. The last time I was there was in January or February.

XQ93. Of this year? A. Of this year.

XQ94. You just went into one floor? A. One floor, the rubber department.

XQ95. That is a large ten story building? A. Yes.

XQ96. When were you there before that time? A. Christmas Eve.

XQ97. What part of the building were you in at that time? A. I was not in at that time. I was there around October, the time I was in there first. I have been around there a couple of 4754
times, just waiting outside to see fellows.

XQ98. Last year? A. Yes.

XQ99. What part of the building were you in at that time? A. The rubber department. I was never on any other floor than the rubber department.

XQ100. Do you know whether the rubber work was done on several floors in that building or one floor? A. I think it was four or five.

XQ101. How many men have you employed at A. A. Waterman & Co.? A. I have not figured that up. I guess they have got about thirteen turners; thirteen or fourteen.

XQ102. How many in the factory altogether, all the workmen? A. There must be about fifty.

XQ103. The factory of A. A. Waterman & Co. is about as 4755
large as one floor in the Waterman factory at 40 Fletcher Street? A. Do you mean the rubber department?

XQ104. The factory? A. I never was on but one floor in the rubber department and they have not got one-half as many as they have got on a floor over there.

XQ105. One floor in the Waterman factory at 40 Fletcher Street is about as large as the whole factory of the A. A. Waterman & Co.? A. No, I don't think so. That is not a large floor over there.

XQ106. How many floors of the Waterman building at 40 Fletcher Street would it take to make the size of the factory

4756 of A. A. Waterman & Co.? A. I guess it would take two floors and then pack them in. Over there they have got everything packed in; there is no room for anything. Everything is close together.

XQ107. Two floors of the Waterman factory at 40 Fletcher Street would give as much floor space as you have in the factory of the A. A. Waterman & Co.? A. Yes, provided it was all put together.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ108. When you were working for L. E. Waterman Com-
4757 pany did they manufacture any Ideal pens in that factory at all?

Mr. Watson: Objected to as the witness has testified that he worked for Aiken-Lambert and does not know that he ever worked for L. E. Waterman Company.

A. They did not manufacture any Ideal pens over there.

RDQ109. They got the holders from Connecticut, did they, the Ideal holders? A. They got them all from Connecticut, the turned holders.

RDQ110. They sometimes chased them there, didn't they? A. They chased them down here in New York.

RDQ111. Where the old factory was? A. Yes.

4758 RDQ112. And that chasing was done by girls? A. Yes, they had two girls.

RDQ113. And they have automatic machines for chasing? A. Yes, it goes by power.

RDQ114. And after those Connecticut holders were chased were the gold pen points put into the holders at the factory? A. Yes.

RDQ115. Where you were working? A. Yes.

RDQ116. That is, the Waterman Ideal fountain pens were assembled in the factory where you were working? A. Yes.

RDQ117. And you worked on Ideal pens? A. I have not been working on them; other people worked on them.

RDQ118. Did you see the assembling of the Remex going on at that factory where you were working? A. Yes.

RDQ119. Do you know where they got their pens? A. They bought some there and they got some from Horn; they got them from several places; I don't know the places; I have heard about it.

RDQ120. The pen points which you speak of went into the holders that you made? A. The L. E.?

RDQ121. No, the pens made by Mr. Horn? A. The pen points they got there were put in L. E. Waterman holders.

RDQ122. The pen points that you got were put in what holders? A. From Horn and other shops they were put in L. E. Waterman holders; but the pens that they got from Aiken-Lambert, they were put in the holders that we were turning. 4760

RDQ123. Don't you know that L. E. Waterman & Company manufactured the gold pens for its Waterman Ideal fountain pens in that factory at Rose Street? A. Yes, they made them there.

RDQ124. And the pen points that they got from Horn went into the Remex? A. No, they went into the L. E. Waterman.

RDQ125. Did you ever put in any? A. No, but I have seen them being put in.

RDQ126. How do you know they came from Horn? A. I was talking to two fellows and they said the outside pens they were putting in were a darned sight better than the pens that were being ground in the establishment. 4761

RDQ127. You don't know anything about it except what you were told? A. That is the fitters that worked at it. They worked at that and got paid days work. I guess they get paid extra for all over the amount they are supposed to.

Mr. Watson: I move to strike that out as immaterial and incompetent.

RE-CROSS EXAMINATION by Mr. Watson:

RXQ128. You have no personal knowledge of where these pen points came from, have you? A. Which pen points?

4762 *Timothy Sweeney*

RXQ129. Any pen points? A. No, but when I worked in Horn's they were doing them there for the L. E. Waterman Co. and having the L. E. name on when they stamped them. When they shaped the pen they had the L. E. name on them because I picked them up and saw them.

RXQ130. Did you have anything to do with the manufacture of gold pens in Horn's factory? A. No, at the time they had the fire in the L. E. shop I went over there to turn rubber. I picked up a pen they were stamping and there was "L. E. Waterman" on it.

RXQ131. Was it not the fact that the only time they got any
4763 pens from Horn that you put into the Waterman pens was right after the fire in the factory? A. They had been putting in before, because I was talking to the foreman.

Mr. Watson: I move to strike out the answer.

RXQ132. Do you know anything about it of your own personal knowledge, except what you were told? A. He asked me if there was much of a fire; he asked me was I burned out over there. Then he inquired how they were putting on the new fellows to learn how to grind. Then he said it would take a long time before they would be able to do all their pens; that meaning, until they got enough broken in over there to grind pens so that they would not need any from the outside.

4764 Mr. Watson: I move to strike out the answer as incompetent.

RXQ133. At the time you speak of they had a rather extensive fire over at the factory where you were working? A. Yes.

RXQ134. It put them all out of business for a while? A. I guess for two or three months.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ135. When you were working for Horn did you see them stamp pens marked Ideal? A. Yes.

RDQ136. And that was during some years? A. They have been doing that for years, yes.

By Mr. Watson:

RXQ137. How long were you working at the Horn factory? A. About two weeks.

RXQ138. That is the only time you have been in Horn's factory? A. Yes. I was in there once before for a job.

RXQ139. That is the only time you saw any pens made at Horn's? A. Yes.

RXQ140. And that was right after the fire? A. Right after the fire.

4766

By Mr. Bacon:

RDQ141. You got your information from the foreman? A. I was talking and that is how I heard it; I and a couple more.

Deposition closed.

Signature waived.

Recess.

ASA A. SPEAR, a witness called on behalf of the defendant, being duly sworn, testified as follows: 4767

Direct-examination by Mr. Bacon:

Q1. Please state your name, residence and business? A. Asa A. Spear; I am a lawyer; my office is at 79 Wall Street; my house, 269 New York Avenue, Brooklyn.

Q2. How long have you been admitted to the bar? A. Since the spring of 1868.

Q3. Do you represent A. A. Waterman & Co. and have you in the last few years? A. I have off and on for quite a number of years last past, by spells.

4768 *Asa A. Spear*

Q4. Were you consulted with reference to the purchase of the effects of A. A. Waterman & Co. and the Modern Pen Co. by L. E. Waterman Company? A. Yes.

Q5. About when? A. As near as I can remember it was either in the late spring or very early summer of 1909.

Q6. Whom did you see in reference to it? A. I saw Mr. Raymond of Watson & Raymond, if I remember correctly.

Q7. What was the first conversation? A. Mr. Raymond came to see me at Mr. Chapman's suggestion, to talk over the details of a sale of the Modern Pen Company and A. A. Waterman & Co. to L. E. Waterman Company, I think it was.

4769 Q8. Have you given the substance of that conversation? A. No, I have not given any of the substance of it.

Q9. If you will give as much of it as you remember? A. My memory is mighty hazy but I will do the best I can for you. Mr. Raymond said that the details of a contract between these people for the sale to the L. E. Waterman Company were all arranged and adjusted except one, and that was the point that Mr. Chapman had called me into the matter to see if I could fix it; that was to determine what value was to be placed upon the plant and assets of the Modern Pen Company and A. A. Waterman & Co. That had not then been determined. I cannot give the conversation in detail. There was a talk of at least half an hour, I should say. The main drift of it was to know how we were to determine the value of those assets and Mr. Ray-

4770 mond's position was that it could not be determined without going through the form of taking an inventory and appraisal; and our conversation ended by his saying that he would send somebody, he mentioned the gentleman's name but I do not remember it, within the next day or two down to the office of the Modern Pen Compony and A. A. Waterman & Co., and take an inventory and appraisal of their assets. That is all I am sure of. I am impressed with the idea that he brought with him some written contracts which I read over but of that point I will not depose definitely because I have handled such a mass of contracts for those people that I cannot state certainly.

Q10. Did you see him again? A. Yes.

Q11. Can you fix that date? A. That was some time along in July, several weeks after the first interview. At that time I saw him again. He came to see me at my request and the purport of that talk was to find out why it was that the inventory and appraisal had not been made; Mr. Chapman advised me that it had not; and at that interview I am uncertain whether Mr. Raymond said that somebody was then down there taking the inventory or that he would be there within a day or two. They wanted information and a correct statement of what had been sold out of the assets or plant of that concern while negotiations had been pending. I promised to get it for him. I think I sent it to Mr. Chapman and the only scrap of paper that I can find is this, which I got from Mr. Chapman, and of which I sent a duplicate or copy or something to Mr. Raymond on or about the date of my last interview, July 22, 1909. That is all the paper that I can find in the office relating to this branch of the matters that I have had for those people. 4772

Mr. Bacon reads the paper referred to into the record, as follows:

Memo of machinery, etc.
Sold during 1908 and 1909.
About 12 rubber turning lathes.
About 4 buff spindles.
2 wet buff frames and carpet.
1 blower, 1 small motor, 1 old safe. 4773
Old shafting and hangers, etc.
1 desk, cabinet, etc.

July 22, 1909.

Underneath, in pencil, "Watson & Raymond."

Endorsed in pencil, "Modern Pen Company inventory, property sold."

Q12. All of this pencil is in your handwriting? A. Yes.

Q13. In either of these interviews was anything said about the trade name A. A. Waterman & Co.? A. That was a part of what they were buying, he told me; they were buying out the

4774 Modern Pen Company and all that they had; and A. A. Waterman & Company and all that it had.

Q14. Did they say anything specially about the name? A. I could not answer that.

Mr. Watson: I move to strike out all the testimony of this witness as incompetent and immaterial to any issue in this case, and subject to the determination of this matter I will cross-examine.

CROSS-EXAMINATION by Mr. Raymond:

4775 XQ15. Didn't I mention to you something about a draft contract that had been made? A. Yes, I think you had one. I am not absolutely certain of that, but I think you had one with you, which I read.

XQ16. Or Mr. Chapman had it with him? A. One or the other.

XQ17. Do you remember the names of the parties that were in the draft contract? A. Yes, I remember what the talk was. I don't exactly remember anything that was in the contract specifically.

XQ18. Do you remember distinctly that there was a draft contract? A. I say my impression is that there was a draft contract there, that either Mr. Raymond or Mr. Chapman produced.

4776 XQ19. Was not the only talk that we had about the party that was purchasing these assets, Aiken-Lambert? A. No, Aiken-Lambert's name was not mentioned to me. I never heard of it until I heard it from Colonel Bacon the other day. It was L. E. Waterman Company my talk was.

XQ20. You had this draft contract? A. I think we did. I am not sure about that; I am not certain that there was a draft contract.

XQ21. Do you think that you would recognize the draft contract? A. No, I do not. I cannot recall a solitary thing that was in it. If I could see the very paper that I saw I would not be able to recognize it now.

XQ22. Who told you that L. E. Waterman Company was buying or proposing to buy the property? A. Both Mr. Chapman and Mr. Raymond.

XQ23. Do you remember Mr. Raymond? A. I think you are the man but I am not quite sure I took you for him when you came in.

XQ24. You are sure I spoke about L. E. Waterman? A. Yes, I am absolutely certain about that. That is the only thing I was talking about.

XQ25. But you are also sure, quite positive, that there was a draft contract? A. I am reasonably certain of it but not absolutely certain. I would not swear to it. I have handled such a mass of these contracts for these people that I am all mixed 4778
up as to what they were, but I think there was a draft contract there.

XQ26. Wasn't it Mr. Chapman that told you about L. E. Waterman buying the property? A. Yes, and you did too.

XQ27. You are sure about Mr. Chapman? A. Yes, I am sure about Mr. Chapman and you too, both, absolutely.

XQ28. Did you go over that draft contract at all? A. If there was a draft contract there, and I think there was, I did nothing but just read it through. I made no criticisms of the contract. Mr. Chapman had sent for me particularly to see if I could not get this point of the valuation of those assets to a head. He had spoken to me about it two or three times before and that is why I was in it. I had nothing to do about the pre- 4779
paration of any contract, nothing whatever.

XQ29. Did you ever have any written correspondence with me about this? A. I cannot find any in the office. My first impression was that I had, but I cannot find anything in the office to confirm my recollection, so the only answer is just what I have told you now. I thought I had written you two or three letters; I think I told Colonel Bacon so the other day, but I cannot find any evidence that I did in the office.

Deposition closed.

Signature waived.

4780

WARD D. WILLIAMS, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct-examination by Mr. Bacon:

Q1. Your name, residence and business? A. Ward D. Williams; 1238 Pacific Street, Brooklyn, attorney.

Q2. How long have you been an attorney? A. About nine years, I think.

Q3. Did you represent A. A. Waterman & Co. and the Modern Pen Co. in some matters? A. I did.

Q4. Were you called in with reference to the sale of their assets during the years 1907, 1908 or 1909? A. Yes.

4781

Q5. With whom did you have your conversation? A. With W. L. Chapman and Mr. Watson.

Q6. This gentleman here? A. This gentleman here.

Q7. About when was it? A. To the best of my recollection it was December and January, 1907 and 1908.

Q8. What was that conversation? A. Those conversations were with reference to a proposed contract between the Modern Pen Company and some others, I have forgotten; I think it was Frazer & Geyer Company and A. A. Waterman & Co. and some company that Mr. Watson represented.

Q9. Did he tell you whom he represented? A. As I remember it at the time he said that he represented the Watermans.

Q10. Will you give us that conversation as nearly as you

4782

can, or the different conversations? A. The conversation chiefly was about the form of the contract to be entered into. There were points of difference between the parties. One was with reference to disposing of the stock on hand; and the other was a question as to the guaranteeing of the patents by Mr. W. L. Chapman.

Q11. Had there been any draft contracts submitted by Mr. Watson? A. There was a draft of the contract submitted which I was informed by Mr. Chapman was submitted by Mr. Watson.

Q12. What was said, if anything, about the Waterman name? A. I cannot give the exact conversation it is so long ago.

Q13. The substance of it? A. The substance of the conversation as near as I can remember it was that Mr. Watson's client wished to purchase this business and get them out of the field; that is as near as I can remember the negotiations, the subject of it.

Q14. Get whom out of the field—the Modern Pen Company or A. A. Waterman & Co.? A. If I remember, A. A. Waterman & Co., the Modern Pen Co. and the Frazer & Geyer Co.

Q15. Did they say anything about getting control of the name Waterman? A. I don't remember as it was exactly in those terms, but as I recall it, that was part of the plan.

4784

CROSS-EXAMINATION by Mr. Watson:

XQ16. Where did you have this conversation with Mr. Watson? A. In your office at 10 Wall Street.

XQ17. Did you have a copy of the draft contract with you there? A. I did.

XQ18. And the discussion was entirely as to the terms of that contract, was it not? A. The terms of the contract and purchase and sale of the business and patents and disposing of the stock; a general conversation.

XQ19. You suggested some changes in the draft that was submitted? A. I did.

XQ20. Were the names of the parties in that contract? A. As I recall they were in the draft. 4785

XQ21. I will show you a copy; maybe it will refresh your recollection. The copy that you had you received from Mr. Chapman, didn't you? A. Yes.

XQ22. You never received any copy from me? A. No, you never sent me any papers at all.

XQ23. I show you Defendant's Exhibit A-58 and Defendant's Exhibit A-59, and ask you if either of those is a copy of the draft that you have referred to (handing witness the exhibits)? A. They look so different in print. I don't know that I could refresh my memory from these. I am inclined to believe that is a copy of it; I am not positive.

4786

XQ24. Look at the other? A. (The witness looks at Exhibit A-59.) I think that is a copy of the draft—the second draft.

XQ25. Did you have them both? A. I had both of them.

XQ26. It was Mr. Chapman that told you I represented the Watermans, was it not, not myself? A. No, in your office you said you represented Waterman.

XQ27. But the draft shows that I was representing somebody else in that transaction, does it not. Are not the parties' names mentioned in there who were to make that contract? A. Surely.

4787 XQ28. In both cases? A. In both cases. The first contract was Aiken-Lambert and the second was the Modern Pen Company, incorporated and organized under the laws of New York.

XQ29. It is quite probable that I might represent the Watermans and also Aiken-Lambert? A. It is quite possible.

XQ30. And the contracts show that I was representing those people at that time rather than the Watermans? A. On the face of them, yes.

XQ31. And those were the basis of our discussion? A. Yes.

XQ32. Was anybody present besides you and myself at this interview. A. As I recollect, you and Mr. Chapman and myself were the only ones present, except when Mr. Raymond came in once or twice, I believe, during the course of the interview. What part he took I will not say. That is where I met Mr.

4788 Raymond.

RE-DIRECT EXAMINATION by Mr. Bacon:

RDQ33. There was at that time no such corporation as the Modern Pen Company in New York, was there? A. I don't know that of my own knowledge. The records will show.

RDQ34. That was wholly different, of course, from the Modern Pen Company of West Virginia, which was an existing concern? A. The Modern Pen Company of West Virginia I understand was an existing concern. I understood that the Modern Pen Company was to be incorporated and take over that business.

RDQ35. And it was the Watermans that were doing it? A. So I understood from Mr. Watson.

RDQ36. And they insisted on getting the trade name Waterman? A. The contract says that. They insisted on the trade name, Frazer & Geyer Company and Modern Pen Company.

RDQ37. Did they lay emphasis on that fact? A. I don't recollect that there was any particular emphasis laid on that fact.

RDQ38. Did they say that they wanted to get the name Waterman out of the way so that nobody would have it but themselves? A. I don't know that that was said in so many words, but the impression I received was that they wanted to 4790
buy the three concerns.

RE-CROSS EXAMINATION by Mr. Watson:

RXQ39. As matter of fact was there any conversation about the name Waterman at all? A. Yes, of course there was, with reference to the A. A. Waterman Company that you were buying.

RXQ40. That question came up, did it? A. That question came up.

RXQ41. And was the reason given because there was confusion in the trade between the names? A. I don't recollect that there was any reason given for it, anything excepting that it was 4791
wanted.

RXQ42. Was not the discussion entirely as to the disposition of the stock of goods on hand? A. No.

RXQ43. Was not that what you came to see about, to arrange about the terms of the stock and when it was to be paid and when it was to be taken over? A. Not entirely. The entire contract was to be threshed out.

By Mr. Bacon:

RDQ44. Are you a patent lawyer? A. No.

4792 RDQ45. Do you know anything about patent law? A. Nothing.

Deposition closed.

Signature waived.

Mr. Bacon: I read in evidence from Mr. Watson's affidavit in the printed record, verified August 11th, 1910, the following:

"That at the outset of these negotiations, your deponent endeavored to arrange to purchase the defendant's manufacturing plant and machinery, but said Chapman advised your deponent that defendant and that Chapman desired to close out the whole pen business, everything relating to the pen business, and that
4793 defendant would not dispose of its factory and machinery alone; that your deponent then endeavored to arrange some basis for negotiations and drafted Exhibit R and Exhibit N-N (Exhibits A-58 and A-59), in an attempt to formulate some definite proposition; that both of these exhibits were drafted within a few days of each other and were merely tentative drafts for the purpose of negotiations; and neither one of these drafts were ever accepted by anybody."

Mr. Watson: I object unless you finish the sentence.

Mr. Bacon: You can read it.

Mr. Watson (reading):

"That these drafts were made in an attempt to arrive
4794 at some definite basis of negotiations. * * * The drafts and contracts, Exhibits R and N-N (Exhibit A-58 and Exhibit A-59), were prepared with a view to meet the suggestions of said Chapman that he and his brother Isaac E. Chapman and the defendant desired to dispose of their entire interest and property in connection with the pen business."

Mr. Bacon: I also read in evidence from the affidavit of Alexander S. Bacon, in order to show the attitude of the defendant at all times, verified August 10th, 1910, as follows:

"At no time has the defendant ever doubted the right of the complainant to trade-mark Ideal. That right was confirmed in Waterman vs. Shipman, 130 New York, 301, at page 312.

From the very beginning every precaution was taken not to imitate or simulate any trade name of the L. E. Waterman Company, and this new motion is based upon the alleged fact that the Modern Pen Company at one time sold to Mr. Saadi a trifling number of holders marked 'Royal Ideal Pen.' This sale was wholly inadvertent and without the knowledge of the principal officers of the defendant. The stamp 'Royal Ideal Pen' was a registered trade-mark of Mr. Saadi, but as soon as the objection was made the name was obliterated and no other sale has been made. No one regrets this circumstance more than the defendant. It was in direct violation of express orders and was merely an accident of inadvertence." 4795

Mr. Watson: I object to all this reading into the record of the affidavit as incompetent.

Mr. Bacon (reading): 4796

"The Modern Pen Company and A. A. Waterman & Co. always, in conversation, pleadings and in affidavits, admitted the validity of the trade-mark Ideal and have said that they have never knowingly violated it."

Mr. Watson: The same objection, and not in accordance with the proof in this action.

Mr. Bacon: I also read in evidence from the appellant's brief in the Appellate Division, Isaac E. Chapman and William L. Chapman vs. L. E. Waterman, appeal argued May 6th, 1910.

Mr. Watson: Objected to as incompetent.

Mr. Bacon: This is offered in evidence for the purpose of showing the attitude of the defendant towards the trade-mark Ideal from the beginning of this controversy. 4797

Mr. Watson: The Court's attention is called to the fact that all this was done after the defendant had infringed admittedly complainant's trade-mark and is self serving.

Mr. Bacon: I will state that at the time this brief was prepared the writer did not know of the infringement in the Saadi matter.

Mr. Watson: Objected to as immaterial.

Mr. Bacon (reading):

4798 "No one will question the right of the L. E. Waterman Company to the exclusive use of the word 'Ideal' as that is their trade-mark and has been sustained by the Court of Appeals in Waterman vs. Shipman, 130 New York, 301, but the word 'Ideal' is the only word that they have an exclusive right to. They have not an exclusive right to the word 'fountain' nor 'pen' nor 'Waterman.' The Court says, at page 312: 'Upon the facts found the plaintiffs were entitled to an injunction restraining the defendant from using the word Ideal as applied to fountain pens, and that was the only word to which the L. E. Waterman Company are entitled under 130 N. Y., 301. No case can be found where the exclusive use of Waterman or Waterman's has been confirmed to the L. E. Waterman Company and the fact that defendant has recently obtained a trade-mark for the word
4799 'Waterman's' does not give them any greater right than they had before."

Mr. Watson: Objected to as incompetent and self serving.

Mr. Bacon: Defendant closes. Notice is given that plaintiff's ten days in which to reply begins from today.

4800

Defendant's Exhibit A. 4801

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Complainant,

vs.

MODERN PEN COMPANY,
Defendant.

WHEREAS a preliminary injunction was issued herein by 4802
Judge Charles M. Hough, which injunction was appealed to the United States Circuit Court of Appeals for the Second Circuit and was modified and as modified, affirmed; and

WHEREAS the appeal book in that case contains 700 printed pages and as is believed contains substantially all of the facts that would be developed on the trial of this action,

NOW THEREFORE, in order to save further expenses and costs the defendant hereby consents that a permanent decree may be entered in conformity with the opinion of Judge Walter C. Noyes, of the said United States Circuit Court of Appeals, wherein it shall affirmatively appear that this defendant is entitled to the use of the trade name "A. A. Waterman & Co." and that the complainant is entitled to its trade name "Ideal" 4803
and to the use of the word "Waterman" in connection with the word "pen" or "fountain pen," when disassociated from any other limiting word.

The defendant admits that by inadvertence, it manufactured a small number of penholders marked "Royal Ideal Pen." Such manufacture was not known to the officers of the defendant; was wholly inadvertent and unintentional, and it is understood that most of these penholders were never sold to individual purchasers, but were restamped by Mr. John Saadi to whom they were sold by the defendant.

The defendant now offers to pay the plaintiff the sum of fifty dollars as liquidated damages on the sale of these penholders to said Saadi.

4804 In the event of this offer not being accepted, the defendant will ask the court that all costs and disbursements following this offer shall be imposed upon the complainant.

Dated, New York City, December 12, 1910.

ALEXANDER S. BACON,
Solicitor for Defendant.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

4805 L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.

Messrs. Watson & Raymond,
Attorneys for Plaintiff.

Gentlemen:

Now that the taking of testimony has closed on both sides, I repeat the offer made early in the taking of your testimony and at the opening of the defendant's case:

4806 We hereby offer and consent to a permanent decree which shall be the same as the interlocutory decree already entered and further consent to pay you for damages on account of the use of the word "Ideal" on the penholders manufactured for Mr. Saadi of Washington, the sum of $75.

The defendant is to have the right to the use of the trade name "A. A. Waterman & Co." and the plaintiff to the use of the trade names "L. E. Waterman," "Ideal" and "Waterman" as applied to fountain pens.

In making this offer we do it without prejudice, and do not recognize that the defendant has ever knowingly or intentionally violated the trade-mark "Ideal," which the defendant has, since

long before the beginning of this litigation, and at all times, recognized as a valid trade-mark belonging to the plaintiff. 4807

In consenting to an injunction against the use of the word "Waterman" without any initials, we do this without recognizing your right to the use of that word standing alone, but make the offer in the interest of compromise and to avoid the labor and expense of printing the testimony and preparation for trial.

The defendant does not admit that it has ever used the word "Waterman" standing alone.

If this offer is not accepted, we shall ask the court that all the expenses and disbursements of this trial, both before and after this offer, and the preceding offers, shall be taxed against the plaintiff.

Dated, New York City, May 17, 1911.

4808

Yours &c.,

ALEXANDER S. BACON,

Attorney for Defendant.

Defendant's Exhibit B.

Decree of 1898.

SUPREME COURT,

NEW YORK COUNTY.

4809

L. E. WATERMAN COMPANY,
Plaintiff,
against
ARTHUR A. WATERMAN and EDWARD L. GIBSON,
Defendants.

This action having come on to be tried by the Court at a Special Term at Part V thereof, in the Court House in the Borough of Manhattan, City of New York, County of New York,

4810 on the 7th day of March, 1898, and subsequent days, Hon. S. Alonzo Kellogg, Justice, presiding and the Court having rendered and filed its decision in writing dated the 7th day of April, 1898, directing judgment to be entered thereon, the decision being in the words following:

"This action having been tried before me at Special Term, Part V, on the seventh day of March, 1898, and subsequent days, and due deliberation having been had, I now hereby make and file my decision in writing stating concisely the grounds upon which the issues have been decided.

"The plaintiff is a domestic corporation which, since 1887, has been engaged in the manufacture and sale of fountain pens, with offices in the City of New York and Boston. For several years before 1887 Lewis E. Waterman, the inventor and patentee
4811 of such fountain pens, was engaged in their manufacture and sale and in 1887 he transferred to the plaintiff the said business, and he has since continued as the plaintiff's president and general manager. During all of this time these fountain pens were stamped 'Waterman's Ideal Fountain Pens, N. Y.' and sometimes 'Waterman's Fountain Pen, N. Y.,' and during all of this time such fountain pens were known to the trade and to customers and to purchasers at retail as 'Waterman's Pens,' or as 'Waterman's Fountain Pens,' and during such time they have been so advertised by the said Lewis E. Waterman and by the plaintiff and by customers of the said Lewis E. Waterman and of the plaintiff, who dispose of such pens at retail.

"That the plaintiff corporation, since 1887, has been known
4812 to the trade and to its customers and to purchasers of such pens as the 'Waterman Company' or the 'Waterman Pen Company,' and such names indicated to such persons the plaintiff company as the manufacturers and sellers of the said fountain pens.

"The plaintiff company, since 1895, has largely advertised the said pens under the name of 'Reliable' used in connection with the word 'Waterman,' and also since early in 1897, has largely advertised said pens by the name 'Standard' or 'Standard of the World' in connection with the word 'Waterman.'

"The plaintiff and the said Lewis E. Waterman, during said times, constructed said fountain pens with a hole of various

shapes in the gold pens at the point where the nibs begin and stamped on the gold pen the word 'Waterman' in a crescent shape just below this hole and adopted lettering on said gold pen and on the barrel of the fountain pen of a particular size, and in capital letters; and the word 'Waterman' was stamped on said gold pen and on said barrel in such lettering. 4813

"That the said Lewis E. Waterman invented and the plaintiff employed before the defendants went into business, a peculiar form of barrel and cap of a conical shape without any shoulder on the barrel which became known as the new style of the plaintiff's manufacture, and which form the defendants subesquently copied when they went into business.

"The plaintiff and the said L. E. Waterman have largely advertised the said fountain pens and they became well and favorably known to the trade and world and are well made and operative fountain pens. That plaintiff guarantees its said fountain pens and agrees to repair them if defective, and has done so during all of its existence as also did the said Lewis E. Waterman prior to the organization of the plaintiff. 4814

"The defendant, Arthur A. Waterman, for some five years prior to February, 1897, was an employee of the plaintiff, and while in its employ formed the intention of going into business for himself in the manufacture and sale of fountain pens. That he left the employ of the plaintiff in February, 1897, and subsequently in May, 1897, went into business and copartnership with the defendant, Edward L. Gibson, in the manufacture and sale of fountain pens. The defendants adopted the name 'A. A. Waterman Pen Company,' although they were not a corporation. That the use of said name has caused much confusion in the trade, and has led purchasers of fountain pens and the trade to believe that the fountain pens manufactured and sold by the defendants are the products of the plaintiff. 4815

"That the defendants advertised styles of their fountain pens under the letters 'A' or 'A. A.' and marked the gold pen on their fountain pens with the letters 'A' or 'A. A.' in connection with the word 'Waterman' stamped in a crescent form thereon in a similar manner to plaintiff's gold pens, and stamped the letters 'A. A.' in connection with the word 'Waterman' on the barrel of said pens, and the defendants used a hole in the said gold pens

4816 similar to that used by the plaintiff and employed similar lettering and capital letters in the stamping of their gold pens and of the holders thereof. It also put upon the market fountain pens of similar shapes and sizes, and with similar gold mounting to those manufactured by the plaintiff.

"That these acts of the defendant have caused the trade and purchasers of fountain pens to believe that the fountain pens of the defendants were those manufactured by the plaintiff and the letters 'A' and 'AA' are misleading, being not only the initials of the name of the defendant Waterman, but also letters of the alphabet and purchasers and the trade generally have been led to believe that the pens sold by defendant were 'A. Waterman Pen,' namely, a fountain pen manufactured by the plaintiff, whose pens have been well known as 'Waterman Pens.'

4817 "That furthermore, the defendants, notwithstanding the prior use by the plaintiff of the words 'Reliable and Standard' in connection with the word 'Waterman,' advertised their fountain pens as 'Reliable' and 'Standard' fountain pens in connection with the word 'Waterman,' and also marked fountain pens manufactured by them with the words 'Reliable' or 'Standard' in connection with the word 'Waterman,' or in connection with the words 'A. A. Waterman,' and that the use by the defendant of these names 'Reliable' and 'Standard' in connection with the word 'Waterman' have produced confusion in the trade and among purchasers of fountain pens, and have led such persons to believe that such fountain pens are new styles of fountain pens manufactured by the plaintiff.

4818 "That the pens manufactured by the defendants are in many cases faulty in construction and either flow too much or will not flow at all, and often break in the middle and otherwise get out of order.

"That the defendants furthermore have, in several instances, imitated the plaintiff's circulars and advertisements, and defendants' circulars in some instances contain misleading statements which tend to make the trade and purchasers of defendants' pens believe that the fountain pens so advertised and so manufactured and sold by the defendants are those manufactured and sold and advertised by the plaintiff.

"The plaintiff for many years has had an office at 157 Broadway, New York City. That the defendants, since they went into business, have opened offices and a store at 178 and 181 Broadway, near the plaintiff's place of business. That the plaintiff for several years had its office in Boston at 38 Bromfield Street, and a certain clerk therein. That the defendants, when they went into business, secured this office from the landlord thereof and secured the said clerk, and are now doing business in the former place of business of the plaintiff in the City of Boston. That the defendants advertise themselves as being the 'A. A. Waterman Pen Company of New York and Boston,' and on the boxes in which they place their fountain pens they advertise themselves as 'New York and Boston' without giving any street address. 4819 4820

"The adoption of said offices near the plaintiff's place of business by the defendants, and their advertising as aforesaid, causes, and has caused, the trade and customers who purchase fountain pens to believe that the A. A. Waterman Pen Comapny of New York and Boston is the plaintiff company, and well-known manufacturers of Waterman's fountain pens.

"That these acts of the defendants in so advertising and in so manufacturing and selling fountain pens and in employing said corporate name, have caused great confusion as to the identity of the said fountain pens. That since the defendants have commenced business a large number of fountain pens manufactured by them have been sent to the plaintiff company by purchasers thereof, in the belief that they were made by the plaintiff, and such customers have sent such pens for repair or exchange to the plaintiff and have corresponded with plaintiff about them. That letters come to the plaintiff not only in reference to defendants' business, but in reference to plaintiff's business, although addressed to the defendants under the said corporate name. That numerous of such pens of the defendants so returned to the plaintiff are broken or faulty in construction or will not work. 4821

"That these acts of the defendants damage the plaintiff's business and lead the trade and purchasers of fountain pens to believe that the plaintiffs are manufacturing a faulty and defective fountain pen, and are a great injury to plaintiff's reputation, and

4822 the said acts of the defendant deceive and tend to deceive and will tend to deceive the public into believing that the fountain pens manufactured by the defendants are those manufactured by the plaintiff, and the plaintiff has no adequate remedy at law.

"That these acts of the defendants were done by them with the intent that the public and the trade and purchasers of fountain pens should be led to believe that the fountain pens manufactured by the defendants were Waterman's pens or Waterman's fountain pens, as manufactured for many years by the plaintiff and its predecessor, Lewis E. Waterman, and with hope and expectation that by the use of the said corprate name and by the use of the word Waterman the defendants might be able to obtain a sale for their pens and to obtain an advantage from the name of 'Waterman Company,' and the
4823 name of 'Waterman' or 'Waterman's' which, for many years, have been well known to the trade as indicating the plaintiff company and its fountain pens.

"The plaintiff is entitled to judgment against the defendants and I direct judgment against them as follows:

"That the defendants, Arthur A. Waterman and Edward L. Gibson, and each of them, and their and each of their servants, employees, attorneys, agents, customers and all persons taking or holding under, from or through them, be and they hereby are, perpetually enjoined and restrained from—

"(1) Using the corporate name 'A. A. Waterman Pen Company,' or any corporate name containing the word 'Waterman'
4824 or from advertising the same or employing the same on fountain pens or in connection with fountain pens.

"(2) Using in connection with the business of making or selling fountain pens on such fountain pens, whether on the holder or the gold pen, or on labels, boxes, signs, letterheads, billheads, circulars or advertisements, or in any manner whatsoever, the word 'Waterman,' 'Waterman's' or 'Watermans' ' alone or the word 'Waterman,' 'Waterman's' or Watermans' ' (whether the same be or be not coupled with other names or initials) in such a collocation with the word pen or fountain pen (whether the same be or be not coupled with some further descriptive word or words) as to indicate that the fountain pens so made,

or sold, are a variety of Waterman's fountain pens. But defendants are not prohibited from indicating that fountain pens made by them are made or prepared or sold for or by Arthur A. Waterman & Company or A. A. Waterman & Company. 4825

"(3) From using the word 'Standard' or 'Reliable' in connection with the word 'Waterman' or 'Waterman's' whether with or without initials or other descriptive words upon their fountain pens or labels, boxes, signs, letterheads, billsheads, circulars or advertisements or in any other manner whatsoever. But the defendants are not prohibited from using the words 'Standard' or 'Reliable' alone in connection with fountain pens, provided that the word 'Waterman' or 'Waterman's' with or without initials, is not employed.

"(4) From imitating the plaintiff in its circulars or advertisements or from imitating the manner in which plaintiff dresses up or marks or letters its fountain pens, or from doing any other act in imitation of the plaintiff's business or methods which would make or tend to make the public or the trade or purchasers of fountain pens believe that the fountain pens manufactured by the defendants are those manufactured and sold by the plaintiff. 4826

"(5) From advertising any of defendants' fountain pens under the styles 'A' or 'A A' or from making said styles 'A' or 'A A' in connection with the word 'Waterman' upon defendants' fountain pens, either upon the gold pen or the holder thereof.

"That plaintiff is entitled to the costs of this action against the defendants." 4827

Now, on motion of Logan, Demond & Harby, attorneys for the plaintiff, it is

Ordered, adjudged and decreed as follows: That the defendants, Arthur A. Waterman and Edward L. Gibson and each of them and their and each of their servants, employees, attorneys, agents, customers and all persons taking or holding under, from or through them, be and they hereby are, perpetually enjoined and restrained from:

(1) Using the corporate name "A. A. Waterman Pen Company," or any corporate name containing the word "Waterman"

4828 or from advertising the same or employing the same on fountain pens or in connection with fountain pens.

(2) Using in connection with the business or making or selling fountain pens on such fountain pens, whether on the holder or the gold pen or on labels, boxes, signs, letterheads, billheads, circulars or advertisements, or in any manner whatsoever, the word "Waterman," "Waterman's" or "Watermans'" alone, or the word "Waterman," "Waterman's" or "Watermans" (whether the same be or be not coupled with other names or initials) in such a collocation with the word pen or fountain pen (whether the same be or be not coupled with some further descriptive word or words) as to indicate that the fountain pens so made or sold are a variety of Waterman's fountain pens. But
4829 defendants are not probibited from indicating that fountain pens made by them are made or prepared or sold for or by Arthur A. Waterman & Company or A. A. Waterman & Company.

(3) From using the word "Standard" or "Reliable" in connection with the word "Waterman" or "Waterman's" whether with or without initials or other descriptive words upon their fountain pens or labels, boxes, signs, letterheads, billheads, circulars or advertisements or in any other manner whatsoever. But the defendants are not prohibited from using the words "Standards" or "Reliable" alone in connection with fountain pens, provided that the word "Waterman" or "Waterman's" with or without initials is not employed.

4830 (4) From imitating the plaintiff in its circulars or advertisements or from imitating the manner in which plaintiff dresses up or marks or letters its fountain pens, or from doing any other act in imitation of the plaintiff's business or methods which would make or tend to make the public or the trade or purchasers of fountain pens believe that the fountain pens manufactured by the defendants are those manufactured and sold by the plaintiff.

(5) From advertising any of the defendants' fountain pens under the styles "A." or "A. A." or from making said styles "A." or "A. A." in connection with the word "Waterman," upon defendants' fountain pens, either upon the gold pen or the holder thereof.

It is further ordered, adjudged and decreed, that the plaintiff is entitled to the sum of Two hundred and ninety-three and 94/100 Dollars ($293.94/100) costs of this action, against the defendants. 4831

Dated, September 3rd, 1898.

Enter,

S. A. KELLOGG,
Jus. Sup. Ct.

Wm. Sohmer,
Clerk.

Copy received July 23, 1910, A. S. Bacon, Atty. for deft.

(Endorsed): U. S. Circuit Court, Southern District of N. Y.
Filed Aug. 25, 1910, John A. Shields, Clerk. 4832

4833

4834 **Defendant's Exhibit C.**

THE ROYAL IDEAL PEN CO. BROOKLYN, NEW YORK,

The Royal Ideal Pen

Sales Office #602-9th St. N. W. Washington, D. C.

Reg. in U. S. Patent Office No. 14975.

4835 (Endorsed): U. S. Circuit Court So. Dist. of New York. In Equity. L. E. Waterman Co. vs. Modern Pen Co. Defendant's Exhibit C. Dec. 29, 1910. A. M. Parkens, Notary Public, D. S. Modern Pen Co Received Nov. 27, 1909, A. M. P. M. 7 8 9 10 11 12 1 2 3 4 5 6.

4836

Defendant's Exhibit D. 4837

No. 14919.

UNITED STATES OF AMERICA,

DEPARTMENT OF THE INTERIOR,

Patent Office.

TO WIT: BE IT REMEMBERED, That on the twentieth day of May, Anno Domini 1909, John Saadi, of Brooklyn, New York and Washington, District of Columbia, deposited in this office for registration a label of which the following is the title: "Royal Ideal Pen," (for fountain pens) the right whereof he claims as sole proprietor, in conformity with the law of the United States entitled "An act to amend the law relating to Patents, Trade-Marks and Copyrights," approved June 18, 1874. 4838

IN TESTIMONY WHEREOF I have caused the seal of the United States Patent Office to be hereunto affixed this twenty-second day of June, 1909, and of the Independence of the United States the one hundred and thirty-third.

(Seal)

Given under my hand at Washington, D. C.

The foregoing is a copy of the record and attached hereto is a copy of said label.

C. C. BILLINGS,
Acting Commissioner of Patents.

ROYAL IDEAL PEN 4839

FOUNTAIN PEN 14 K. GOLD

4840 **Defendant's Exhibt E.**

No. 14975.

UNITED STATES OF AMERICA,

DEPARTMENT OF THE INTERIOR,

Patent Office.

TO WIT: BE IT REMEMBERED, That on the Seventeenth day of June, Anno Domini 1909, John Saadi, of Washington, District of Columbia, deposited in this office for registration a label, of which the following is the title: "Royal Ideal Pen," (for fountain pens) the right whereof he claims as sole proprietor, in conformity with the law of the United States entitled "An act
4841 to amend the law relating to Paents, Trade-Marks, and Copyrights," approved June 18, 1874.

IN TESTIMONY WHEREOF I have caused the seal of the United States Patent Office to be hereunto affixed this twenty-ninth day of June, 1909 and of the Independence of the United States the one hundred and thirty-third.

(Seal)

Given under my hand at Washington, D. C.

The foregoing is a copy of the record, and attached hereto is a copy of said label.

C. C. BILLINGS,
Acting Commissioner of Patents.

4842 ROYAL IDEAL PEN

FOUNTAIN PEN 14 K. GOLD

Defendant's Exhibit F.

4843

Lincoln Fountain pen box (containing Exhibit G) which will be exhibited to the Court.

Defendant's Exhibits A and B of April 8, 1910.

Lancaster pen points which will be exhibited to the Court.

4844

4845

4846

Defendant's Exhibit G.

Defendant's Exhibit G, enclosed in Defendant's Exhibit F.

Please read these Hints

HINTS TO USERS

See the Makers' Guarantee below

Of Fountain Pens made and guaranteed by

A. A. WATERMAN & CO., New York

OPENING AND FILLING This pen has a screw joint unscrewing at the point marked J in the illustration.

CLOSING THE PEN The threads on the barrel should be wiped dry with tissue paper or clean cloth, otherwise a few drops may exude at the joint on closing. Screw the joint tight and keep it free from grit or dirt.

USE BLUISH FLUID INK Fluid inks give best results. The blacker the first color of the ink, or the more it contains "copying" elements, the sooner the pen clogs. Use ink from a bottle kept *closed constantly* from air and dust; a combination cork and dropper is very convenient.

CLEANING No ink is free from some trace of sediment, and the best results are obtained by those who frequently rinse the reservoir and force water through the section so as to clean the feed and pen.

DON'T TAKE APART *Do not remove the feed bar, nor the gold pen from the holder.* It is difficult to replace both with the proper adjustment, and handling the gold pen changes its action.

CAUTION The point should never be down except when the pen is on the paper for writing; therefore exercise care at all other times, especially in removing or putting on the cap, or in handling the pen in any way.

ABOUT CAPS Give a slight twist to the right in taking off or putting on the cap; don't jerk it. Keep the little hole in the cap open if the pen is carried in the pocket. Otherwise keep it closed (with a little wax).

BAD RESULTS Disregarding the foregoing suggestions causes untidy results. In cleaning inky surfaces use soft tissue paper or a clean cloth, and wipe out *inside of cap thoroughly.*

FIRST USE The pen should write instantly on contact with paper, though if new it will be necessary to wet the pen and feed at first, or to urge the ink into the feed-bar by jarring the pen slightly. The acid in the ink will correct any irregular flow caused at first by accidental traces of oil on the feed.

PECULIAR TRAITS When the pen is nearly empty it may flow more freely, as the heat of the hand causes rapid expansion of increased air in the reservoir. To insure against blotting re-fill it at once. If the cap is left off so that the ink dries on the pen, moisten the pen to make it start quickly. After filling, sometimes a bit of shut-in air drives out a drop of ink. Draw off the excess ink by touching the pen to a blotter.

THE MAKERS' GUARANTEE We guarantee any pen bearing our name. This guarantee, to be made good by the dealer through whom the pen is obtained, is against *actual defects or faults in construction only.* If any dealer fails to respect this guarantee, we request that the facts be reported.

MODERN PEN CO

Defendant's Exhibit A, Apl. 10, 1911.

4849

W. R. Ramsey,
Druggist.

Mulberry, Ind., March 6th, 1911.

A. A. Waterman & Co.
New York, N. Y.

Dear Sir:

Last week L. E. Waterman's representative was here and informed me that they had an injunction against A. A. Waterman. I have 1-1/6 doz. A. A. Waterman pens on hand and thought it best to write you and have them exchanged and save further trouble following is list of pens on hands.

4850

2 only	#703	@	$3.00
1 "	#603	@	$2.50
6 "	#503	@	$2.00
5 "	#303	@	$1.50

Yours truly,
W. R. RAMSEY.

Defendant's Exhibit B, Apl. 10, 1911.

The following is an extract from an order of the United States Circuit Court for the Southern District of New York, entered on the 10th day of December, 1910, entered pursuant to a mandate of the United States Circuit Court of Appeals for the Second Circuit:

4851

* * * * * *

Present: Hon. Charles M. Hough, United States District Judge.

L. E. WATERMAN COMPANY,
Plaintiff,
vs.
MODERN PEN COMPANY,
Defendant.

This cause having come on to be heard upon the motion by plaintiff for a preliminary injunction, and on reading and filing

4852 the notices of motion for a preliminary injunction herein and admission of service thereof, and the affidavits on behalf of the plaintiff annexed thereto, and on reading and filing affidavits on behalf of the defendant, and Alexander S. Bacon, Esq., counsel for the defendant, and Samuel S. Watson, Esq., counsel for the plaintiff, having been heard, and it appearing that this Court has jurisdiction over the parties and the subject-matter and upon full consideration of the facts presented it appearing that the plaintiff is a corporation under the laws of the State of New York, and is the owner of the trade-mark "Waterman's Ideal Fountain Pen, N. Y." for fountain pens and of the trade-mark "Ideal" for fountain pens, and that the same have been duly registered by the plaintiff in the United States Patent Office and
4853 that the defendant is a corporation under the laws of the State of West Virginia, and has infringed plaintiff's said trade-marks, and it also appearing that the defendant is guilty of unfair competition in trade with the plaintiff by using the name "Waterman" in connection with the marking, advertising and selling of fountain pens and parts hereof;

Now, therefore, it is hereby

Ordered, adjudged and decreed that a writ of injunction be issued pursuant to the prayer of the bill of complaint herein, strictly commanding and enjoining the defendant, Modern Pen Company, and its officers, servants, agents, attorneys and workmen, and each and every one of them, under the pains and penalties which may fall upon them, and each of them, in case of disobedience, that they forthwith and until the further order,
4854 judgment or decree of this court, desist from:

1. Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale or advertising any fountain pens of other manufacture than that of the plaintiff under the name of Waterman or Waterman's or Waterman Pens or Waterman's Pens or Waterman Fountain Pens or Waterman's Fountain Pens or Ideal Pens, or any mark or name in imitation thereof or near resemblance thereto as might be calculated to deceive or be likely to cause confusion or mistake in the mind of the public or deceive purchasers or which would indicate that the fountain pens so sold, represented or advertised are fountain pens of plaintiff's manufacture.

2. Infringing the plaintiff's trade-mark "Waterman's Ideal Fountain Pen, N. Y." or infringing the plaintiff's trade-mark "Ideal" and from manufacturing or selling fountain pens (other than fountain pens of plaintiff's manufacture) having the said trade-marks or either of them, or any simulation or colorable imitation thereof, on such fountain pens, whether on the holder or on the gold pen, or on labels, boxes, signs, letterheads, bill-heads, circulars or advertisements accompanying or used in connection with the making or selling of such fountain pens, or in any manner whatsoever. 4855

Dated, New York, N. Y., Aug. 27, 1910.

C. M. HOUGH,
United States District Judge.

(Signed) C. M. HOUGH, 4856
United States District Judge.

Defendant's Exhibit A of Mar. 27, 1911.

H. C. Bartlett, Jr.,
Special Western Representative.

MODERN PEN COMPANY
22 Thames Street
New York

4857

Modern
Self Filling
and
Middle Joint
Fountain Pens

Sole Selling Agent
for A. A. WATERMAN & Co.

4858

Defendant's Exhibit B of Mar. 27, 1911.

Rating *See Up.* Credit *M N S* Shipped *Mar. 21, 1910*

Order or Voucher No. *1968* *Hely* *3/12* *S* 1910

Ordered by Received from, Delivered to

Buhrman Bros.

New Castle Ont

Ship *O N C* by *Expss loll* Terms *1/260-92* 90

Mention Number of Modern Pens on Hand. See below

Fountain Pens as Below				This Space For Figuring				Asssortment of Nibs and Points							
								Short Nibs Only				Reg'r Nibs. For Short Nibs write S after quantity			
How Many Pens	Size and Style Nos.	List Price Per Pen	Discount According to Size of Stock					Manifold	Stenog'r	Stub	Ob Stub	Ex. Fine	Fine	Medium	Coarse
2	30	250	40	5					1/2 Black					2	
2	40	300	40	6										2	
									1/2 Mat						
1	50	350	40	3.50										1	
				14.50	8.70										
2	503	200	50								Imprint all			2	
				4							A. A. W. & Co.				
3	703	300	50	9										3	
2	603	250	50	5										2	
3	303	150	50	4.50										3	
3	A	100	50	3	12.75									3	
				25.50											
1	3 doz. Cond Mat B Clps Oak Tray				1.00										

Mat 100 *Hed*

This is a new firm but good so bank says. Have nice stock.

4859

4860

N. B.—For the various finishes of holders use distinct Nos. thus, 40, 40 Ch., or 40 M. If no mention of NIBS and POINTS, the Nibs will be half regular and half short; and the POINTS HALF MED., Quarter FINE and Quarter COARSE and BROAD (or Stub).

This Order Fills the Stock to *New Acct* Modern Pens.

THE MODERN PEN CO., 22 Thames St., New York
Sellling Agent for
A. A. Waterman & Co.

Buhrman Bros. Per *Bartlett*

Use the other side for any special condition; but separate sheets for all else.

Requested Wilber report 2/5/10 27

[Stamped on back]

Modern Pen Co,, Received Mar 15, 1910. A. M., P. M. 7-8-9-10-11-12-1-2-3-4-5-6.
H. W. G., A. H. H., E. K., Order, Credit, Repair, Billing, Exchange, Cash, B. K.

Defendant's Exhibit C of March 27. 4861

Letterhead of Henry R. Brink.

Holland, Mich., Dec. 15, 1910.

Modern Pen Co.,
125 Greenwich St., New York.

Gentlemen:

We are informed that the pens your agent sold us last August are being sold in New York for 85 cents. We are also informed that the name Waterman in the manufacturing and selling of fountain pens is owned and controlled by the L. E. Waterman Co. and any other concern in using their name is liable to 4862
get in trouble. We therefore believe the only safe way is to return the pens as we are not allowed to sell them under the name of Waterman as stamped on pens. Please let us know by return mail what we shall do.

Respectfully yours,

H. R. BRINK.

Defendant's Exhibit D of March 27, 1911.

Dec. 19th, 1910.

4863

Mr. H. R. Brink,
Holland, Mich.

Dear Sir:

Your letter of the 15th instant received and you were misinformed when told that our pens are being sold in New York for 85¢. We have the one price on our goods, and all the dealers are selling them at the list prices, and as far as we know, we are sure that none of our dealers in New York are cutting prices, as we would hear of this immediately if it was done.

In regard to the name "Waterman," the L. E. Waterman Company have sued us to prevent our using the name A. A. Water-

4864 man & Company, and it was carried through to the United States Circuit Court of Appeals for this district, which is the highest court to which this case can be carried, and it is decided distinctly that we have the right to the use of the name A. A. Waterman & Company, and the decision was rendered only last week. In selling our pens, or advertising same, you must be sure to use the full name "A. A. Waterman & Company," as the L. E. Waterman Co. have the use of the name without any initials.

The L. E. Waterman Co. have tried all they knew how to bother us with our customers, but as the case has now been decided in our favor, we look for no more of these tactics from them.

4865 Yours truly,
THE MODERN PEN COMPANY,
Hobart W. Geyer,
Treasurer.

Defendant's Exhibit E, March 27, 1911.

Mch. 31, 1909.

H. C. Bartlett, Jr.,
C/o Marion Hotel,
Little Rock, Ark.

4866 Dear Sir:

Your letter of the 28th inst. received, as well your several letters with orders which were received yesterday.

Before the receipt of your orders we had received a letter from Messrs. Thompson & Huskins, De Queen, Ark., stating that they understood they were purchasing the Waterman's Ideal pen and so countermanded their order. We have written them quite a lengthy letter explaining the situation and hope that they will let us ship the goods to them. We gave you considerable leeway on special terms where you found it necessary and do not care to sell goods on payments due sight or nine months

hence. It has been our experience that where customers buy on 4867
sixty days as a general thing it is from three to four months before they pay their account, although two or three of the bills which you sold on sixty days have been discounted, the customers sending a check almost by return mail after receipt of the goods, so that while you gave them a long time they really did not wish it.

We have not seen any of the Parker Pen Co.'s contracts but from the general reports which we get as to their dealings we understand that there is some kind of a "joker" in the contract. Their customers buy with the understanding that they can return the goods but when they try to return them they find that there is some clause which prevents their so doing. From the reports we get the Parker Pen Co. has more dealers sore on them than 4868
any concern in the fountain pen business.

We do not know what jobbers are selling our goods in your territory. The only ones we know of who would be liable to touch it, that are handling our goods, are Messrs. Montag Bros., Atlanta, Ga., Belkna Hdwe & Mfg. Co., Louisville, Ky. and possibly Daniel Stewart Co., Indianapolis, Ind. We never told you that we did not sell to jobbers and do not know where you got this impression. We have no knowledge of what territory these jobbers cover.

In one of our previous letters we wrote you that you might run up against goods made by A. A. Waterman & Co. of Chicago, and as you state that some of the dealers are buying goods at 50% discount, it is possible that they are selling at this dis- 4869
count, although we have not heard of their making any such prices on the Modern line. However, their goods are nothing like as good quality as ours and we do not see that we can make better discounts in the southwest, than we do all through our trade in the eastern part of the country. The jobbers who are handling our line certainly are not selling the Modern at 50% discount as if they did they would have nothing left for their own profit. The terms we have quoted you are the same terms that we give to all of our trade as we do not believe in giving part of our trade any better terms than another part.

We are willing to do everything we can to help you sell our goods in your territory and we have put the list prices on

4870 the Lincoln pens much lower for the same size pens than the Chicago house is putting out their Lincoln line.

We have no leather covers for order books but are sending you a board cover same as our salesmen use.

We appreciate the business you are sending us and trust you will be able to increase it right along.

With best wishes, we remain,

Yours truly,

THE MODERN PEN CO.,
Hobart W. Geyer, Ass't Treas.

4871 **Defendant's Exhibit G, March 27, 1911.**

Letterhead of the Great Northern Hotel

Hot Springs, Ark., 4/4/1909.

The Modern Pen Co.

Gents. In reply to your letter of the 31st will say that most all the St. Louis Jobbing Houses are selling your pens at 50% even Butler Bros. of St. Louis. This makes it hard for me. I will secure a copy of Parker's contract and send it to you. I would like to know if the A. A. Waterman Pen Co. of Chicago, Ill., are the same as A. A. Waterman, New York. Please advise me fully about this matter so I can explain to the trade
4872 also what relation or connection has A. A. Waterman with L. E. Waterman full information along these lines would be of great value to me in securing orders.

I note what you say about long time; also 60 days and that several of my customers have remitted on receipt of goods. I will say you will find all my customers prompt pay I give them long time because they say they can get the same from other people. I note Thompson & Huskins of DeQueen, Ark., say that they understood that they were getting the Ideal pen. Now this is not true for we talked that all over and they bought our goods; also kept me from selling another firm that wanted our line. I am writing them today relative to this matter. I hope

you have received instructions from them to ship. I have received the cover O. K. and ask that you accept my thanks for same. 4873

I will ask you to please send me statement of my act. to Springfield, Mo. care the Metropolitan Hotel. I will spend next Sunday the 11th in Springfield, Mo.

Thanking you in advance for your reply, I remain

Yours truly,

H. C. BARTLETT, JR.

Please advise what the costs of repairing old pens will be, the one you have charged to my act.

4874

Defendant's Exhibit F, March 27, 1911.

April 7, 1909.

Mr. H. C. Bartlett,
C/o Metropolitan Hotel,
Springfield, Mo.

Dear Sir:

Your several letters with orders received, and we are pleased to note that you are able to send us orders regularly.

We are sorry to inform you, however, that on the 5th before the receipt of your orders, we received telegrams from Mr. A. C. Jennins and Messrs. J. E. Jackson & Co., of Hot Springs, Ark., to cancel their orders. We do not understand this except that it is possible Mr. A. A. Waterman is stopping at Hot Springs on account of his health and he may have found out that you had secured these orders and got the people to cancel them. 4875

You request us to let you know the full particulars of our standing with A. A. Waterman & Co. of Chicago, and also the relationship of A. A. Waterman & Co. of Chicago and the L. E. Waterman Co. We are pleased to do this as fully as it can be done in a letter. For some years Mr. A. A. Waterman

4876 was a salesman for the L. E. Waterman Co.; he left their employ some dozen years ago to go into business for himself. As far as the writer knows, he is no relation to any of the L. E. Waterman people. Some seven or eight years ago A. A. Waterman formed a copartnership with Mr. Frazer and the writer, who were conducting a fountain pen business under the name of the Frazer & Geyer Co., a New York Corporation, and we started the firm of A. A. Waterman & Co., the two concerns doing business together. In June, 1905, the Frazer & Geyer Co. and A. A. Waterman & Co. were consolidated under the name Modern Pen Co., Mr. Waterman at that time making a contract with the Modern Pen Co. whereby he had the option of leaving us at the end of a year or so and taking up the Western
4877 part of the country as his territory, he to pay us several thousand dollars if he took advantage of this option. He decided to take advantage of said option and took up the Western territory but he never paid us a dollar to fulfill his part of the contract. While we have not been active in his field, we have sold regularly to what trade came our way and Mr. Waterman tried to stop us by attaching some of the accounts owed us by customers in the West, but we fought these out in the Courts both in Minnesota and in Washington and won out in all cases.

Until we got the information from you we did not know that the Chicago concern were selling their goods at 50% discount. We are not surprised, however, that they have to do this as the quality of their goods is very poor. They do not manufacture themselves, buying their goods wherever they can get
4878 them and at the cheapest prices they can get them made. We have judgment against Mr. Waterman personally for some thirty or forty thousand dollars but we are unable to collect a dollar on them.

The firm of A. A. Waterman & Co. of New York consists of Mr. I. E. Chapman and Mr. Wm. L. Chapman, the President and Treasurer of the Modern Pen. Co.

The firm of A. A. Waterman & Co. of Chicago has no connection whatever with this Company or firm.

We have heard nothing further from Thompson & Haskins since writing you.

Enclosed we hand you statement of your account, showing a balance to your credit of $22.47. We would have enclosed a check to cover this but you wrote us not to remit until you sent us definite instructions to that effect. 4879

Referring to the lot of pens we have of yours, we find that on these repairs there are five new gold pens needed, two caps and five sacs, besides general cleaning up and polishing. We will do this work for you at actual cost, which will be $2.50, in case you wish us to do it.

Trusting the information given herein will cover your requirements in explaining the situation to the trade, we remain

Yours truly,

THE MODERN PEN CO.,

Hobart W. Geyer, Ass't Treas. 4880

Defendant's Exhibit H, March 27, 1911.

Letterhead of the Oriental Hotel.

Dallas, Texas, 5/15 1910.

The Modern Pen Co.

Gent:

I see from the Jewelers Circular Weekly that L. E. Waterman & Co. has started an action against you and asked for injunction & damage $250,000. Now I would like to know what about this. I don't think they should say a word for there me tell it that our pens are no good and do any thing they can to keep us from getting business but the more they say the more we sell. I always tell the dealers L. E. has just as good a pen as we have and that they are nice people to do business with, and that we are in no way connected with them. They are sending out letters to the trade stating we have no right to sell our pens. I hope you win out in the suit. I will expect to hear from you Sunday at Oklahoma City, Okla. care Threadgill Hotel. 4881

Wishing you success, I remain,

Yours truly,

H. C. BARTLETT, Jr.

4882 **Defendant's Exhibit I, March 27, 1911.**

May 19th, 1910.

Mr. H. C. Bartlett, Jr.,
Oklahoma City, Okla.

Dear Sir:

Your letter of the 15th instant with enclosures received, and we are sorry that you have found trade so poor; from the business you got in Oklahoma last year, we hope that you will do well there again at this time.

The F. Levy Stationery Co. is not rated in Duns so we are getting a special report on them; if the report is all right, we will ship their goods without delay dating the bill as July 1st.

4883 In regard to the suit of the L. E. Waterman Co. against ourselves, our attorney has telephoned us that their motion has been denied. About two months ago we started a suit against the L. E. Waterman Co. to prevent them from bringing suits such as they brought in Cleveland and Washington against dealers who were handling our goods, but in this complaint they did not mention us at all but got judgment by default and in their decree put our name in so that they enjoined the customer from selling goods made by us. This case is being fought out and in the meantime the L. E. Waterman Co. brought a suit in the U. S. Circuit Court asking an injunction against the Modern Pen Co. selling goods made by the A. A. Waterman & Co., this is the suit that has just been decided in our favor. We

4884 have no doubt but what we will win our other suit also but it may be some months before it is finally settled.

Your order from J. M. Goldberg calls for emblems which you wish stamped 14 kt. Our emblem bands are not made of 14 kt. the bands being gold filled of 1/10 18 kt. plate, but the emblem is solid gold. If you want a 14 kt. band as well as emblem we would have to make the pens list at $8.00 or $9.00 instead of at $6.00. You might take this up with Mr. Goldberg and see if he will take the pens as they are or if he will take them with the full 14 kt. band at the higher price.

Yours truly,
THE MODERN PEN COMPANY,
Hobart W. Geyer,
Ass't. Treasurer.

Defendant's Exhibit J, March 27, 1911. 4885

Aug. 6, 1909.

Mr. H. C. Bartlett, Jr.,
C/o The Brady,
Tulsa, Okla.

Dear Sir:

Your letter of the 2nd inst. received, also the orders contained therein.

It appears that A. A. Waterman & Co. of Chicago are telling the trade the exact opposite of the facts. We manufacture our pens, both gold pens and holders complete right here on our premises, whereas the Chicago concern have their holders made in different places and their gold pens wherever they can get them. 4886
At present, a man named Williamson, of Janesville, Wis. is making their gold pens. We do not know who makes their holders. Mr. A. A. Waterman is no longer connected with the Chicago house except in the capacity of salesman, he having disposed of his interest in the concern entirely. We understand Mr. Waterman closed out the last of his stock in the Chicago concern something like three or four months ago. While we did not get this direct from him we did get it from a party very close to him to whom he wrote this information.

We cannot get Nos. 5706, 5806 and 5606 in Middle Joints but can furnish them in end joints, if you wish. The list on them would be the same as the Self-filler.

Enclosed we hand you your commission sheets for July, and 4887
we have a balance of $63.21 due you. Please let us know if you wish us to send you a check for this, and if so, where.

Yours truly,
THE MODERN PEN CO.
Hobart W. Geyer, Ass't. Treas.

4888 **Defendant's Exhibit K, March 27, 1911.**

Sept. 7, 1909.

H. C. Bartlett, Jr.,
Owensboro, Ky.

Dear Sir:

We have received a letter from the Younkman's Red Cross Pharmacy, Tulsa, Okla., in which he states that you gave him to understand you were selling the L. E. Waterman pens.

As we wrote you before, we want it distinctly understood that we have nothing to do with the L. E. Waterman pens, our being the A. A. Waterman and being far superior in every way to the old style and joint pens, our end joint line being as good or bet-
4889 ter than the Ideal, at less than half the price. We want our goods sold on their merits and cannot stand for any complaints of this sort, so that you will please see that it does not occur again.

Yours truly,
THE MODERN PEN CO.
Hobart W. Geyer,
Ass't. Treas.

Defendant's Exhibit M, March 27, 1911.

Letterhead of the Aultman & Taylor Machinery Company.

4890

Owensboro, Ky., 9/9/09.

The Modern Pen Co.,
New York.
Gents:

I have your letter of the 7th and note what the Younkman Red Cross Pharmacy say about me giving them to understand that I was selling them the L. E. Waterman Pens. I wish to say that I did not do this. I explained to them that I was not and they looked our price list over and they can read and I say again that they knew what they were buying.

I can explain to you how this comes about. I think that L. E. Man is just about now in that section and he is causing the trouble not I. 4891

You seem to think that I am not explaining to the trade that I am selling the A. A. Waterman Pens, I wish to say to you that I do not have to misrepresent any thing to sell it and if you think I am not giving you a fair deal all you have to do is to say so and I will quit. What the L. E. Man may say to our customers I have nothing to do with but I am sure that is the trouble I trust that my explanation will meet with your approval if not please advise at once awaiting your reply, I remain

Yours truly,
H. C. BARTLETT, JR.

4892

Defendant's Exhibit L, March 27, 1911.

Sept. 13, 1909.

H. C. Bartlett, Jr.,
Owensboro, Ky.

Dear Sir:

Your letter of the 9th inst. received, and we are pleased to note that you are not selling our pens as L. E. Waterman pens.

We had had no intimation that you were doing anything of this sort but when we had the statement direct from Mr. Younkman there was nothing for us to do but to put it up to you. Mr. Younkman wrote that he presumed our goods were fully as good as the Ideals and it is probable that your assumption, that the L. E. man is there making misstatements, is correct. 4893

Yours truly,
THE MODERN PEN CO.
Hobart W. Geyer,
Ass't Treas.

4894 **Defendant's Exhibit N, March 27, 1911.**

Letter-head of the Aultman & Taylor Machinery Company.

Owensboro, Ky., 10/23/10.

The Modern Pen Co.,
New York, N. Y.

Gents:

I hand you herewith a few orders and trust you find same acceptable.

I have not had a letter from you for two weeks and I fear you are *Dead*. I would like to have an answer to my letters relative to the Simmons Hardware Co. I lost out in Decatur, Ill., Bloomington, Ill., and several other places, the A. A. W. & Co. of Chicago have a man just ahead of me calling on all of our customers, telling them that we are not the A. A. W. Co. and that we are only making pens for the Jobbers and they are getting some of our customers. Has the A. A. W. Co. of Chicago a right to make our safety pen. They are selling it. If I could hold all my old customers with what new ones I am getting I would have a fair business. I do not know yet as to my next Sunday Town but will advise you later. Thanking you in advance for your prompt reply, I beg to remain

4895

Yours truly,
H. C. BARTLETT, Jr.

4896

Defendant's Exhibit A-1.

Eugene Flewitt

MODERN PEN COMPANY
22 Thames Street
New York

Modern
Self Filling
and
Middle Joint
Fountain Pens

Sole Selling Agent
for A. A. Waterman & Co.

Defendant's Exhibit A-2.

4897

Sir:

Please to take notice that I have qualified as Receiver of the property of William G. Frazer, under an order of Chief Justice Edward F. O'Dwyer of the City Court of the City of New York. A copy of such order and its notice of entry is hereto annexed. The undertaking required by law has been duly approved and filed herein in the office of the Clerk of the County of New York, on June 8, 1905.

I hereby demand that said William G. Frazer deliver to me all his property, including debts owing to him, not exempt by law from levy and sale under execution, including all stock held by him in the Frazer & Geyer Company, and all in- 4898
terest in the firm of A. A. Waterman & Co., in which said Frazer is a partner. I demand that on a liquidation of the assets of the partnership all of said Frazer's interest therein be turned over to me.

Dated, New York City, June 8, 1905.

GRATZ NATHAN,
Receiver.

To William G. Frazer,
Hobart W. Geyer, and
Arthur A. Waterman.

4899

4900 **Defendant's Exhibit A-3.**

CITY COURT OF THE CITY OF NEW YORK.

ISAAC E. CHAPMAN,
Plaintiff,

vs.

WILLIAM G. FRAZER,
Defendant.

An order having been heretofore made by Mr. Justice Edward F. O'Dwyer, on the 5th day of June, 1905, requiring William
4901 G. Frazer to attend and be examined concerning his property before him or one of the Justices of this Court, at Chambers thereof, appointed to be held at the Brown Stone Building, 32 Chambers Street, Borough of Manhattan, City of New York, on the 7th day of June, 1905, as prescribed in Article First, of Title 12, of Chapter 17 of the Code of Civil Procedure; and the said William G. Frazer having been accordingly examined before me on the said 7th day of June, 1905, and at the close of the hearing an application having been made by Morton Stein, Esq., of counsel for the judgment-creditor above named, for an order appointing a receiver herein in the presence of said William G. Frazer, and I having ascertained by the oath of said William G. Frazer, the judgment-debtor, that no action specified
4902 in Article First of Title 4, of Chapter 15 of the Code of Civil Procedure, or special proceeding instituted as prescribed in Article First of Title 12, of Chapter 17 of the Code of Civil Procedure, is pending against said judgment-debtor, now I do hereby, on the application of Alexander S. Bacon, Esq., attorney for the judgment-creditor herein, and on reading and filing the aforesaid order requiring the defendant to appear for examination, granted by Mr. Justice Edward F. O'Dwyer on the 5th day of June, 1905, and returnable June 7, 1905, and the examination of the judgment-debtor taken before me on the said June 7, 1905.

Appoint Gratz Nathan, Esq., of the Borough of Manhattan, City of New York, receiver of the property of the said William G. Frazer, the judgment-debtor herein, upon the receiver executing, acknowledging and filing with the Clerk of this Court, a bond in the form required by law, to the People of this State, in the penalty of $300, to be approved as to its form and manner of execution by a Justice of this Court, conditioned for the faithful discharge of his duties as such receiver. 4903

I do hereby further order that there should be allowed to Isaac E. Chapman, the judgment-creditor herein, the sum of $30 costs herein, and I hereby direct the payment thereof by said receiver out of any money that may come into his hands as such receiver.

Dated, New York City, June 7th, 1905.

EDWARD F. O'DWYER, 4904
Chief Justice of the City Court
of the City of New York.

Defendant's Exhibit A-4.

ARTICLES OF AGREEMENT, made the ninth day of January, one thousand nine hundred and one; between Arthur A. Waterman, of Cambridge, County of Middlesex, Commonwealth of Massachusetts; William G. Frazer and Hobart W. Geyer, of Brooklyn, New York, as follows: The said parties above named have agreed to become co-partners in business, and by these presents do agree to be co-partners together under and by the name or firm of A. A. Waterman & Co., for the purpose of manufacturing and selling gold pens, fountain pens and sundry kindred or allied articles and particularly the line of fountain pens heretofore sold by the said Arthur A. Waterman, and in the buying, selling and vending of all sorts of goods, wares and merchandise to the said business belonging, and to occupy the premises at Number 36 Gold Street, New York City, or such other premises as they may agree upon; their co-partnership to commence on the 9th day of January, Nineteen hundred and One (1901) and to continue until the thirty-first day of January, 4905

4906 Nineteen hundred and eleven (1911), and to that end and purpose the said William G. Frazer and Hobart W. Geyer shall each contribute the sum of Five hundred Dollars ($500) to the capital of said co-partnership, and said Arthur A. Waterman shall contribute all his time, energy and experience to the business of said firm, and also all the tools, dies, records, designs and other articles and assets belonging to said Arthur A. Waterman and recently in use in the business of a former firm of A. A. Waterman & Co., together with the use of all patents now owned by him for fountain pens, to be used and employed in common between them for the support and management of the said business, to their mutual benefit and advantage. And it is agreed by and between the parties to these presents that at all
4907 times during the continuance of their co-partnership, they and each of them will give their attendance; and do their and each of their best endeavors, and to the utmost of their skill and power exert themselves for their joint interest, profit, benefit and advantage, and truly employ, buy, sell and merchandise with their joint stock, and the increase thereof, in the business aforesaid, And Also, that they shall and will at all times during the said co-partnership, bear, pay and discharge between them, all rents and other expenses that may be required for the support and management of the said business; and that all gains, profit and increase that shall come, grow or arise, from or by means of their said business, shall be divided between them as follows: Arthur A. Waterman 15%; William G. Frazer 47½% and
4908 Hobart W. Geyer 37½%. Before any profits are divided it is understood and agreed that Arthur A. Waterman is to draw a salary of $2,000 per annum, payable $38.46 weekly, and also a Royalty of 2c. on each complete fountain pen made and sold by A. A. Waterman & Co., which salary and royalty are to be treated as a part of the expenses of said business. And all loss that shall happen to their said joint business by ill commodities, bad debts or otherwise, shall be borne and paid between them in the above named proportions.

And it is agreed by and between the said parties, that there shall be had and kept at all times during the continuance of their

co-partnership, perfect, just and true books of account, wherein each of the said co-partners shall enter and set down as well all money by them or either of them received, paid, laid out and expended in and about the said business, as also all goods, wares, commodities and merchandise, by them or either of them bought, or sold, by reason or on account of said business and all other matters and things whatsoever to the said business and the management thereof in anywise belonging; which said books shall be used in common between the said co-partners, so that either of them may have access thereto, without any interruption or hindrance of the other. 4909

And Also, the said co-partners, once in each year after the first year or oftener if necessary, shall make, yield and render, each to the other, a true, just and perfect inventory and account of all profits and increase by them or either of them made, and of all losses by them or either of them sustained; and also all payments, receipts, disbursements and all other things by them made, received, disbursed, acted, done or suffered in this said co-partnership and business; and the same account so made shall and will clear, adjust, pay and deliver, each to the other, at the time their just share of the profits made as aforesaid. And the said parties hereby mutually covenant and agree to and with each other, that during the continuance of said co-partnership, neither of them shall nor will endorse any note or otherwise become surety, for any person or persons whomsoever, without the consent of the other of the said co-partners. And at the end or other sooner determination of their co-partnership, the said co-partners, each to the other, shall and will make a true, just and final account of all things relating to their said business, and in all things truly adjust the same, and all and every the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts or otherwise, shall be divided between them in the same proportions as the profits and losses are shared. 4910 4911

It is Understood and Agreed, that William G. Frazer and Hobart W. Geyer, jointly, are to have entire control of the business, except that Arthur A. Waterman is to have authority in these matters, viz: (a) The styles and quality of all goods

4912 made on which the name of A. A. Waterman & Co. shall appear; (b) List and net prices and terms to the trade. In the event of the death of any partner the remaining partners may continue the business and use the firm name of A. A. Waterman & Co., with the same status for the estate of the deceased partner as he himself had in his lifetime, except that in case of the death of Arthur A. Waterman his salary is to cease but his royalty is to continue.

IT IS UNDERSTOOD AND AGREED that William G. Frazer and Hobart W. Geyer obligate themselves to secure credit for A. A. Waterman & Co. for such amount as shall be needed up to Twenty-five thousand Dollars ($25,000) A. A. Waterman & Co., paying interest at the rate of six (6) per cent per annum on any
4913 sums so borrowed, or credit furnished.

IT IS UNDERSTOOD AND AGREED that A. A. Waterman & Co., shall contract with the Frazer & Geyer Company for the goods used by said firm so far as said Company are able to furnish them. Any interest in patents applicable to the line of business of said firm which any partner may have or may acquire shall be for the use and benefit of the co-partnership. ALL new patents shall be secured and defended, if at all, at the expense of the co-partnership free of any allowance for royalty.

AND IT IS FURTHER AGREED that upon the termination of said co-partnership said William G. Frazer and Hobart W. Geyer are each to be repaid the Five Hundred Dollars ($500) con-
4914 tributed as capital before there shall be any division of assets between the partners.

IN WITNESS WHEREOF, the said parties to these Articles have hereunto set their hands and seals the day and year first above written.

In the presence of

ARTHUR A. WATERMAN (L. S.)
WM. G. FRAZER (L. S.)
HOBART W. GEYER (L. S.)

Defendant's Exhibit A-5.

4915

The foregoing Articles of Co-partnership are, this 12th day of December, 1901, modified as follows:

The term for which said co-partnership is formed shall be forty years from January 9th, 1901.

A. A. Waterman shall continue to travel and act as salesman as heretofore. The partners shall have equal authority in all prices and terms of sale: William G. Frazer shall have the general management of the partnership business.

As above modified said Articles of Co-partnership are hereby affirmed.

ARTHUR A. WATERMAN (L. S.)
WM. G. FRAZER (L. S.) 4916
HOBART W. GEYER (L. S.)

Endorsement: Arthur A. Waterman, William G. Frazer, Hobart W. Geyer. Copy Articles of Co-partnership. Dated January 9, 1901.

Defendant's Exhibit A-6.

Memorandum of agreement made this 27th day of August, 1901, between the Frazer & Geyer Company, a Corporation, party of the first part and Wm. G. Frazer and Hobart W. Geyer, parties of the second part, witnesseth that; 4917

WHEREAS the parties of the second part have as individuals formed a co-partnership with one Arthur A. Waterman, dated the 9th day of January, 1901, and to continue for ten years from that date for the selling of Fountain Pens, &c., and

WHEREAS the parties of the second part are both officers of and employed by the party of the first part, and

4918 WHEREAS the parties of the second part have each as individuals contributed to said co-partnership the sum of $500.00 of their own money as capital therefor, and

WHEREAS all the time and attention of the parties of the second part as officers and employees of the party of the first part, is due by them to the said party of the first part, and

WHEREAS the business of the above mentioned co-partnership does now and will hereafter require some part of the time and attention of the parties of the second part due as aforesaid to the party of the first part,

NOW THEREFORE in consideration of the foregoing and of one dollar paid by the party of the first part to each of the parties
4919 of the second part upon the signing of this agreement, it is agreed that the parties of the second part and each of them do hereby assign, sell, transfer and set over unto the party of the first part any and all sums of money or emoluments which shall become due and have become due to them from the time they formed said co-partnership of A. A. Waterman & Company, and during the whole term of said co-partnership over and above 10% on their investments in said co-partnership, to wit, the sum of $500 each, it being understood and agreed that the object of this agreement is that the parties of the second part may devote such time and attention due as aforesaid to the party of the first part as may be necessary to the business of said co-partnership and that the party of the first part shall have there-
4920 for, any and all sums of money and emoluments which the parties of the second part shall derive from said co-partnership over and above the said 10% on their investment, and it is further

AGREED that should the said co-partnership be dissolved before its expiration and also at its termination the parties of the second part and each of them will after first deducting their said investment of $500, each turn over any and all further sum which they or either of them receive to the party of the first part.

IN WITNESS WHEREOF the party of the first part has caused these presents to be signed by its Vice-president and its corporate

seal to be attached and the parties of the second part have hereunto set their hands and affixed their seal the day and date first above written. 4921

FRAZER & GEYER CO. (Seal)
by ISAAC E. CHAPMAN,
Vice Prest.
WM. G. FRAZER (Seal)
HOBART W. GEYER (Seal)

Attest,
Wm. G. Frazer,
Sec.
(Corporate Seal.)

County of New York, ss.: 4922

On this 27th day of August, 1901, before me personally came Wm. G. Frazer and Hobart W. Geyer, to me known and known to me to be the individuals described in and who executed the foregoing agreement and they severally acknowledged to me that they executed the same.

STEPHEN P. CUSHMAN,
Notary Public,
(Notarial Seal) Kings County,
Certificate filed in New York County.

County of New York, ss.:

On this 27th day of August, 1901, before me personally came Isaac E. Chapman, to me known, who, being by me duly sworn 4923
did depose and say that he resides in Brooklyn, New York City, that he is the Vice President of the Frazer & Geyer Company, the Corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

STEPHEN P. CUSHMAN,
Notary Public,
(Notarial Seal) Kings County,
Certificate filed in New York County.

4924 The above agreement is extended to the same time as the amended co-partnership papers, viz: 40 years from Jan. 9, 1901. Jany. 10th, 1902.

FRAZER & GEYER CO.,
By ISAAC E. CHAPMAN,
Vice Prest.

Wm. G. Frazer.
Hobart W. Geyer.

Defendant's Exhibit A-7.

4925 THIS AGREEMENT made this 12th day of December, 1901, between The Frazer and Geyer Company, a corporation organized under the Laws of the State of New York, party of the first part, and Arthur A. Waterman, party of the second part,

WITNESSETH:

WHEREAS the party of the first part is engaged in the manufacture of gold pens, fountain pens and other articles of a similar character and desires to increase its sales as largely as possible and avail itself of the services, reputation and skill of the party of the second part for that purpose, and

4926 WHEREAS the party of the second part is a partner in the firm of A. A. Waterman & Co., which is also engaged in the production and sale of similar goods under articles of co-partnership dated January 9th, 1901, and to run forty years from that date, with which firm the party of the first part has an exclusive contract for the manufacture of the goods sold by it and for furnishing capital and credit to said firm and as such partner is entitled, among other emoluments, to receive fifteen per centum of the net profits of said firm, and a royalty of two cents on each and every fountain pen made and sold by said firm of A. A. Waterman & Co., and

WHEREAS it is for the mutual benefit of said parties hereto as well as of said firm that close business relations shall exist between them:

NOW THIS AGREEMENT WITNESSETH: 4927

That the said party of the second part will, during the whole term of said co-partnership, sell for said party of the first part, the goods manufactured by it, as well as the goods put upon the market by said firm of A. A. Waterman & Co., and use his reasonable endeavors and skill and his personal influence and reputation to make the sales thereof as large as possible, and will assign to the said party of the first part his said fifteen per cent of the profits of said firm of A. A. Waterman & Co., and said royalty of two cents for each and every fountain pen made and sold by said firm of A. A. Waterman & Co., during the whole term of said co-partnership.

And the said party of the first part in consideration of the said services and of the personal influence and reputation of the party of the second part, and in consideration of the aforesaid assignment of his said profits of said firm of A. A. Waterman & Co., and in consideration of the aforesaid assignment of his said royalty, will pay, annually, to the said party of the second part the sum of One hundred dollars for every one per cent of the annual net profits made by said party of the first part from all its business computed on the actual investment, based on the book value of the stock, before dividends are declared upon any of its capital stock, said amount to be paid in cash up to Twelve hundred dollars and all amounts above twelve hundred dollars, in cash or in capital stock of the party of the first part, at its book value, at its option, and if paid in stock, then in all the different classes of stocks in equal number of shares; or if Mr. Waterman shall desire in First Preferred Stock or in First and Second Preferred Stock; and particularly in consideration of the aforesaid assignment of his said royalty, and of his said services, will issue to him, 17 shares of its First Preferred Stock; 17 Shares of its Second Preferred Stock and 16 Shares of its Common Stock. 4928 4929

And the said party of the second part, in consideration of the premises, further covenants and agrees not to engage in any other business than that of the said firm of A. A. Waterman & Co., and that covered by this agreement during said term, and will not, during said term, use or permit the use of his name

4930 in connection with any other business, firm, corporation or person whatsoever, but during the whole of said term will use his influence, reputation, energy and skill solely for the benefit of said firm and said parties of the first part, and that in case of his death the business of the said firm of A. A. Waterman & Co., may be continued under the same firm name upon complying with the Statutes of the State of New York for continuing the use of a firm name; and in case, for any reason whatsoever, the said party of the second part shall withdraw from said firm or from this agreement, before the expiration of the term above limited, he further covenants and agrees that he will not directly or indirectly engage in the manufacture or sale of fountain pens during the term contemplated by this agreement within the United States and will not use or permit the use of his name, in-
4931 fluence or reputation, by any corporation, firm or individual whatsoever in said business during the same period of time.

And in consideration of the premises of One dollar to him in hand paid by said party of the first part, the said party of the second part hereby sells, assigns, transfers and sets over unto said party of the first part, all his said fifteen per cent of the net profits of said firm of A. A. Waterman & Co., and his said royalty of two cents on each and every fountain pen made and sold by said firm of A. A. Waterman & Co., during the remaining term of that said co-partnership and hereby constitutes and appoints the said party of the first part his true and lawful attorney to collect the said profits and royalty from time to time as the same shall become due and payable.

4932 It is further mutually agreed that the 50 shares of stock to be issued to the party of the second part under this agreement shall be immediately assigned by him to Asa A. Spear of New York, N. Y. as Trustee, who shall hold the same for Ten years or until the death of said party of the second part, should he die within ten years; if the said party of the second part shall make default in the provisions of this contract within ten years, said stock shall be forfeited by him and transferred to the party of the first part by said Trustee; if the party of the second part shall die within ten years without default in the terms of this contract, said Trustee shall then transfer said stock to his personal representatives or as he shall direct; if no default shall be made by the

party of the second part within ten years said Trustee shall then transfer said stock to said party of the second part at the end of said ten years. 4933

This agreement shall go into effect January first, 1902.

In Witness Whereof the said party of the first part has set its corporate seal and caused these presents to be signed by President and Secretary and the said party of the second part has set his hand and seal the day and year first above written.

CHARLES T. GEYER,
President.

Wm. G. Frazer,
Secretary.
(Seal)

ARTHUR A. WATERMAN. 4934

In presence of
Asa A. Spear.

Defendant's Exhibit A-8.

THIS AGREEMENT made this 12th day of December, 1901, between The Frazer and Geyer Company of the Borough of Manhattan, City, County and State of New York, of the first part, and A. A. Waterman & Company of the same place of the second part, WITNESSETH:

WHEREAS the said firm of A. A. Waterman & Company is engaged in the production and sale of fountain pens, under articles of co-partnership running for the term of forty years from January 9th, 1901, and has not adequate manufacturing facilities and not sufficient capital for the carrying on of the business which it has developed, and hopes to develop in the future, and desires to make an advantageous arrangement for the manufacture of its goods, and for sufficient funds with which to carry on its business, and 4935

WHEREAS said The Frazer and Geyer Company is about providing ample facilities for the manufacture of goods desired

by said firm of A. A. Waterman & Company, and ample capital for its business purposes and desires to make a contract for the manufacture of goods for said firm of A. A. Waterman & Co., which shall be profitable to itself and beneficial to said firm:

NOW THEREFORE THIS AGREEMENT WITNESSETH:

That party of the first part has agreed and hereby does agree to manufacture for said firm of A. A. Waterman & Co., all the goods in their line, consisting of gold pens, fountain pens and the several parts thereof, which said firm can sell, and to furnish the capital needed to produce such manufactured goods as rapidly as they can be sold by said firm, and deliver the same to said firm as they are ordered.

That the party of the second part has agreed and hereby does agree that said party of the first part shall have the exclusive right to manufacture goods in their said line, and that they will not themselves, hereafter manufacture any goods in their line nor give any orders for or contract for, their manufacture by any other person, firm or corporation whatsoever than said party of the first part, but in case they cannot furnish goods the party of the second part may procure them elsewhere.

And it is further mutually agreed that said party of the first part shall be paid for the goods so manufactured by them and for the credit furnished said party of the second part as follows:

The party of the second part out of the proceeds of sales shall pay first, to the party of the first part the agreed price of goods manufactured by it.

Second: The salaries and wages of the necessary clerks and employees of said party of the second part, including a salary to A. A. Waterman of said firm, of two thousand dollars per annum; also the fair, necessary rent and expenses of carrying on the business of said firm.

Third: A royalty of two cents on each fountain pen made and sold by said firm of A. A. Waterman & Co., as provided in the articles of co-partnership of said firm of A. A. Waterman & Co.

Fourth: Ten per cent per annum dividends on the capital stock contributed to said firm of A. A. Waterman & Co., by Hobart W. Geyer and William G. Frazer and to the other partner, A. A. Waterman, the fifteen per cent of the net profits of said firm belonging to him under said articles of co-partnership. 4939

Fifth: All the balance of A. A. Waterman & Co.'s receipts shall be paid over to the party of the first part.

Settlement of accounts shall be made as often as once a month and the party of the first part shall have access to the books of the party of the second part at all reasonable times for the purpose of verifying accounts rendered by the party of the second part.

This agreement shall extend over the whole term of said co-partnership of A. A. Waterman & Co., to wit: Forty years from January 9th, 1901, and should said firm be dissolved for any reason before the end of said term and said business be continued under the same firm name or re-organized, the partners now composing the said firm of A. A. Waterman & Co., who shall continue said business shall continue this agreement or cause the same to be continued until said full term of forty years shall have run. 4940

This agreement shall take effect January first, 1902.

In Witness Whereof, the said party of the first part has caused its corporate seal to be hereunto affixed and these presents signed by its President and Secretary, and the party of the second part has set his hand and seal hereto the day and year first above written. 4941

CHARLES T. GEYER,
President.

Wm. G. Frazer,
Secretary.
(Seal.)

A. A. WATERMAN & CO.,
Per A. A. WATERMAN.

In presence of
Asa A. Spear.

4942 **Defendant's Exhibit A-9.**

The articles of co-partnership heretofore entered into, on or about the 9th day of January, 1901, between A. A. Waterman, William G. Frazer and Hobart Geyer, under the firm name and style of A. A. Waterman & Co., are hereby modified, to take effect the 1st day of March, 1904, as follows:

It is mutually agreed that instead of the salary of two thousand dollars ($2,000.00) per annum provided in said articles to be paid to said Waterman, there shall be paid to said Waterman a commission on a certain part of the firm's wholesale business on the following basis:

(1) There shall be and hereby is set aside and exclusively
4943 appropriated to said Waterman, a certain field which shall include the following portions of the United States, to wit: Maine, New Hampshire, Vermont, Ohio, that part of Michigan south of the Strait of Mackinac, Missouri, Kansas, Oklahoma, Nebraska, Colorado, New Mexico, Arizona, Utah, Wyoming and Montana; and all of the Dominion of Canada, excepting British Columbia.

(2) All sales of goods to the account of said A. A. Waterman & Co., in said field shall be deemed to be made and duly credited to the account of said Waterman, for the purposes herein provided, to wit: a commission (being the commission hereinbefore referred to as in lieu of the salary of two thousand dollars per annum) is to be paid monthly to said Waterman
4944 upon the wholesale business done by A. A. Waterman & Co. in the said field hereinbefore enumerated in paragraph one (1), not including the business in repairs and exchanges, which said commission shall be based on the collections from said wholesale business at the following rates of commission; on all collections from the said Canadian field, ten per cent (10%); on all collections from the said field located within the United States, twenty per cent (20%); except that collections for items sold other than Modern pens, so-called, shall yield but ten per cent (10%) commission: Provided, however, that if the collections from that part of the said territory located in the United States for any one business year (the business year

for this purpose being from the 1st day of March, to the last day of February, both inclusive, of each year), shall amount to more than $30,000, the rates of commission on the collections in said United States territory in excess of said $30,000 shall be one-half the rate of the aforesaid commission. 4945

(3) Said Waterman is to pay all his traveling expenses; also any salary and expenses of commission paid with his approval to any assistant working in his field under his direction; also for any pens given to any individuals at his instance in said field, the gifts being charged as if cash, at 20% of the retail or list prices if the names and addresses of recipients are supplied.

(4) A consignment account is to be kept with said Waterman charging all samples or surplus stock having a retail list price, at 50% discount and other samples if any at the lowest trade prices; and said surplus stock for use in the United States territory alone, may at said Waterman's pleasure consist of at least 144 Modern pens. Said Waterman is to make vouchers at least monthly for any pens he disposes of on the firm's account by deliveries from said samples or surplus stock. If any merchandise is not accounted for on said consignment account, any deficiency is to be charged to said Waterman, as if cash paid to him, at the net consignment rates. 4646

In witness whereof, we have hereunto set our respective hands and seals this eleventh day of June, in the year one thousand nine hundred and four A. D.

A. A. WATERMAN (Seal) 4947
WM. G. FRAZER (Seal)
HOBART W. GEYER (Seal)

4948 **Defendant's Exhibit A-10.**

The Articles of Copartnership heretofore entered into between Arthur A. Waterman of Cambridge, Massachusetts, and William G. Frazer and Hobart W. Geyer of Brooklyn, New York, in the firm name and style of A. A. Waterman & Co., under date of the ninth day of January, 1901, and various subsequent modifications thereof, are hereby further modified by mutual consent of the said copartners this 11th day of February in the year one thousand nine hundred and five, for the better interest and conduct of the business therein contemplated; the provisions of this modification of said articles of copartnership to be binding and effective and operative as of date of the first day of January, in the year one thousand nine hundred and five:

4949 It is mutually agreed that for the purposes of the business in which the said partnership is engaged, the territory embraced in North America shall be divided into two parts, namely an Eastern part (hereinafter referred to as the Eastern territory) which shall include that part of North America consisting of that portion of the Dominion of Canada including and east of the Province of Ontario; that part of the United States including and East of the southern peninsula of Michigan, Indiana, Kentucky, Tennessee and Mississippi, together with the West Indian Islands including Porto Rico; and a western part (hereinafter referred to as the Western territory) which shall include all that part of North America not included in the aforesaid Eastern territory.

4950 It is mutually agreed that, instead of the field or territory set aside and exclusively appropriated to Arthur A. Waterman by the modification of the articles of this copartnership bearing date the 11th day of June, 1904, there shall be and hereby is set aside and exclusively appropriated to said Waterman the said Western territory, for the purposes, uses and benefits hereinafter stated,

FIRST: It is agreed that the said Waterman may, at his own option, at any time on or before the first day of July, 1906, engage in the manufacture and sale of fountain pens, parts and accessories thereof, for his own separate interest, in

said Western territory, either under his own name or through the medium of a firm or copartnership or corporation which he may organize and which may bear the name of A. A. Waterman & Co., or any other name; the principal place of business for such manufacture and sale of said goods in said territory to be located in said territory. It being understood and agreed that in case said Waterman elects to engage for himself in such independent manufacture and sale of fountain pens, etc., in said Western territory, that he may cease to act as salesman and representative in said territory for the present copartnership of A. A. Waterman & Co., it being desired and understood that the business that may be so organized in said territory by said Waterman, and the business of the present firm of A. A. Waterman & Co. shall be separate and independent, each of the other, except to the extent that this modification of the articles of copartnership provide for certain limited relations, and that each of said concerns shall then be exclusive, as to the other, in its own defined territory as aforesaid. To this effect it is more particularly agreed that in case the said Waterman shall engage in the independent manufacture and sale as aforesaid of fountain pens, etc., in said Western territory, he or his firm or corporation shall have the sole and exclusive right to manufacture and sell in said Western territory such fountain pens, parts and accessories thereof as are now manufactured and sold by the present firm of A. A. Waterman & Co., without interference or competition in any form or manner in said Western territory by or from the present firm of A. A. Waterman & Co., or either of the other said partners Frazer and Geyer. And it is further mutually agreed that in case said Waterman engages in such independent manufacture of fountain pens, etc., he or his firm or contemplated corporation shall likewise not interfere or compete in any manner whatsoever with the business of the present firm of A. A. Waterman & Co., or Frazer & Geyer Co., hereinafter referred to, or its successors, in the said Eastern Territory. If in either one of the above-defined territories or sections of North America, there shall be a house that has a branch or branches in the other territory, effort shall be made to have the branches buy separately under such favoring conditions that all the divided purchases may be considered

4951 4952 4953

4954 one large purchase to secure to the branches the same prices or terms of sales that could be had by the main house; if the main house will not permit its branches to purchase separately, then the distribution to the branches shall be exhibited monthly and the party selling to the main house shall pay to the party in whose territory a branch is located a commission of twenty per cent (20%) of the net value of that portion of the business done with every such branch. Either the present firm or the said Waterman's proposed new firm or corporation may make and sell fountain pens, etc., in any and all other parts of the world outside of the territorial restrictions hereinbefore particularly provided for the respective concerns. Either the old (or present) firm, or said Frazer & Geyer Co., or its successors, and the proposed new concern may advertise separately at its own ex-
4955 pense, including placards, signs, show-cases and periodicals; but advertising in periodicals which may be jointly undertaken and the form of advertisement jointly approved shall be one-third paid for by the said Waterman's contemplated new firm or corporation in said Western territory, and two thirds (2/3) by said Eastern business.

It is further mutually agreed that in case said Waterman shall establish himself in the independent manufacture as aforesaid of fountain pens, etc., then he or any firm or corporation so organized by him, and the present firm of A. A. Waterman & Co., shall have equal rights and privileges to manufacture and sell fountain pens under a perpetual free use of all patents, trade-marks and improvements now or hereafter owned, acquired or
4956 used by either the present firm or the contemplated independent concern; but, provided that if either of the two concerns wishes to have the use and benefit of any patent or other interest acquired by the other after said Waterman shall engage independently in the manufacture and sale of fountain pens, it must pay one-half of the expense incurred in obtaining such patent or interest; and provided also that the present firm or any member thereof or the proposed new firm or corporation, shall not sell or transfer patents, trade-marks, rights or interests relating to patents, trade-marks, etc., used jointly by them in the manufacture of and sale of fountain pens, except by mutual consent and agreement in writing, between the old and

new concerns and the assent of the Frazer & Geyer Co., or its successors. 4957

It is further mutually agreed that, if said Waterman shall engage in the independent manufacture and sale of fountain pens as aforesaid, the prices, discounts and terms of sale on such fountain pens, made and sold by both the old and the new concern as are substantially identical in construction, size and appearance, shall be those fixed and in force by said old concern at the time when said Waterman shall start his independent business and thereafter shall be changed only by mutual agreement, and neither concern shall sell any such fountain pens at more favorable prices, discounts and terms of sale than thus agreed upon; but either concern may make the said prices higher, but rates of discount and terms of sale shall not be more favorable to buyers. Either concern may increase or decrease the kinds and styles of fountain pens made and sold by it. 4958

It is further mutually agreed that in case said Waterman shall engage in the independent manufacture as aforesaid of fountain pens, etc., then neither the present firm nor the contemplated new organization shall manufacture or sell, in any part of the world, any form of fountain pens which the other concern shall decide has characteristics peculiar only to the fountain pens made by it, except under names and at prices, discounts and terms of sale to be mutually agreed upon between the two concerns. It is agreed that all fountain pens or parts thereof to be manufactured and sold by either the present firm or the contemplated new organization which fountain pens or parts bear in any manner the name of Waterman, shall be uniformly stamped or marked "A. A. Waterman & Co.," of "New York" or "Chicago" or other proper place of manufacture; this provision applying to such goods whether sold within the limitations of territory hereinbefore defined or in any other part of the world. 4959

It is further mutually agreed and understood that nothing herein contained shall prevent the said Waterman from transferring and assigning to Frazer & Geyer Co., a corporation organized and existing under the laws of the State of New York, all of his assignable and transferrable interests in any patents, trade-marks and licenses relating to the manufacture and sale

4960 of fountain pens for the use of said corporation, including patents, trade-marks and licenses heretofore contributed by said Waterman to the use of the present copartnership of A. A. Waterman & Co., it being understood and agreed however that any such assignment shall be subject to the continued free use, by the present firm of A. A. Waterman & Co., of all such patents, trade-marks and licenses, during the continuance of said firm.

It is further mutually agreed that if said Waterman shall engage as aforesaid in the independent manufacture and sale of fountain pens, etc., in said Western Territory, he or the firm or corporation so to be organized by him shall purchase from the present firm all show cases owned by it in said Western territory, so far as they are in use by dealers for the display
4961 of modern fountain pens in said Western territory, paying for such show cases seventy-five per cent of the cost thereof (not including in the cost any transportation charges), which purchase price shall be paid fifty per cent (50%) when the proposed independent concern begins business in said Western territory, and the balance of such purchase price in the five months immediately following in equal installments.

The said Waterman shall, notwithstanding he may engage as aforesaid in the independent manufacture and sale of fountain pens, etc., be ready at any time to give thought and advice for the good of the present business, upon reasonable notice and request; and whenever requested by the present firm to spend more than a nominal amount of time in effecting the
4962 maintenance of the standard of the products of the present firm or otherwise promoting and assisting in its business, he is to be paid, in addition to his present fifteen per centum of profits and two cent royalty in said present firm, an amount per day to be agreed upon together with all necessary expenses incurred in doing such work, including necessary expenses of travelling and maintenance; but, if the said Waterman engages in the independent manufacture and sale of fountain pens as aforesaid, he shall thereupon yield up and surrender to the copartner, William G. Frazer, all his authority to determine the quality of the products of the present firm of A. A. Waterman & Co.

SECONDLY: It is mutually agreed that until said Waterman shall engage as aforesaid in the independent manufacture and sale of fountain pens, etc., or (in case he does not elect to engage in such independent manfacture of such pens), during the remainder of the forty year term appointed for this present copartnership, there shall be set aside and exclusively appropriated to said Waterman, commencing as of date of January 1st, 1905, all of the field or territory hereinbefore defined as the Western Territory, excepting therefrom only Mexico and Central America, as an exclusive territory in which said Waterman may represent the present firm of A. A. Waterman & Co., and said Frazer & Geyer Co., in lieu of the territory heretofore exclusively appropriated to said Waterman by a certain modification of the articles of copartnership bearing date the eleventh day of June, 1904. 4963 4934

All sales of goods to the account of A. A. Waterman & Co. in said territory shall be deemed to be made and duly credited to the account of said Waterman, for the purposes herein provided, to wit: a commission is to be paid monthly to said Waterman upon the wholesale business done by A. A. Waterman & Co., in the said territory, not including business in repairs and exchanges, which said commission shall be based on the sales and shipments to said territory, at the following rates of commission: on all sales and shipments to the Canadian portion of said territory, ten per cent (10%); on all sales and shipments to the said territory located within the United States, twenty per cent (20%), except that upon sales and shipments of items sold other than as modern pens, so-called, the commission rate shall be ten per cent (10%) and except that on fountain pens wholesaled at fifty cents each or less, no commission shall be paid. Provided, however, that if the sales and shipments to that part of said territory located in the United States shall amount, in one year, to more than $45,000, the rates of commission on the sales and shipments in excess of said $45,000, in said United States territory shall be one-half of the aforesaid rate, and provided further that if the total combined sales and shipments by A. A. Waterman & Co. and Frazer & Geyer Co., in the said United States territory for any year is less than the said combined sales and shipments for the year 1904, then the 4965

4966 said Waterman shall receive a commission of only fifteen per cent (15%) upon the business of that year on which he otherwise would have received twenty per cent (20%).

Said Waterman is to pay all his travelling expenses; also any salary and expenses or commission paid with his approval to any assistant working in his field under his direction; also for any pens given to any individuals at his instance in said field, the gifts being charged as if cash, at 20% of the retail or list prices if the names and addresses of recipients are supplied.

A consignment account is to be kept with said Waterman charging all samples or surplus stock having a retail list price, at 50% discount and other samples if any at the lowest trade prices; and said surplus stock for use in the United States territory alone, may at said Waterman's pleasure consist of at
4967 least 144 Modern pens. Said Waterman is to make vouchers at least monthly for any pens he disposes of on the firm's account by deliveries from said samples or surplus stock. If any merchandise is not accounted for on said consignment account, any deficiency is to be charged to said Waterman, as if cash paid to him, at the net consignment rates.

Any assistant of said Waterman approved by the partner Frazer or Geyer, is to have consigned to him constantly suitable samples charged at the same rates as hereinbefore provided for the consignment of samples to said Waterman. But said Waterman shall not be held responsible for any samples furnished to any such assistant or their indebtedness to A. A. Waterman & Co.

4968 Commissions are due and payable when the goods are shipped.

It is further mutually agreed that during the continuance of this commission arrangement the said Waterman and his assistants may act in said Western territory as salesman for the corporation of Frazer & Geyer Co., and may also represent any other person, firm or corporation in said territory so far as he or they do not solicit business in competition with the business of A. A. Waterman & Co., or Frazer & Geyer Co.

It is expressly agreed that while the said Waterman represents the present firm of A. A. Waterman & Co., upon the aforesaid commission basis and arrangement in said Western territory, there shall be no unfavorable discrimination against

the customers and the business in said territory in any manner whatsoever and more particularly in the manner, care and promptness to be exercised by said firm in filling orders for goods therefrom or in the quality of the goods supplied thereto or in the general services and attention rendered, and nothing shall be done in the management of the said firm and its business that may tend to retard the development and promotion of the firm's business in said Western territory to the advantage of any other territory or locality in which the firm may also be engaged in doing business; and there shall be furnished to said Waterman, whenever requested by him, but not oftener than once for each month, a list of all unfilled orders from customers in his said Western territory, so that he may require satisfactory explanation of the cause of any unreasonable delay in filling of such orders. 4969 4670

THIRDLY: It is further mutually agreed and expressly understood that it is entirely optional with said Waterman whether or not he will organize a new firm or corporation to engage in the independent manufacture of fountain pens, etc., as aforesaid in said Western territory; provided, only that if he elects to so organize such an independent firm or corporation he must do so, and the said proposed new concern must be ready to begin business in said Western territory on or before the first day of July, 1906.

FOURTHLY: It is further mutually agreed and expressly understood that the continuance of the aforesaid commission arrangement in said exclusive Western territory provided for by this modification of the co-partnership is optional with said Waterman; that in the event that the said commission arrangement is not terminated, as aforesaid, by the formation of an independent firm or corporation, the said Waterman may, at his option, nevertheless, terminate the same at any time, either before or after the first day of July, 1906; and he may at any time withdraw from and cease to represent the present firm of A. A. Waterman & Co., and Frazer & Geyer Co., in said territory in which event he shall surrender said territory and all his rights and interest therein under this modification of the articles of co-partnership; in case he shall or shall not be- 4971

4972 gin business on his own account by July 1st, 1906, as hereinbefore provided, he shall on that day retire as an active partner in said present firm of A. A. Waterman & Co., retaining no connection with the said firm or its business except he shall permit therein the continued use of all his patents, trade-marks and improvements and shall permit the remaining partners to continue the said business under the said firm name of A. A. Waterman & Co., upon their complying with the statutory requirements to obtain the right to use said firm name and in return for the continued use of his name and patents, trade-marks and improvements, he shall be entitled to receive from any copartnership so organized or its successors the fifteen per cent (15%) of profits and the two cents per pen royalty as provided
4973 in the original articles of copartnership of A. A. Waterman & Co., bearing date January 9th, 1901, being the profits and royalty hereinbefore assigned by said Waterman to Frazer & Geyer Co. But said Waterman, may at his own option, if he does not organize as aforesaid, a firm or corporation for the independent manufacture and sale of fountain pens, etc., continue for the remainder of the 40 year term of the co-partnership, or for any part thereof, the commission arrangement herein provided.

Provided further that as long as said Waterman continues as a salesman as hereinbefore provided, said Waterman shall retain and exercise all the rights and power which he now has as a partner in the present firm of A. A. Waterman & Co., as to the quality of all pens and their accessories made and sold as
4974 the product of the present firm of A. A. Waterman & Co., or of any firm that may be formed after July 1st, 1906, as the successors to the present firm, which goods bear the name or initials of said Waterman in any form; and provided further that the reservation to said Waterman of this right and power as to the quality of all said goods shall apply to and be binding upon any concern or firm continued, formed or organized after July 1st, 1906, which goods bear the said Waterman's name as hereinbefore provided, and this privilege and power to pass on the quality of said goods, both of the present firm of A. A. Waterman & Co., or of any succeeding firm as aforesaid is an express condition and consideration for the use as hereinbefore

provided of the name of said Waterman in any such firm, or on any such goods. 4975

It being the desire and intent and is mutually agreed to provide hereby that the said Waterman may at any time hereafter voluntarily at his own option give up the aforesaid commission arrangement and be at liberty to engage in any business other than in the manufacture and sale of fountain pens; it being expressly agreed that the said Waterman will not, during the continuance of said forty years term of the copartnership of A. A. Waterman & Co., engage in the manufacture and sale of fountain pens (except as hereinbefore provided) and will not during said term of forty years use or permit the use of his name in any manner in any other firm or corporation engaged in the manufacture or sale of fountain pens, except that the said name may be used by the corporation of Frazer 4976
& Geyer Company under the terms and conditions of a certain agreement bearing even date herewith between said Frazer & Geyer and said Waterman.

In Witness Whereof, the said parties hereto have hereunto set their hands and seals the 11th day of February, 1905.

ARTHUR A. WATERMAN,
WM. G. FRAZER,
HOBART W. GEYER.

In the presence of
Asa A. Spear.

4977

Defendant's Exhibit A-11.

This Agreement, made and entered into at the City and State of New York, this eleventh day of February, in the year one thousand nine hundred and five, by and between Frazer & Geyer Company, a corporation organized and existing under the laws of the State of New York, party of the first part, and Arthur A. Waterman, of Winchester, State of Massachusetts, party of the second part, Witnesseth:

4978 Whereas, there is now in existence a certain contract or agreement duly made by and between the aforesaid parties, bearing date the twelfth day of December, 1901, binding upon the said parties until the ninth day of January, 1941, relating among other matters to certain services of the party of the second part and to the payment by the party of the first part unto the party of the second part of a portion of its profits annually and the delivery to be held in trust of certain fifty (50) shares of the capital stock of said Frazer & Geyer Company corporation, party of the first part, to the use and benefit of the party of the second part, and,

Whereas, the parties hereto are desirous of making other and different arrangements for the manufacture and sale of fountain pens and are willing to relieve the party of the second part
4979 of any obligations not to engage in any business during the term of said agreement other than therein specified:

Now, Therefore, This Agreement Witnesseth: That the parties hereto and thereto have mutually agreed and do hereby mutually agree as follows:

FIRST: That the aforesaid agreement made by the parties hereto and dated the twelfth day of December, 1901, is vacated, abrogated and in all respects set aside and the parties release each the other from all obligations thereby imposed upon either to the other, except and only to the extent and effect that any of said obligations are hereinafter by this agreement expressly saved and reserved:

4980 And it is mutually and particularly agreed:

(1) The assignment by the party of the second part to the party of the first part, of his interest of fifteen per cent (15%) of the profits, and of a certain royalty of two (2) cents on each fountain pen made and sold by the firm of A. A. Waterman & Co., a copartnership formed under articles dated January 9th, 1901, during the continuance of the term of said copartnership, is continued of full force and effect, and the party of the first part continues to be constituted and appointed the true and lawful attorney of the party of the second part to collect the said profits and royalty from time to time as the same shall become due and payable.

(2) The fifty (50) shares of the capital stock of the party of the first part (to wit: 17 shares of First Preferred Stock, 17 shares of Second Preferred Stock, and 16 shares of Common Stock) issued to the party of the second part and now held in trust by Asa A. Spear, as trustee, for the benefit of the party of the second part under the terms of the aforesaid agreement between the parties hereto, dated December 12th, 1901, shall at the time of the signing and sealing of this agreement be conveyed and delivered to the party of the second part absolutely and the said trusteeship terminated, and the party of the first part will execute or cause to be executed any and all further paper, conveyance, indenture or power necessary to effect at said time the transfer to the party of the second part absolutely of the said fifty shares of stock and to determine thereby the said trusteeship of the same. 4981 4982

(3) It is agreed that the party of the second part shall not, and will not, during the terms of said firm of A. A. Waterman & Co., (which is organized for a term of forty (40) years under articles of copartnership dated the ninth day of January, 1901, and modifications thereof, and with which said firm the party of the first part has a certain agreement dated the twelfth day of December, 1901, for the exclusive manufacture of the goods to be sold by the said firm of A. A. Waterman & Co.) engage in the manufacture or sale of fountain pens either in his own name or the name of any other person, firm or corporation, and will not use or permit his name to be used during said term of forty years in connection with the manufacture or sale of fountain pens either alone or with any person, corporation or firm, other than with the aforesaid firm of A. A. Waterman & Co., or other than under and in accordance with the terms, conditions and agreements of a certain modification bearing even date herewith of the articles of copartnership of said firm of A. A. Waterman & Co., the execution of which said modification of said articles of copartnership by the party of the second part as a member of said firm is a consideration for the making of this agreement between the parties hereto. 4983

It being further expressly understood and agreed that the right, privilege and option of the party of the second part to

4984 engage in the manufacture and sale of fountain pens on his own account as provided by said modification of the articles of said copartnership (to wit: other than as a member of the aforesaid firm of A. A. Waterman & Co.) shall not be deemed to be and are not in any way or manner affected, abridged, limited or restrained by reason of any terms or conditions, legal or equitable, of the aforesaid agreement dated the twelfth day of December, 1901, between the party of the first part and the said firm of A. A. Waterman & Co., and relating among other matters to the exclusive manufacture of the goods to be sold by the said firm of A. A. Waterman & Co., and the terms, conditions and agreements of said agreement between the party of the first part and said firm shall have no application to the business that may be organized by the party of the second part
4985 for the manufacture and sale of fountain pens in accordance with the terms and conditions of said modification of the said articles of copartnership of even date herewith.

SECONDLY: The party of the second part agrees that at any time when requested by a majority of the directors of the party of the first part to consent to the incorporation of a new company under the corporate name of A. A. Waterman Pen Company or A. A. Waterman & Co., or some similar name, to do business in the territory reserved to the present and aforesaid firm of A. A. Waterman & Co., by the modification of the articles of copartnership of said firm bearing even date herewith, which territory is referred to as that part of the
4986 Dominion of Canada, including and East of the Province of Ontario, that part of the United States including and East of Southern Michigan, Indiana, Kentucky, Tennessee, Mississippi and the West India Islands, including Porto Rico; said new company to be incorporated in one of the states within said reserved territory, other than the State of New York. And as a condition precedent to the use of the name of the party of the second part in any such new incorporated company in said territory, the party of the first part agrees to furnish to the party of the second part a good and sufficient surety to protect party of the second part from any and all liability, at law or in equity, that may accrue against the party of the

second part by reason of permitting his name to be used in such incorporated company, and the party of the first part will at its own expense defend and cause to be defended the party of the second part from any and all manner of causes or alleged causes of action on account of the use of the name of the party of the second part in any such incorporation as aforesaid, upon notice so to do from the party of the second part to the party of the first part. 4987

THIRDLY: In consideration of the premises herein, and having particular regard to the release by the party of the second part of his right to receive of the party of the first part the sum of one hundred dollars for every one per cent of the annual net profits of the party of the first part as more particularly provided by the said agreement between the parties hereto dated the twelfth day of December, 1901, the party of the first part agrees to and hereby does release and discharge the party of the second part of all manner of claims or demands on account of any and all indebtedness owing to the party of the first part from the party of the second part upon the thirty-first day of December, 1904. And the party of the first part will further pay or cause to be paid to the firm of A. A. Waterman & Co., a sum sufficient to discharge all manner of indebtedness of the party of the second part to said firm, which indebtedness existed on December 31st, 1904; the said sum to be paid and said indebtedness discharged so soon as the same can be determined. And upon such payment being made and said indebtedness discharged the said party of the second part hereby releases and discharges the party of the first from all claim and demand whatsoever for the payment of said one hundred dollars for every one per cent of profits. 4988 4989

FOURTHLY: The party of the second part agrees to assign to the party of the first part his individual interest in all patents and trade-marks in which the aforesaid firm of A. A. Waterman & Co., is interested, including the right to manufacture and sell and manufacture or sell fountain pens and parts thereof bearing the name of "A. A. Waterman & Co." and agrees to obtain for the party of the first part any further assurance of title therein necessary from the said firm of A. A.

4990 Waterman & Co., said assignment by the party of the second part of such patents and trade-marks being however subject to and conditioned upon the free perpetual use by the present firm of A. A. Waterman & Co., of all such patents and trade-marks hereby assigned and transferred: Provided, however, that it shall be and is agreed that neither of the parties hereto nor the said firm of A. A. Waterman & Co., shall sell, assign, transfer or license to any person, firm or corporation, except the possible successors of the party of the first part, the use of any such patents, trade-marks or improvements except by mutual agreement and consent of the parties hereto and the said firm of A. A. Waterman & Co., And provided further that the only separate use of any such patents, trade-marks and improvements which the party of the second part shall be
4991 entitled to make, shall be under the terms and conditions of the modifications of the articles of copartnership of said firm of A. A. Waterman & Co., bearing even date herewith; and in the event that the party of the second part does engage in the separate manufacture and sale of fountain pens under the terms and conditions of said modification of the articles of said copartnership, then and in that event the said party of the second part shall be entitled to the free perpetual use, not only of all the patents, trade-marks and improvements and rights hereby assigned, to the party of the first part, but also of all other patents, trade-marks and improvements and rights relating to the manufacture of fountain pens and now belonging to the party of the first part or hereafter owned or acquired by it.
4992 It is further agreed that any patents and improvements hereafter made by the party of the second part shall likewise be of free perpetual use to the party of the first part. If either party hereto wishes to have the use of and benefit of any patent or other interest purchased after said Waterman shall engage in such independent manufacture, that party must pay one-half the expense incurred in obtaining the said patent or interest. It is agreed that all fountain pens or parts thereof manufactured or sold by the party of the first part which shall bear the name in any manner of the party of the second part shall be uniformly stamped or marked "A. A. Waterman & Co." of "New York" or the other place of business of the party of the first part.

It is further agreed that in the event that the party of the second part shall engage in the separate manufacture and sale of fountain pens under the terms and conditions of the modification of the articles of copartnership of the firm of A. A. Waterman & Co., bearing even date herewith, then it is agreed that the reservation therein as to the exclusive use of certain territority in North America shall likewise in all respects obtain against and be binding upon both parties hereto. All limitations and restrictions as to competition, etc., contained in said modification shall bind each of the parties hereto with like force and effect as though bodily incorporated herein. 4993

It is mutually agreed that in the event that the party of the second part elects to continue to sell goods of A. A. Waterman & Co., upon commission in certain exclusive territory as provided by the said modification bearing even date herewith of the articles of copartnership, then the party of the second part shall be and the party of the first part hereby constitutes and appoints him its sole agent or salesman in said defined territory upon all the terms and conditions by which the party of the second part is to sell goods in said territory for the firm of A. A. Waterman & Co. as provided by the said modification of the copartnership bearing even date herewith, the rates of commission to be those therein specified. 4994

In Witness Wereof, the said party of the first part has hereunto set its corporate seal and caused these presents to be signed by its Vice-President and Secretary and the party of the second part has hereunto set his hand and seal the day and year first above written. 4995

WM. L. CHAPMAN,
Vice-Prest.
Wm. G. Frazer,
Secretary.

(Seal.)

ARTHUR A. WATERMAN.

In the presence of
A. A. Spear.

4996 **Defendant's Exhibit A-12.**

TEMPORARY AGREEMENT, entered into at the City of New York, this 27th day of May, 1905, between Arthur A. Waterman, of Winchester, Massachusetts, and Isaac E. Chapman, of the City of New York, WITNESSETH:

WHEREAS, the Frazer & Geyer Company is now in process of reorganization, and it is contemplated that the present firm of A. A. Waterman & Co., should be dissolved or reorganized, and it is desirable that the parties hereto should come to a substantial agreement pending the completion of these negotiations, now, therefore,

In consideration of one dollar to each in hand paid, the receipt whereof is hereby acknowledged, it is hereby agreed:

4997

I. That in the event of such reorganization, the new firm of A. A. Waterman & Co. shall consist of Arthur A. Waterman, Isaac E. Chapman and William L. Chapman, and/or their representatives; or of Isaac E. Chapman and William L. Chapman and/or their representatives, with perpetual permission and right to operate and do business and manufacture and/or sell fountain pens, &c., under the name of A. A. Waterman & Co.

II. The new copartnership agreement shall be substantially the same as the present copartnership agreement between A. A. Waterman, W. G. Frazer and H. W. Geyer, dated February 11, 1905, and the relations of the new firm to the new corporation shall be substantially the same as those of the old firm to the

4998 old corporation.

III. Mr. Isaac E. Chapman agrees to loan Mr. Arthur A. Waterman additional money to Fifteen hundred dollars ($1500.-00) in the aggregate, as follows:

One hundred and twenty-two dollars and fifty cents ($122.50) having already been paid to Mr. Waterman.

One hundred and eighty-eight dollars and fifty cents ($188.-50) to be paid on the signing of this temporary agreement.

One hundred and eighty-nine dollars ($189.00) to be paid Mr. Waterman on June 15th, 1905.

Two hundred and fifty dollars ($250.00) to be paid Mr. Waterman on July 1st, 1905. 4999

And the balance, Seven hundred and fifty dollars ($750.00) to be paid for Mr. Arthur A. Waterman's account to cover the assessment on fifty (50) shares of stock of the Frazer & Geyer Company.

IV. As security for the payment of loan, Mr. Waterman is to endorse his forty-six (46) shares of stock and deposit them with Isaac E. Chapman as collateral, and give Isaac E. Chapman a stock note, if so desired.

V. Liquidation of this loan is to be made as follows:

One hundred dollars ($100.00) per month on November 1st, 1905, and each month thereafter until the entire loan and interest thereon at six per cent (6%) shall have been paid in full. 5000

VI. Mr. Waterman undertakes to anticipate the discharge of his indebtedness by paying on August 1st, 1905, one-quarter (1/4) of his net commissions remaining after paying business expenses for July, 1905, and to continue paying one-quarter (1/4) in this way every month thereafter.

VII. For the payment of these various sums Mr. Waterman agrees to send to Mr. Isaac E. Chapman drafts on the new Pen Company, monthly, as soon as the Company is able to determine his commissions; or he will otherwise assign commissions due from the Pen Company to cover amounts due under this agreement. 5001

VIII. Immediately after the said reorganization shall have been accomplished, the parties hereto shall enter into a formal agreement, which shall carry out the intent of this temporary agreement, except in so far as it may be changed by mutual consent.

IX. Mr. Waterman hereby grants to Mr. Isaac E. Chapman an option to purchase before reorganization or payment of assessment the stock to be held by him as collateral under the

5002 terms of this agreement at Fifty dollars ($50.00) per share, said option to expire upon the payment of the assessment.

WITNESS our hands and seals the day and year first above written.

(Signed) ARTHUR A. WATERMAN, (Seal.)
(Signed) ISAAC E. CHAPMAN, (Seal.)

Witness as to both
(Signed) Joseph J. Glatzmayer.

Defendant's Exhibit A-13.

5003 ARTICLES OF COPARTNERSHIP, entered into at the City of New York, on this twelfth day of June, 1905, between Arthur A. Waterman, Isaac E. Chapman and William L. Chapman, Witnesseth:

In consideration of one dollar to each in hand paid, by the other, and other good and sufficient consideration, the receipt whereof is hereby acknowledged, it is hereby mutually agreed as follows:

I. The parties hereto hereby enter into a partnership and constitute themselves copartners for the transaction of business under the firm name of A. A. Waterman & Co.

II. The object of this partnership is to manufacture, purchase, and sell pens, fountain pens, and other articles, and the different
5004 parts and materials thereof, and accessories thereto.

III. Profits and losses shall be shared equally by the parties hereto.

IV. The term of this copartnership shall be thirty-six years from the date hereof.

V. Any capital contributed to said firm by any member thereof shall be deemed a loan; shall bear 6% interest, and shall be, at the option of the partner advancing the same, repaid before any profits shall be distributed.

VI. The management of the affairs of the said firm shall be and remain in the hands of the Messrs Isaac E. and William L. Chapman, who alone are hereby authorized to make, accept, or endorse, checks, notes, drafts and other instruments for the payment of money, and to enter into any contracts or obligations that shall bind the partnership as such. 5005

VII. It is the principal purpose of this partnership, to manufacture, purchase and sell fountain pens and parts thereof. A new corporation, to be called the Modern Pen Company, shall be organized, in which the parties hereto shall be interested, which corporation shall be the sole sales agent of this manufacturing firm of A. A. Waterman & Co., and with which said selling company, Mr. Waterman may have contract relations.

VIII. Arthur A. Waterman hereby grants to this said firm of A. A. Waterman & Co. the right to use the name of A. A. Waterman and said firm name of A. A. Waterman & Co., in connection with the manufacture and sale of fountain and other pens and articles perpetually, and exclusively, except as hereinafter reserved to said Waterman to make use of said firm name, and hereby conveys to said firm all the good will now existing and attaching to the name of A. A. Waterman and A. A. Waterman & Co.; this grant shall not be modified or diminished by said Waterman ceasing to have an interest in this said firm under the terms of this agreement, or by his death or otherwise. 5006

IX. The Continent of North America is hereby divided into two districts, called the Eastern District and Western District. The Eastern District shall consist of that portion of the Dominion of Canada including and east of the Province of Ontario; that part of the United States including and east of the southern peninsula of Michigan, Indiana, Kentucky, Tennessee and Mississippi, together with the West India Islands including Porto Rico; and a Western District which shall consist of all that part of North America not included in the aforesaid eastern territory. 5007

If said A. A. Waterman shall so desire, it is hereby agreed that he may do business on his own account, under a firm, trade, or corporate name of A. A. Waterman & Co., or other

5008 suitable name, either alone or with others, in the manufacture and, or, sale of fountain and other pens in the said western territory provided he shall begin such business before July 1, 1906, in which event he shall have the exclusive right to said western territory, and the remaining members of this firm of A. A. Waterman & Co. shall have the exclusive right to the eastern territory, operating under the name of A. A. Waterman & Co.

If said A. A. Waterman shall exercise said option before July 1, 1906, and establish such business on his own account as aforesaid, he shall thereupon cease to have any interest in this firm of A. A. Waterman & Co., which said firm shall belong exclusively to Messrs. Isaac E. and William L. Chapman, their heirs, executors, administrators and assigns; and if said Waterman
5009 shall fail to exercise his said option before July 1, 1906, all his interest in this said firm of A. A. Waterman & Co. shall, in like manner, cease and determine in all respects the same as if he had exercised such option.

X. In the event of said Arthur A. Waterman doing business on his own account in said western territory, the following covenants shall prevail:

A. Advertising, jointly approved of, in periodicals having a general circulation throughout the United States, shall be paid for, 1/3 by said Waterman, representing the western trritory, and 2/3 by the Messrs. Chapman, or the Modern Pen Company as their selling agents, representing the eastern territory. After
5010 three years from the date of said Waterman going into business for himself, the expenses of general advertising, jointly approved of, shall be paid for according to the proportion of goods sold in the eastern and western territory in the United States.

B. Each party hereto shall have the perpetual free use of all patents, trade-marks and trade names (within their respective territories) in which either party hereto, or the Modern Pen Company, now has, or may hereafter acquire any interest.

C. Any patents or improvements in patents heretofore taken out by said Waterman or that he may hereafter acquire, shall be used in common between the parties, upon the Messrs. Chap-

man paying one-half of the expenses thereof, and should the Messrs. Chapman or the Modern Pen Company take out or acquire other similar patents, said Waterman shall have equal rights with them, upon paying one-half of the expenses therefor. 5011

D. The parties hereto shall agree on a minimum price of goods to be sold in the eastern and western territories.

E. All goods manufactured in the eastern territory, shall be marked "A. A. Waterman & Co., New York" and all those manufactured in the western territory, shall be marked "A. A. Waterman & Co., (or some similar name) Chicago."

F. As soon as said Waterman shall go into business for himself, he shall purchase all show cases in use for "Modern" pens formerly belonging to the firm of A. A. Waterman & Co., and, or, Frazer & Geyer Company, that shall then be situated within the boundaries of the said western territory, paying therefor the actual cost less 25%, to be paid, one-half when the proposed independent concern begins business in said western territory, and the balance of such purchase price in the five months immediately following, in equal instalments. 5012

G. No party hereto shall sell any goods in the territory of the other; and if, for any reason, goods should be shipped into the other's territory, either directly or through branch houses of any concern, 20% of the net prices thereof shall belong to the party in whose territory the goods are to be sold.

XI. In consideration of one dollar to him in hand paid by the said Messrs. Chapman, the receipt whereof is hereby acknowledged, the said Arthur A. Waterman hereby covenants and agrees with the said Isaac E. Chapman and William L. Chapman, their heirs, executors, administrators and assigns that in the event of his connection with this said firm of A. A. Waterman & Co. being severed in any way, he will not, either directly or indirectly, connect himself with any person, company or firm engaged in business similar to, or competing with, that of this partnership, (except as herein provided), nor will he himself (except as herein provided) engage in any business that will 5013

5014 compete with the business of this partnership, for a period of thirty-six years from the date hereof; and that he will not use, or authorize and permit any other persons, firm or corporation to use, the name of Waterman or A. A. Waterman, in any way or manner in connection with the manufacture, purchase or sale of fountain pens, other than as contemplated by this agreement: that is to say, if this agreement is terminated, the said Arthur A. Waterman hereby covenants with said Isaac E. Chapman and William L. Chapman, not to compete, either directly or indirectly, in the manufacture, purchase or sale of fountain pens or to use his own name, or to permit his name to be used in any such competing business, except as herein provided.

XII. If said Waterman shall not avail himself of the privilege
5015 of engaging in business independently in the western territory, he shall have the exclusive agency for that territory during the thirty-six year term of this partnership, excepting only Mexico and Central America. Said Waterman shall receive commissions on all sales and shipments to the Canadian portion of said territory, ten per cent (10%); on all sales and shipments to the said territory located within the United States, twenty per cent (20%), except that upon sales and shipments of items sold other than as modern pens, so-called, the commission rate shall be ten per cent (10%), and except that on fountain pens wholesaled at fifty cents each or less, no commission shall be paid. Provided, however, that if the sales and shipments to that part of said territory located in the United States shall amount,
5016 in one year, to more than $45,000, the rates of commission on the sales and shipments in excess of said $45,000 in said United States territory shall be one-half the aforesaid rate, and provided further that if the total sales and shipments in said United States territory for any year is less than $30,000, then the said Waterman shall receive a commission of only fifteen per cent (15%), upon the business of that year on which he otherwise would have received twenty per cent (20%); and provided further that if in any one calender year the sales of said Waterman's field shall be less than $20,000, then his other partners, or the Modern Pen Company, shall have the right to send salesmen into the said western territory at the expense of said Waterman, such

expense not to exceed Waterman's commissions from the State or States occupied by such salesmen while they are employed therein, and for one year thereafter. 5017

The provisions of this paragraph XII, shall bind the heirs, executors, administrators and assigns of the parties hereto, and this firm shall make no agreement relative to sales agents not in conformity with the terms of this paragraph.

XIII. Said Waterman is to pay all his traveling expenses, also any salary and expenses or commissions paid with his approval to any assistant working in his field under his direction; also for any pens given to any individuals at his, or his representatives' instance in said field, the gifts being charged as if cash, at 20% of the retail or list prices if the names and addresses of recipients are supplied.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written. 5018

ARTHUR A. WATERMAN (Seal)
ISAAC E. CHAPMAN (Seal)
WM. L. CHAPMAN (Seal)

Witness:
Alex. S. Bacon.

Defendant's Exhibit A-14.

THIS AGREEMENT, made and entered into at the City of New York, this fifth day of July, 1905, between the Modern Pen Company, a corporation organized and existing under and by virtue of the laws of the State of West Virginia, party of the first part, and Arthur A. Waterman, of Winchester, Massachusetts, party of the second part, Witnesseth: 5019

WHEREAS, the firm of A. A. Waterman & Co., composed of Arthur A. Waterman, Isaac E. Chapman, and William L. Chapman, and formed by articles of copartnership entered into by said copartners upon the 12th day of June, 1905, has for its purpose the manufacture of pens, fountain pens and parts thereof, etc., and the said firm or co-partnership has engaged the afore-

5020 said Modern Pen Company as the sole and exclusive sales agent for all of the goods to be manufactured by the said firm; and the said Modern Pen Company is desirous of securing the services of the said Waterman and of carrying out that portion of his agreement with his said partners whereby there is reserved to said Waterman certain exclusive territory,

Now, THEREFORE, in consideration of One Dollar ($1) each to the other in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations, it is hereby mutually agreed between the parties hereto as follows:

I. The said copartnership agreement is hereby referred to, and the Modern Pen Company hereby acknowledges full knowledge of all the terms of said agreement. Nothing in this agree-
5021 ment shall be deemed or construed to interfere with the said Waterman carrying out all the terms and conditions of said copartnership agreement and entering into business for himself if he may so desire, in the terms and in the manner as indicated in said copartnership agreement.

II. The Modern Pen Company hereby employs said Arthur A. Waterman as its agent to sell upon commission in the Western territory hereinafter described, all articles handled by it, and said Arthur A. Waterman hereby accepts said agency.

III. It is further mutually agreed that there shall be, and hereby is, set aside and exclusively appropriated to said Waterman as his exclusive sales territory, all that part of North
5022 America west of and excluding the Providence of Ontario; and that part of the United States west of and exclding the southern peninsula of Michigan, Indiana, Kentucky, Tennessee and Mississippi, and excluding the West Indian Islands and Porto Rico; and including Central America and Mexico.

IV. All net sales of goods made by the Modern Pen Company in said territory shall be deemed to be made and duly credited to the account of said Waterman, for the purpose herein provided, to wit: a commission is to be paid monthly to said Waterman upon the wholesale business done by the Modern Pen Company, in the said territory, not including retail mail business and business in repairs and exchanges; which said com-

mission shall be based on the sales and shipments to said territory, 5023
at the following rates of commission: on all sales and shipments to the portion of said territory not within the United States, ten per cent (10%); on all sales and shipments to the said territory located within the United States, twenty per cent (20%), except that upon sales and shipments of items sold other than as Modern pens, so-called, the commission rate shall be ten per cent (10%) and except that on fountain pens wholesaled at fifty cents each or less, no commission shall be paid; provided, however, that if the sales and shipments to that part of said territory located in the United States shall amount, in one year, to more than $45,000, the rates of commission on the sales and shipments in excess of said $45,000, in said United States territory shall be one-half the aforesaid rate; 5024
and provided further that if the total sales and shipments in said United States territory for any year is less than $30,000, then the said Waterman shall receive a commission of only fifteen per cent (15%) upon the business of that year on which he otherwise would have received twenty per cent (20%); and provided further that if in any one calendar year the sales in said Waterman's field shall be less than $20,000, then his other partners, or the Modern Pen Company, shall have the right to send salesmen into the said western territory at the expense of said Waterman; such expense not to exceed said Waterman's commissions; from the State or States occupied by such salesmen while they are employed therein, and for one year thereafter.

5025

V. Said Waterman is to pay all his traveling expenses; also any salary and expenses or commission paid with his approval to any assistant working in his field under his direction; also for any pens given to any individual at his instance in said field, the gifts being charged as if cash, at 20% of the retail or list prices, if the names and addresses of recipients are supplied.

VI. A consignment account is to be kept with said Waterman charging all samples and surplus stock having a retail list price, at 50% discount, and other samples, if any, at the lowest trade prices. If any merchandise is not accounted for on said con-

5026 signment account, any deficiency is to be charged to said Waterman quarterly as if cash paid to him, at the net consignment rates.

VII. Any assistant of said Waterman, approved by the Modern Pen Company, is to have consigned to him constantly suitable samples charged at the same rate as hereinbefore provided for the consignment of samples to said Waterman. But said Waterman shall not be held responsible for any samples furnished to any such assistant or their indebtedness to the Modern Pen Company.

VIII. Commissions are due and payable when the goods are shipped; if any goods are returned, commissions already collected or credited thereon shall be charged back.

5027

IX. It is further mutually agreed that during the continuance of this commission arrangement the said Waterman and his assistants may also represent any other person, firm or corporation, in said territory so far as he or they do not solicit business in competition with the business of the Modern Pen Company.

X. It is further mutually agreed and expressly understood that the continuance of the aforesaid commission arrangement in said exclusive western territory provided for by the said copartnership agreement is optional with said Waterman; that in the event that said commission arrangement is not terminated by the formation of an independent firm or corporation, as provided in said articles of copartnership, the said Waterman
5028 may, at his option, nevertheless, terminate the same at any time; and he may at any time withdraw from and cease to represent the Modern Pen Company in said territory, in which event he shall surrender said territory and all his rights and interests therein under this agreement.

XI. It is further mutually agreed that this agreement will be binding upon both parties hereto for the full term of thirty-six years of the aforesaid copartnership, unless the agreement is sooner terminated at the option of said Waterman as herein provided, or by said Waterman going into business for himself, or unless the said Modern Pen Company, party of the

first part, shall sooner cease to be the appointed selling agent of the said firm of A. A. Waterman & Co. 5029

XII. In the event that the said Waterman does engage in the separate and independent manufacture of fountain pens &c., in said western territory, then it is mutually agreed that all the restrictions and obligations of the said copartnership agreement shall likewise be binding upon the Modern Pen Company, to the benefit of Waterman, the same as if herein set forth at length, and the Modern Pen Company shall not sell, or permit or cause to be sold any goods in competition with said Waterman in said western territory; and all the restrictions and obligations of said copartnership agreement binding upon said Waterman, shall likewise redound to the benefit of the Modern Pen Company; and all the obligations imposed upon the Messrs. Isaac E. and 5030 William L. Chapman (the two other copartners in said copartnership) under the terms of said copartnership agreement shall be binding upon the Modern Pen Company.

XIII. It is further mutually agreed that if said Waterman shall engage in the independent manufacture and sale of fountain pens &c., in said western territory, as provided in the aforesaid articles of copartnership, then he, or any firm or corporation that may be organized for that purpose by him, shall purchase from the Modern Pen Company all show cases owned by it in said western territory, so far as they are in use by dealers for the display of Modern fountain pens in said western territory, paying for such show cases seventy-five per cent (75%) of what was paid therefor to the manufacturer, which purchase price shall 5031 be paid 50% when the proposed independent concern begins business in the western territory, and the balance of such purchase price in the five months immediately following, in equal installments.

XIV. It is expressly agreed that the said Waterman will not, during the continuance of the thirty-six year term of the said copartnership of A. A. Waterman & Co., engage in the manufacture and sale of fountain pens except as provided in the said articles of copartnership, and will not, during the term of thirty-six years, use, or permit the use of, his name in any manner,

5032 in any other firm or corporation engaging in the manufacture and sale of fountain pens except as provided in said articles of copartnership.

In Witness Whereof the Modern Pen Company, the party of the first part, has caused these presents to be signed by its president, and its corporate seal to be hereto affixed, and Arthur A. Waterman, the party of the second part has hereunto set his hand and seal the day and year first above written.

MODERN PEN COMPANY,
(Seal.) by Isaac E. Chapman, President.
Arthur A. Waterman, (Seal).

Witness:
Alex. S. Bacon.

5033

Defendant's Exhibit A-15.

A. A. Waterman I. E. Chapman W. L. Chapman

A. A. WATERMAN & CO.,

Makers of

"MODERN" FOUNTAIN PENS

Works and Sales Office
22 Thames St., New York.

5034 The Middle Joint and the Automatic Self-Filling "Modern" Fountain Pens TO THE TRADE:

Cable Address: "Modernpen" New York.

NEW PARTNERSHIP

The partnership, A. A. Waterman & Co., was dissolved on May 8, 1905, and on May 12, 1905, a new partnership was formed under the same name. The effect of this is to have Messrs. Isaac E. Chapman and William L. Chapman instead of Messrs. Wm. G. Frazer and Hobart W. Geyer as general partners, thus

adding greatly to the financial strength of the firm. The business is continued without interruption, and without changes except for some improved methods. 5035

This opportunity is taken to make the following statement:

The Messrs. Chapman have been for several years indirectly interested in the business of A. A. Waterman & Co. They have become in this way well acquainted with the prospects of this rapidly increasing business—also with financial needs due to its growth; and they are now partners in the new firm because of their large financial interests in the business and the great advantage that will come to it in several ways as a result of their active participation in its management.

The constant progress in improving the quality and styles of our fountain pens which has been the "hobby" of Mr. Waterman for years will be maintained; indeed, it will be advanced in every possible way. We shall remain the foremost fountain pen manufacturers—especially in point of novelty in construction, quality of material and finish of product. The new firm will manufacture the best fountain pens that large capital and the highest skill can produce. Its manufacturing equipment and the ability of its staff of organizers, managers and salesmen will preclude the possibility either of supplying inferior goods that less fully equipped makers must be content with; or of failing to give the Trade *attractive business propositions.* 5036

To improve still further the service of A. A. Waterman & Co. in the distribution of its products to the Trade, there has been organized a separate Sales Corporation. With Mr. Waterman as an officer and director, this Selling Agency will have the benefit of his wide experience in a long connection with the Trade. 5037

We wish to thank our customers for their liberal past and present patronage and their many other expressions of interest in our business. We hope to merit and enjoy a continuance of this popularity and support by carrying out as liberal a trade policy as is consistent with uniform and safe business methods.

A. A. WATERMAN & CO.

5038 **Defendant's Exhibit A-16.**

Royal Ideal Pens sold J. Saadi.

Sold	No. 11	No. 12	No. 14	No. 15
1909				
July 10th	72	144	72	24
Oct. 13th	72	72	216	48
Dec. 4th	144	144	144	36
	288	360	432	108

Returned

Feb. 19th 1910 155 No. 12 gold pens, 30¢ 46.50
24 " 15 " " 50¢ 12.00

5039 58.50

		Sold at		Cost		Profit		
288	No. 11 holders	14-1/2¢	41.76	12¢	34.56	7.20		
360	" 12 "	18¢	64.80	17¢	61.20	3.60		
432	" 14 "	14-1/2¢	62.64	13¢	56.16	6.48		
108	" 15 "	23¢	24.84	19¢	20.52	4.32		
		21.60						
			194.04		172.44			21.60

288	No. 11	Gold pens	21¢	60.48	18¢	51.84	8.64		
5040 360	" 12	" "	30¢	108.00	24¢	86.40	21.60		
432	" 14	" "	21¢	90.72	20¢	86.40	4.32		
108	" 15	" "	50¢	54.00	32¢	34.56	19.44	54.00	
				313.20		259.20			

Less	155	No. 12	Gold pens	30¢	46.50	24¢	37.20	9.30			
	24	" 15	" "	50¢	12.00	32¢	7.68	4.32	13.62		40.38
					58.50		44.88				
					254.70		214.32				

1188 Boxes & Fillers 2¢	23.76	2¢	23.76

Profit

Less paid commission to salesmen 10%

Less 10% office expenses

Bill July 10th '09 Royal Ideals	144.00
" Oct. 13th '09 " "	180.00
" Dec. 4th '09 " "	207.00
	531.00
Credit Feb. 19th '10 " " G. Pens	58.50
	472.50

This profit of $21.60 on the holders does not take into consideration the fact that a large part—or nearly all, of the holders imprinted "Royal Ideal Pen" had that imprint removed by Mr. Saadi, before their sale.

Defendant's Exhibit A-18.

Cleveland, O. 11-10-09.

Mr. H. Geyer,

Dear Sir:

I was very much surprised when I noticed this insertion in this eve. paper. I thought I would send it to you and also wish you would advise me. I have not been served yet and I don't know what to make of it. I hope you will stand by me in this matter or I will have to stop handling your goods.

5044 Let me know what you think of this or don't it amount to anything?

Hoping to hear from you soon, I remain

Yours truly,

S. TELLER,
411 Euclid Ave.,
Cleveland, O.

Defendant's Exhibit A-17.

New York, November 11, 1909.

5045 Standard Drug Company,
411 Euclid Ave., Cleveland, O.

Gentlemen:

In the suit of L. E. Waterman Company against you filed on November 10th, in the United States Circuit Court for your District, we beg to advise that we shall be pleased to supply you or your attorneys with a copy of the complaint upon the entrance of your appearance in the case and your request for same.

We also further beg to notify you that the representation of a globe on fountain pens is a duly registered trade-mark of the L. E. Waterman Company and we find that you are advertising fountain pens under the name of "Globe Special." We have
5046 advised our clients that this constitutes unfair competition in trade and we notify you to forthwith discontinue the use of same.

The trade-mark above referred to was registered by the L. E. Waterman Company on February 4, 1902, No. 37,762 and re-registered under the new law on December 19, 1905, No. 48,-230, and May 1, 1906, No. 51,993.

Yours truly,

(Signed) WATSON & RAYMOND,
10 Wall Street.

SSW/FB.

Defendant's Exhibit A-19. 5047

Nov. 12, 1909.

Mr. S. Teller,
411 Euclid Ave.,
Cleveland, O.

Dear Sir:

Your letter of the 10th inst., enclosing clipping, received and contents have our attention.

You say you have not yet been served with any notice of the suit and until you have this we cannot, of course, tell what the suit is for. If you have been advertising our pens without the initials A. A. Waterman, the other people might possibly sue 5048
you for this but in all our experience this is the first case in which we have heard of their starting a suit. Many of our customers have received threatening letters from the attorneys of the L. E. Waterman Co., and we are inclined to think that this item of news may be a mistake.

If they are suing you to prevent you using pens imprinted A. A. Waterman & Co. advertised as such, we will certainly defend the case for you.

As soon as you get any further information in regard to this, please let us know and we will then take it up with our attorneys.

Yours truly,
THE MODERN PEN CO.,
Hobart W. Geyer,
Ass't. Treas. 5049

Dict. to N. H.

5050 **Defendant's Exhibit A-20.**

STANDARD DRUG COMPANY

Cleveland, Nov. 12th, 1909.

Modern Pen Co.,
22 Thames St.,
New York City.

Gentlemen:

As you have been informed by Mr. Teller suit has been brought against us by the L. E. Waterman Company of New York as it is in our store that Mr. Teller has been selling your pens. This is the first intimation we have had that there was
5051 any question of his right to sell your pens. We would like to hear from you at once regarding the legal status of your company, and as to the truth or error of their allegations in bill of complaint (copy enclosed).

We are also sending you letter just received from their attorneys. It is but natural to expect that you will stand back of us in the defense of this suit.

Kindly return papers to us as soon as you have gone over them.

Very truly yours,
THE STANDARD DRUG CO.,
per Perin Shirley,
Secy.-Treas.

5052

Defendant's Exhibit A-21.

Nov. 18, 1909.

The Standard Drug Co.,
East Ninth S. & Boliver Road,
Cleveland, Ohio.

Dear Sirs:

Your letter of the 12th inst. with enclosure received, and contents have our attention.

There is no question whatever of Mr. Teller's or anybody else's right to sell our pens providing they are sold as pens made by A. A. Waterman & Co. If you or Mr. Teller, as the L. E. Waterman Co. claim, have been selling pens not of their make as manufactured as "Waterman's Ideal Fountain Pens," "Waterman's Pens," "genuine Waterman Ideal Fountain Pens," "genuine Waterman's Pens," "Waterman's Fountain Pens" and "Waterman Fountain Pens;" have caused those to whom you have sold such pens to believe that the said fountain pens so sold by you are "Waterman's Ideal Fountain Pens," and "Waterman's Fountain Pens," "Waterman Fountain Pens" and "Waterman Pens" made by the L. E. Waterman Co. when in fact such pens so sold by you were not made by them and were not of their manufacture; and thereby infringed their trade-marks and deceived the purchasers of the fountain pens sold by you and fraudulently secured to yourselves the profits rightfully belonging to the L. E. Waterman Co. to their great detriment and damage and deceived the purchasers of said fountain pens, you of course have been doing what you had no right to do and there is nothing that we can do to help you in this matter. 5053 5054

If, however, you have been selling the goods made by us and distinctly stating or advertising that they are pens made by A. A. Waterman & Co., we will do the right thing in protecting you and ourselves against unjust interference.

Please give us the necessary information in regard to the manner in which the goods have been advertised and sold, and we will then take the matter up further with you. 5055

We return herewith the letter from Messrs. Watson & Raymond and copy of complaint.

Yours truly,
THE MODERN PEN CO.,
Hobart W. Geyer,
Ass't. Treas.

Dict. to N. H.

5056 **Defendant's Exhibit A-32.**

C. A. GODMAN, President

C. E. ROSEMAN
Vice-President

PERIN SHIRLEY,
Secretary-Treasurer

THE STANDARD DRUG COMPANY

WHOLESALE DRUGGISTS

East Ninth Street and Bolivar Road

Cleveland, Nov. 18th, 1909.

The Modern Pen Co.,
22 Thames St.,
5057 New York City.

Gentlemen:

We are somewhat surprised in not receiving from you an acknowledgment of our letter enclosing bill of complaint of L. E. Waterman Co. We fully expected to hear from you yesterday, as we wish to know where you and we stand in this matter.

Kindly let us hear from you and oblige,

Yours very truly,
THE STANDARD DRUG CO.,
per Perin Shirley,
Secy.

5058 MODERN PEN CO.,
Received
Nov 20 1909
a. m. p. m.
7-8-9-10-11-12-1-2-3-4-5-6
†

Defendant's Exhibit A-22.

5059

Nov. 19th, 1909.

The Modern Pen Co.,
22 Thames St.,
New York City.

Gentlemen:

Your favor received today and Mr. Teller is writing you setting forth the facts regarding the sale of your pens in our store by him. He will go on the witness stand and swear that he has not misrepresented the facts to customers.

Kindly let us know how we are to proceed in this matter.

Yours very truly,
THE STANDARD DRUG CO., 5060
per Perin Shirley,
Secy.-Treas.

Defendant's Exhibit A-23.

Cleveland, 11-19-09.

Mr. H. Geyer.

Dear Sir:

The Standard Drug referred your letter to me and in reply will say that as far as L. E. Waterman Ideal Pens is concerned, I have sold them and still sell them but of course if I can influence a prospective buyer to take A. A. Wat. goods I do so 5061
and I also want to say that I sell a very few of the Ideal Pens because of my efforts on your goods. As far as selling your goods and claiming that they were Ideal Pens, I will state emphatically that their claim is not true. I take their course as a matter of persecution and not prosecution simply unjust interference. I have sold lots of goods and never misrepresented anything.

Yours truly,

S. TELLER,
411 Euclid Ave.,
Cleveland, O.

5062 **Defendant's Exhibit A-24.**

Nov. 23, 1909.

Mr. S. Teller,
411 Euclid Ave.,
Cleveland, O.

Dear Sir:

Your letter of the 19th inst. received and we are writing the Standard Drug Co. by this mail.

While an appearance will have to be made in Court, we do not imagine for an instant that the L. E. Waterman Co. will push any suits as they certainly have no grounds to stand on.

5063 Yours truly,
THE MODERN PEN CO.,
Hobart W. Geyer.
Ass't. Treas.

Dict. to N. H.

Defendant's Exhibit A-25.

Nov. 23, 1909.

The Standard Drug Co.,
East Ninth St. & Bolivar Road,
5064 Cleveland, Ohio.

Dear Sirs:

Your letter of the 19th inst. and also letter from Mr. Teller of the same date, received and contents have our attention.

From what Mr. Teller writes, he has been selling the Ideal pens as well as our own and if he has any of the Ideals he certainly has a perfect right to advertise them. We can not see wherein the L. E. Waterman Co. have any case at all from the information given us, and there seems to be nothing in their complaint that covers the goods that we make.

You might let us know what it will cost for you to engage an attorney to put in an appearance for you and we will probably be willing to pay a limited amount towards such expense. 5065

As we wrote you above, we can not see that this suit is caused by Mr. Teller having sold our goods, but we are willing to do what is right in the matter.

Yours truly,
THE MODERN PEN CO.,
Hobart W. Geyer,
Ass't. Treas.

Dict. to N. H.

Defendant's Exhibit A-33. 5066

T. H. BUSHNELL,

ATTORNEY AT LAW,

705 Society for Savings Building,

Telephone, Main 2174

Cleveland, Ohio, December 1st, 1909.

Modern Pen Company,
22 Thames Street,
New York, N. Y.

Gentlemen: 5067

I have been retained by The Standard Drug Company, in a case filed here in United States Court against it, by L. E. Waterman Company, and have before me your letter of Nov. 18th to the Drug Company. Of course as you know, the pen business in the store belongs to Mr. Sol Teller; the Drug Company simply rents him space. I find in the window rented to Mr. Teller by the Drug Company, a lot of signs as follows:

"No. 8 Reliable made by A. A. Waterman & Co., $3.00"

"The Modern Middle Joint Pen, made by A. A. Waterman & Co."

5068 "The New Lincoln Model, made by A. A. Waterman & Co."
"Waterman Ideal, Parkers, Moore, Safety, Holland & C."

I also saw in the window a single pen box marked "L. E. Waterman (globe with word Ideal) Fountain Pen." Mr. Teller says he has sold the L. E. Waterman pen, buying odd lots of them, if he finds a bargain. I saw no advertisement of L. E. Waterman goods except as stated herein, and did see there a L. E. Waterman Ideal pen case. The A. A. Waterman & Co. pens appear to be plainly marked A. A. Waterman & Co. on each pen box. Is there such a person as A. A. Waterman and if so, has he been in the fountain pen business long, if so how long? Did he ever part with the use of his name, to be used in this business? Do you suggest that Mr. Teller drop your A. A.
5069 Waterman & Co. goods? What do you advise as to the matter? The Drug Company feels that it is not the party to be sued even if any one should be and don't like to assume the burden of defending unless properly indemnified.

Very truly,

T. H. BUSHNELL.

Answer O. K. W.
H. W. G.
W. W. M.
N. H.
E. A. P.
A. H. H
Order
5070 Credit
Repair
Exchange
Cash
B'keeper

MODERN PEN CO.,
Received
Dec-2 1909
a. m. p. m.
7-8-9-10-11-12-1-2-3-4-5-6

Defendant's Exhibit A-34.

5071

Dec. 2, 1909.

Mr. T. H. Bushnell,
705 Society for Savings Bldg.,
Cleveland, Ohio.

Dear Sir:

Your letter of the 1st inst. received and contents have our attention.

As we wrote your clients, we do not see where the L. E. Waterman Co. have any kind of a case against them and from what you state we are still of the same opinion.

In 1898 before A. A. Waterman had a connection with this 5072
Company he allowed the L. E. Waterman Co. to get a judgment against him by default, but the judgment distinctly stated that he had a perfect right to use his name, A. A. Waterman or Arthur A. Waterman, or A. A. Waterman & Co. or Arthur A. Waterman & Co., which is, as we understand it, common law. In 1905 Mr. Waterman formed a co-partnership with Messrs. Isaac E. and William L. Chapman, President and Treasurer of the Modern Pen Co., under the firm name of A. A. Waterman & Co., with a provision therein that he could withdraw from the firm at the end of the year, he giving the firm the right to use the name A. A. Waterman & Co. or A. A. Waterman, which right still holds good.

Mr. A. A. Waterman was employed by the L. E. Waterman 5073
Co. for a number of years until along about 1895 when he went into business in Boston, Mass., using the name of A. A. Waterman Pen Co. After retiring from the firm of A. A. Waterman & Co. in New York, Mr. Waterman went to Chicago and formed a corporation organized under the laws of Arizona, known as A. A. Waterman & Co., Inc. Within the last year Mr. Waterman was withdrawn from the Chicago Company and is now with the Held Pen Co. of Salt Lake City, Utah.

If it is necessary for you to have a copy of the co-partnership agreement with Messrs. Chapman, we will be pleased to get it and send it to you.

5074 Any other information you wish we will be only too pleased to give you if in our power.

Yours truly,
THE MODERN PEN CO.,
Hobart W. Geyer,
Ass't. Treas.

Dict. to N. H.

Defendant's Exhibit A-26.

411 Euclid Avenue,
old Arcade,
5075 Cleveland, O., 12-15; 1909.

H. Geyer,
The Modern Pen Co.

Dear Sir:

On Dec. 14th the L. E. Waterman Co. enjoined the Standard Drug Co. of this city from selling or allowing to be sold in their store Fountain Pens made under the name of A. A. Waterman & Co. The Standard Drug compels me to discontinue selling your goods or displaying any placards in window or in the store. What do you think about that. Consequently I must ask you to cancel the orders I have sent you for goods and also want
5076 to return all the A. A. Pens I have on hand for credit to my account in consequence of this injunction. You will readily see to what extent this injunction will interfere with my business at this time of the year as the Standard Drug Co. insist that I discontinue the sale of your goods in their store, on account of the unnecessary expense and trouble that they have already been put to on account of L. E. Co. actions.

Kindly let me hear from you or advise me, and oblige,

Yours truly,
S. TELLER.

Defendant's Exhibit A-27. 5077

Dec. 17, 1909.

Mr. S. Teller,
411 Euclid Ave.,
Cleveland, Ohio.

Dear Sir:

Your letter of the 15th inst. received, and this is the first intimation we had that the L. E. Waterman Co. were able to get an injunction against the Standard Drug Co. selling our goods.

We would like to have you furnish us with some of the particulars if you will, so that we can decide on what course to 5078
pursue in the matter.

As you will be unable to sell our goods, you of course can return whatever of them you have on hand and we will give you credit for same.

Yours truly,
THE MODERN PEN CO.,
Hobart W. Geyer,
Ass't. Treas.

Dict. to N. H.

5079

5080 **Defendant's Exhibit A-28.**

UNITED STATES CIRCUIT COURT,

EASTERN DIVISION OF THE NORTHERN DISTRICT OF OHIO,

In Equity.

L. E. WATERMAN COMPANY,
Complainant,

against

STANDARD DRUG COMPANY,
Defendant.

5081

To the Honorable, the Judges of the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio:

The L. E. Waterman Company, a corporation duly incorporated, organized and now existing under the laws of the State of New York, and a citizen of said State, having its principal place of business at No. 173 Broadway, in the City of New York, County and State of New York, in the Southern District of New York, brings this, its bill of complaint against the Standard Drug Company, a corporation incorporated, organized and now existing under the laws of the State of Ohio,
5082 and a citizen of the State of Ohio, having its principal place of business in the City of Cleveland, in Cuyahoga County, State of Ohio, and carrying on business at No. 411 Euclid Avenue, in said City of Cleveland and at No. 11211 Prospect Avenue, N. E., in said City of Cleveland, State of Ohio.

And your orator thereupon complains and says:

I. That the L. E. Waterman Company, your orator, is a corporation incorporated, organized and now existing under the laws of the State of New York, with its principal place of business at No. 173 Broadway, in the City, County and State of New York, and is a citizen of the State of New York; that

your orator is informed and believes, and therefore alleges, that 5083
the defendant, Standard Drug Company, is a corporation incorporated, organized and now existing under the laws of the State of Ohio, and a citizen of the State of Ohio, having its principal place of business in the City of Cleveland, in Cuyahoga County, State of Ohio, and carrying on business at No. 411 Euclid Avenue, in said City of Cleveland and at No. 11211 Prospect Avenue, N. E., in said City of Cleveland, State of Ohio.

II. That in the year 1883 one Lewis E. Waterman was engaged in the business of manufacturing and selling fountain pens in the said City of New York, and in the year 1883 adopted as his trade-mark for fountain pens manufactured and sold by him the word "Waterman's" and the words "Waterman's Ideal Fountain Pen, N. Y.," and in connection with the manufacture 5084
and sale by him of fountain pens used and continued to use continuously until the year 1887 and until he was succeeded in said business by your orator, the said trade-marks in commerce among the several States of the United States and in commerce between the United States and foreign nations to denote and designate to the public the fountain pens so manufactured and sold by him.

III. That in the year 1887 your orator, the L. E. Waterman Company, was incorporated and organized as a corporation under the laws of the State of New York and thereupon succeeded to the business and all rights of the said Lewis E. Waterman in and to said trade-marks "Waterman's" and "Waterman's Ideal Fountain Pen, N. Y.," and all rights, interests and prop- 5085
erty of the said Lewis E. Waterman in the business of the manufacture and sale of fountain pens, as aforesaid; that your orator has continued the said business of manufacturing and selling fountain pens since the year 1887 continuously until the present time; that in connection with the said manufacture and sale of fountain pens and for the purpose of more clearly distinguishing the goods of their manufacture from those of other manufacturers, your orator and its predecessor, the said Lewis E. Waterman, continuously from the year 1883 to the present time, stamped and labeled fountain pens made by them with said trade-mark "Waterman's" and "Waterman's Ideal Fountain Pen, N.

5086 Y.;" and continued from the year 1883 to the present time the use of said trade-mark, stamped, labeled and affixed to the fountain pens of their manufacture for the purpose of more clearly distinguishing the goods of their manufacture from those of other manufacturers.

IV. That on the 5th day of February in the year 1901, your orator duly registered in the United States Patent Office its said trade-mark "Waterman's Ideal Fountain Pen, N. Y.," as a trade-mark for fountain pens under and in accordance with the United States Trade-mark Acts then in force, which certificate of registration or a duly certified copy of same is ready here in Court to be produced; that on the 6th day of February, in the year 1906, your orator duly registered in the United States Patent
5087 Office its said trade-mark "Waterman's Ideal Fountain Pen, N. Y.," as a trade-mark for fountain pens under and in accordance with United States Trade-mark Acts then in force, which certificate of registration or a duly certified copy of same is ready here in Court to be produced; that on the 15th day of January, in the year 1907 your orator duly registered in the United States Patent Office its said trade-mark "Waterman's" as a trade-mark for fountain pens under and in accordance with United States Trade-mark Acts then in force, which certificate of registration or a duly certified copy of same is ready here in Court to be produced; that your orator is now the owner and entitled to the exclusive use as a trade-mark for fountain pens of said trade-marks "Waterman's" and "Waterman's Ideal
5088 Fountain Pen, N. Y.;" that your orator and its predecessor in business have since the year 1883 continuously until the present time, applied and affixed to fountain pens of its manufacture and to the boxes in which said fountain pens were sold the said trade-marks, "Waterman's" and "Waterman's Ideal Fountain Pen, N. Y.," and has extensively used the said trade-marks in advertising and selling said pens; that your orator has invested and expended large sums of money in the manufacture and sale of its fountain pens bearing said trade-marks and improving and perfecting the same, and that it has sought in many ways and by a large expenditure of money exceeding the sum of Two hundred fifty thousand ($250,000) Dollars, to popularize said

fountain pens and to advertise the same under said trade-marks, and because of the superior quality, workmanship and material of said fountain pens of your orator's manufacture bearing said trade-marks, your orator's trade therein increased from year to year and assumed large proportions until thousands of said fountain pens bearing said trade-marks were annually sold by your orator, the same being a source of great profit to your orator and a benefit to the public; that your orator further shows unto your Honors, that the said trade-marks "Waterman's" and "Waterman's Ideal Fountain Pen, N. Y.," applied and affixed to fountain pens of its manufacture, as aforesaid, came to be widely known and widely and generally recognized by dealers therein and by the public generally as indicating and distinguishing the goods of your orator's manufacture which were widely and generally known as "Waterman's Ideal Fountain Pens," "Waterman Ideal Fountain Pens," "Waterman Pens," "Waterman's Pens," "Waterman's Ideal Pens," "Waterman Ideal Pens," "Waterman Fountain Pens" or "Waterman's Fountain Pens," and that the said dealers and the public generally relied upon said trade-marks stamped and affixed upon said pens and upon the boxes in which they were contained as indicating that the goods so stamped and marked were of your orator's manufacture and they were thereby assured that the goods so stamped and marked were reliable and superior in quality, material and workmanship and were in fact "Waterman's Ideal Fountain Pens" or "Waterman's Pens" or "Waterman Fountain Pens," and the public having become familiar with such goods, and the quality, material and workmanship thereof, called for and purchased the same by asking for the fountain pens of your orator's manufacture as "Waterman's Ideal Fountain Pens" or "Waterman Ideal Fountain Pens" or "Waterman Pens," or "Waterman's Pens," or "Waterman's Ideal Pens," or "Waterman Ideal Pens," or "Waterman Fountain Pens," or "Waterman's Fountain Pens."

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V. And your orator further shows unto your Honors that it is informed and believes, and therefore alleges, that the defendant, Standard Drug Company, was and for some time has been and still continues to be engaged in the business of selling

5092 fountain pens at No. 411 Euclid Avenue and at No. 11211 Prospect Avenue, N. E., in said City of Cleveland, State of Ohio, and that said defendant has made sales of fountain pens not of your orator's manufacture, as "Waterman's Ideal Fountain Pens," "Waterman's Pens," "Genuine Waterman Ideal Fountain Pens," "Genuine Waterman's Pens," "Waterman's Fountain Pens" and "Waterman Fountain Pens;" that the said defendant has caused those to whom he has sold such pens, as aforesaid, to believe that the said fountain pens so sold by him, as aforesaid, are "Waterman's Ideal Fountain Pens," and "Waterman's Fountain Pens," "Waterman Fountain Pens" and "Waterman Pens," made by your orator, when in fact such pens so sold by the defendant, as aforesaid, were not made by your
5093 orator and were not of your orator's manufacture and that thereby the defendant infringed your orator's said trade-marks and deceived the purchasers of the fountain pens sold by him, as aforesaid, and that the defendant thereby fraudulently secured to himself the profits rightfully belonging to your orator, to your orator's great detriment and damage and deceived the purchasers of said fountain pens and that the defendant is still continuing the business and practice of selling fountain pens bearing the said trade-marks and trade names of your orator and colorable imitations thereof, which fountain pens are not of your orator's manufacture and wilfully threatens to continue said illegal and unlawful acts to the great injury and damage of your orator's reputation and business and to the great injury and damage of
5094 your orator's good name and trade-marks; that your orator is informed and believes and therefore alleges that the defendant has notice and full knowledge of your orator's rights in the premises, but defendant in defiance of your orator's rights wilfully continues its illegal and unlawful acts and persists in infringing your orator's trade-marks and continuing his illegal and unlawful acts, as above set forth, and continues unlawfully and illegally to use your orator's said trade-marks and trade name and colorable imitations thereof in offering to the public and in selling fountain pens which are not of your orator's manufacture and the defendant is thereby deceiving the public and injuring the good name and good will of your orator's business to your orator's great detriment, injury and damage.

And your orator further shows unto your Honors that the fountain pens which the defendant is advertising, offering for sale and is selling under the false representation that they are "Waterman's Ideal Fountain Pens," "Waterman's Fountain Pens," or "Waterman's Pens," are not of your orator's manufacture and are inferior to the "Waterman's Pens," "Waterman Fountain Pens" and "Waterman's Ideal Fountain Pens," of your orator's manufacture in utility, appearance, style, workmanship and material, and their inferiority in these particulars taken in connection with their fraudulent substitution for the goods of your orator, has damaged and continues to damage the reputation of your orator's fountain pens among the trade and public generally, and your orator does not know the full extent of the damages thus suffered, but states, upon information and belief, that the sum exceeds, exclusive of interest and costs, the sum of Ten thousand Dollars ($10,000). 5095 5096

VI. That the amount in controversy in this cause is of more than Two thousand Dollars ($2,000) in value, exclusive of interest and costs.

VII. And your orator further charges that the actions of the defendant, as aforesaid, are contrary to equity and good conscience and constitute an unlawful, fraudulent, unfair and inequitable competition in business, and an invasion and infringement of your orator's rights in the premises and of your orator's registered trade-marks, whereby it has been deprived of and has lost the sale of pens which have been sold by the defendant as "Waterman's Pens," or "Waterman's Fountain Pens," or "Waterman's Ideal Fountain Pens," which pens were not of your orator's manufacture, all to your orator's great and irreparable loss and injury, and by which your orator has been and still is being deprived of profits which it might and otherwise would have obtained but which have been received and enjoyed, and still are being received and enjoyed by the defendant by reason of his unlawful acts, as aforesaid; and your orator further charges that the actions of the defendant, as aforesaid, have caused and are still causing great and irreparable injury and damage to your orator's reputation and good name, and great damage and injury among the trade and public generally to the 5097

5098 reputation and good name of "Waterman's Pens," "Waterman's Fountain Pens," and "Waterman's Ideal Fountain Pens," of your orator's manufacture.

Forasmuch as your orator can have no adequate relief except in this Honorable Court and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief hereby prayed, and may make full disclosure and discovery of all the matters aforesaid and according to the best and utmost of his knowledge, remembrance, information and belief, full, true and perfect answers make to the matters hereinbefore made, stated and charged, but not under oath, answer under oath being hereby expressly waived;

To the end, therefore, that your orator may obtain relief in the premises and forasmuch as your orator has no adequate
5099 rememdy at law and can obtain no adequate relief except in this Honorable Court, it humbly prays:

That the said defendant, Standard Drug Company, its servants, agents, attorneys and workmen and each and every one of them, may be restrained and enjoined provisionally and perpetually by an order and injunction of this Honorable Court, from:

1. Directly or indirectly making or causing to be made, selling or causing to be sold, offering for sale or advertising any fountain pens of other manufacture than that of your orator under the name of "Waterman's Ideal Fountain Pen, N. Y.," or "Waterman's Ideal Fountain Pen," or "Waterman's Foun-
5100 tain Pens," or "Waterman's Pens," or "Waterman Pens," or any mark or name in imitation thereof or near resemblance thereto as might be calculated to deceive or be likely to cause confusion or mistake in the mind of the public or to deceive purchasers.

2. Directly or indirectly selling or causing to be sold, offering for sale or advertising fountain pens of other manufacture than that of your orator representing the same to be of your orator's manufacture.

3. Using in connection with the business of making or selling fountain pens on such fountain pens, whether on the gold pen

or any part of the fountain pen, or on labels, signs, letterheads, billheads, circulars, prints, advertisements, boxes, packages, receptacles, wrappers or in any manner whatsoever, the word "Waterman," "Waterman's," "Waterman Pen," "Waterman's Pen," "Waterman Ideal Pen," "Waterman's Ideal Pen," "Waterman Ideal Fountain Pen," "Waterman's Ideal Fountain Pen," "Waterman's Ideal Fountain Pen, N. Y.," or the word "Waterman's," "Waterman" alone, or the word "Waterman" or "Waterman's," or any imitation or simulation thereof (whether the same be or be not coupled with other names or initials) in collocation with the word "pen" or "fountain pen" (whether the same be or be not coupled with some further descriptive word or words), or the name "Waterman" in any form, or any name in imitation or simulation thereof, as to indicate that the fountain pens so made or sold are a variety of "Waterman's Pens," or "Waterman Fountain Pens," or "Waterman's Ideal Fountain Pens, N. Y.," made by your orator. 5101 5102

That the said defendant may be decreed to deliver up any and all fountain pens, labels, signs, prints, packages, wrappers or receptacles in the possession of the defendant bearing the trade-mark of your orator or any reproduction, counterfeit, copy or colorable imitation thereof and that this Honorable Court may order the same destroyed.

That the said defendant may be decreed to render a full, true and perfect account and to pay unto your orator all the profits obtained by it by reason of its aforesaid wrongful acts and the damages thereby suffered by your orator including the damages sustained by your orator by its loss of trade and also the damages done to the good name and good will of your orator's said business and to the reputation of its said "Waterman's Pens," or "Waterman Fountain Pens," or "Waterman's Ideal Fountain Pen, N. Y.," including three times the amount of the actual damages suffered by your orator on account of the use by the defendant in connection with the sale of fountain pens of any reproduction, counterfeit, copy or colorable imitation of your orator's said trade-mark, and also the costs of this suit. 5103

That your orator may have such other and further relief as to this Honorable Court may seem meet, equitable and just.

5104 May it please your Honors to grant unto your orators a writ of injunction, as well provisional as perpetual, issuing out of and under the seal of this Honorable Court, commanding, enjoining and restraining the said defendant, Standard Drug Company, its servants, agents, attorneys and workmen and each and every one of them, as is hereinbefore in that behalf prayed.

May it please your Honors to grant unto your orator the writ of subpoena issuing out of and under the seal of this Honorable Court, directed to the said defendant, Standard Drug Company, commanding it on a certain day and under a certain penalty to be and appear in this Honorable Court then and there to answer the premises and to stand to and abide such order and decree as may be made against him.

And your orator will every pray, etc.

5105 Dated, New York, October 9th, 1909.

L. E. WATERMAN COMPANY,
By Frank D. Waterman,
President.

Watson & Raymond,
Solicitors for Complainant,
No. 10 Wall Street,
New York City, New York.
Samuel S. Watson,
Of Counsel.

State of New York,
City and County of New York, } ss.:
5106 Southern District of New York,

Frank D. Waterman, being duly sworn, deposes and says: That he is the President of the complainant herein; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the said complainant is a corporation and the reason why this application is not made by the complainant is because of that fact. That deponent's knowledge and the grounds for his information and belief are derived from his participation

in the management of the business of said complainant as its President. 5107

FRANK D. WATERMAN.

Sworn to before me this
9th day of October, 1909.
Victor C. Cormier,
Notary Public,
New York County.
(Notarial Seal.)

Defendant's Exhibit A-29.

The United States of America, }
Northern District of Ohio, } ss.: 5108
Eastern Division, }

At a stated term of the Circuit Court of the United States, within and for the Eastern Division of the Northern District of Ohio, begun and held at the City of Cleveland, in said District, on the first Tuesday in October, being the 5th day of said month, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States of America, the one hundred and thirty-fourth, to wit: on Tuesday, the 14th day of December, A. D. 1909.

Present: Honorable Robert W. Tayler,
United States District Judge. 5109

Among the proceedings then and there had were the following, to wit:

5110 UNITED STATES CIRCUIT COURT,

IN AND FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF OHIO.

In Equity.

L. E. WATERMAN COMPANY, Complainant, against STANDARD DRUG COMPANY, Defendant.	No. 7898.

5111 A motion for a writ of permanent injunction this day by consent coming on to be heard upon the bill of complaint, the affidavits in support of said motion, and the exhibits attached and filed therewith, after hearing Samuel S. Watson, Esq., of counsel for the complainant, and Thomas H. Bushnell, Esq., of counsel for the defendant, and after due consideration and deliberation had, it is

ORDERED, ADJUDGED AND DECREED, that a writ of permanent injunction issue enjoining the defendant, Standard Drug Company, a corporation under the laws of the State of Ohio, its officers, agents, servants, employees and all persons taking or holding, under, from or through it from:

5112 (1) Infringing the complainant's trade-mark "Waterman's Ideal Fountain Pen, N. Y.," and infringing the complainant's trade-mark "Waterman's," and from manufacturing or selling fountain pens (other than fountain pens of complainant's manufacture) having the said trade-marks, or either of them on such fountain pens whether on the holder or on the gold pen, or on labels, boxes, signs, letterheads, bill-heads, circulars or advertisements, accompanying or used in connection with the making or selling of such fountain pens, or in any manner whatsoever;

(2) Using in connection with the business of making or selling fountain pens, (other than fountain pens of complainant's manufacture), whether on the holder or on the gold pen or on labels, boxes, signs, letterheads, billheads, circulars or advertisements or in any manner whatsoever, the word "Waterman," "Waterman's" or "Waterman's" alone, or the word "Waterman," "Waterman's" or "Watermans's" whether the same be or be not coupled with the initials "A. A.," or whether or not the same be or be not used in collocation with the word "pen" or "fountain pen"; 5113

(3) Using the name "A. A. Waterman & Co.," or any corporate name containing the word "Waterman," or "Waterman's" or "Watermans's" in connection with the manufacture or sale of fountain pens, unless accompanied by words which conspicuously, clearly and unmistakably distinguish such corporate name from that of the complainant; 5114

(4) Selling, representing or advertising in any manner whatsoever fountain pens (other than fountain pens of complainant's manufacture) as "Waterman Pens," "Waterman's Pens," "Waterman Fountain Pens," "Waterman's Fountain Pens," "Watermans's Fountain Pens," or using any other word which would indicate that the fountain pen so sold, represented or advertised are fountain pens of complainant's manufacture.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the complainant recover its costs to be taxed by the clerk.

TAYLER, 5115
United States District Judge.

The United States of America, ss.:

I, Irvin Belford, Clerk of the Circuit Court of the United States, within and for the Northern District of the State of Ohio, do hereby certify that I have compared the within and foregoing transcript with the original Order entered upon the Journal of the proceedings of said Court in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

5116 Witness, my official signature and the seal of said Court, at Cleveland, in said District, this 14th day of December, A. D. 1909, and in the 134th year of the Independence of the United States of America.

IRVING BELFORD,
Clerk.
By R. C. Dean,
Deputy Clerk.

(Seal.)

Defendant's Exhibit A-30.

5117 To all Whom it May Concern:

Notice is hereby given, that infringement of our trademarks and trade names is enjoined by the United States Circuit Court as appears from the injunction, a copy of which is hereby served upon you. All persons found indulging in unfair trade practices in violation of the terms of the injunction will be vigorously proceeded against.

L. E. WATERMAN CO.,
173 Broadway,
New York, N. Y.

Watson & Raymond, Attorneys,
10 Wall Street,
5118 New York, N. Y.

Defendant's Exhibit A-31.

State of New York, } ss.:
County of New York, }

Isaac E. Chapman and William L. Chapman do hereby certify that they are conducting or transacting the business of manufacturing and selling fountain pens and the parts thereof, and other articles, at #22 Thames Street, in the County of New

York and State of New York, its principal place of business, under the name of 5119

A. A. WATERMAN & CO.

and that the true or real full names of the persons conducting or transaction such business with the post-office addresses of said persons are as follows:

Name	Residence & Post Office Address
Isaac E. Chapman,	4 Tennis Court, Brooklyn, N. Y.
William L. Chapman,	289 Hancock St., Brooklyn, N. Y.

Said firm of A. A. Waterman & Co. has business relations with foreign countries and has transacted business in this State for more than three years; said firm formerly consisted of Arthur A. Waterman, Isaac E. Chapman and William L. Chapman; said Arthur A. Waterman has retired therefrom, and said business is continued under the firm name of A. A. Waterman & Co. under the terms of their written contract, and the same business is now conducted at the same place, under the same name, by the said Isaac E. Chapman and William L. Chapman, as sole partners therein. 5120

Dated, New York City, February 4th, 1910.

ISAAC E. CHAPMAN.
WM. L. CHAPMAN.

County of New York, ss.:

On this 4th day of February, 1910, before me personally came Isaac E. Chapman and William L. Chapman, to me known, and known to me to be the individuals described in and who executed the foregoing certificate, and they duly severally acknowledged to me that they executed the same. 5121

V. M. TURNER,
Notary Public,
New York County.

5122 **Defendant's Exhibit A-85.**

L. E. WATERMAN COMPANY

Limited,

136 St. James St., Montreal.

Montreal, January 13th, 1910.

Mr. Arthur J. Ryan,
Frederickton, N. B.

Dear Sir:

5123 We have received through our Clipping Bureau, a copy of your advertisement reading "A Fountain Pen Snap. All guaranteed. Selling at $1.00, $1.25 and $1.50. Waterman's Self Filling Pens for $2.00 to $5.00. Everybody knows this pen. Ink Pencils at $1.00. (Signed) Central Pharmacy, Arthur J. Ryan."

To advertise any other fountain pens than those stamped "Waterman's Ideal Fountain Pen," as a Waterman, is a violation of our trade-marks and patent rights, and we are fully protected under Canadian Patents and Trade-marks, and so that you may better understand our position, we are enclosing herewith a copy of a recent decision referring to the trade-marks of our pens.

Possibly you have been misled in the purchasing of a stock of pens, as those of ours, and before referring the matter to

5124 our attorneys, we thought it best to write you, and await your reply.

Yours very truly,
L. E. WATERMAN COMPANY, Limited.

Defendant's Exhibit A-36.

5125

New York, N. Y., February 1st, 1910.

M. 1083

Mr. George M. Hammell,
Walnut Hills,
Cincinnati, Ohio.

Dear Sir:

We are in receipt of your letter of Jan. 27th, addressed to A. A. Waterman & Co., New York and wish to inform you that as there is no such concern in New York City, your letter was delivered to us and as your fountain pen is not manufactured by us, we would suggest your writing to the Modern Pen Co., 22 5126
Thames St., New York City, who are the selling agents for this fountain pen.

Trusting the above information will be of assistance to you, we remain

Yours very truly,

L. E. WATERMAN CO.

W. R.

Defendant's Exhibit A-37.

BANK NOTE DEPARTMENT 5127

F. C. DUNEMACHER PRESS

Louisville, Ky.

June 22nd, 1910.

A. A. Waterman Co.,
New York City.

Gentlemen:

Under date of June 16th, I sent you letter as per the enclosed carbon. Today I received the enclosed letter and the pen re-

5128 ferred to returned by the L. E. Waterman Pen Co. I am not interested in a Waterman Ideal. I cannot understand how L. E. Waterman should have received your letter which very plainly was addressed to you and why they should have opened it and not delivered it to you for answer but have taken the liberty to write me and return the pen when you are both located in New York City. I do not feel that this shows business courtesy and I realize that I am a very small frog in a great big pond but this action on the part of the L. E. Waterman Co. would be enough for me not to desire any of their goods.

Please advise me as to my letter of the 16th and greatly oblige.

Yours very truly,
C. H. DUNGAN

5129 M

(Stamped): Modern Pen Co., Received June 25 1910.
7-8-9-10-11-12 1-2-3-4-5-6

Defendant's Exhibit A-38.

June 25, 1910.

Mr. C. H. Dungan,
Louisville, Ky.

Dear Sir:

5130 Your letter of the 22nd inst. with enclosure and pen received and we are indeed sorry that you have had so much trouble on account of this pen going astray. Since the pen left our place a different make of gold pen was put in the holder and we presume this was done by the L. E. Waterman & Co. We therefore send you an entirely new pen in place of same and trust this one will prove to be satisfactory to you, if not please let us know and we will be pleased to send you one-half dozen pens to select from so that you will be able to get a pen that suits your hand.

Yours truly,
MODERN PEN CO.
Hobart W. Geyer,
Asst. Treas.

Defendant's Exhibit A-39.

5131

Ideals		Modern Self-filling.	Modern Middle Joint
No. 12	$2.50 match our	No. 30 $2.50	No. 32 $2.50
No. 13	$3.50 " "	No. 40 $3.00	No. 42 $3.00
No. 14	$4.00 " "	No. 50 $3.50	No. 52 $3.50
No. 15	$5.00 " "	No. 60 $4.00	No. 62 $4.00
No. 16	$6.00 " "	No. 70 $5.00	No. 72 $5.00
No. 17	$7.00 " "	No. 80 $6.00	No. 82 $6.00
No. 18	$8.00 " "		

Discount to the Trade.

5132

L. E. Waterman Co.	A. A. Waterman & Co.
Less than 12 pens 33-1/3%	1 to 35 pens 40%
12 or over 40%	36 to 71 " 40% and 5%
Rebate on quantities,	72 to 143 " 40% and 10%
	144 or more 50%

Ideals		A. A. W. & Co. End Joint Line
No. 12	$2.50 matches our	No. 303 $1.50
No. 13	$3.50 " "	
No. 14	$4.00 " "	No. 503 $2.00
No. 15	$5.00 " "	No. 603 $2.50
No. 16	$6.00	No. 703 $3.00
No. 17	$7.00	No. 803 $3.50
No. 18	$8.00	

5133

Discount to the Trade.

Less than 12 pens 33-1/3%	50% on any quantity
12 or over 40%	
Rebate on quantities	

Defendant's Exhibit A-40.

5134

A. C. TUCKER,

JEWELER AND OPTICIAN.

Watches, Clocks and Jewerly.

27 South Avenue.

Fine Watch, Clock and Jewelry Repairing.

Whitman, Mass., April 4, 1910.

D. C. Percival & Co.,
373 Washington St.,
5135 Boston, Mass.

Dear Sirs:

In reply to yours of April 1st, I would say that I made no statement to Mr. Chaplin that you were selling me the A. A. Waterman pen and representing them to be Ideal goods. Also, no Salesman has misrepresented the goods in any way.

Yours truly,
AMERSEE C. TUCKER.

Defendant's Exhibit A-41.

5136

CONSENT TO SALE OF THE ASSETS

FRAZER & GEYER COMPANY

To the Reorganization Committee

The undersigned, owners of the respective common, first preferred and second preferred stock of the Frazer & Geyer Company, set opposite their names, hereby consent that all of the assets, property, rights, privileges, patents and franchises of said Company be sold to the Modern Pen Company, or new company with some similar name, upon the terms and conditions following:

Whereas, the assets and liabilities of the Frazer & Geyer Company, as shown by the Company's books on April 1, 1905 (except good will and capital stock), are as follows: 5137

ASSETS

Cash	$566.93
Machinery	15,569.27
Patents	15,455.34
Royalty	4,364.49
Insurance	255.00
Accounts Receivable	60,161.45
Merchandise	17,791.62
	$114,134.10 5138

LIABILITIES

Notes Payable	$41,620.67
Accounts Payable	3,864.58
	$45,485.25

The said new Company shall pay over to the Frazer & Geyer Company, in consideration of said assets and the good will of the Company, and $18,500 in cash, or such other sum as the Committee on Reorganization may fix, 1255 shares of the capital stock of said new Company, and said new Company is to assume 5139 the liabilities of the Frazer & Geyer Company above set forth (and without prejudice to the chattel mortgages now covering said assets);

And the undersigned agree to pay over to said new Company the sum of $15 for each share of stock in the Frazer & Geyer Company now owned by him, or as much thereof as he or she wishes to protect.

It being understood that immediately upon said stock of said new Company being delivered to said Frazer & Geyer Company, it shall be distributed to the undersigned, one share of the common stock of the new Company for each share of either

5140 common, first preferred or second preferred stock of the Frazer & Geyer Company, and that the Frazer & Geyer Company shall thereafter be dissolved.

This consent and agreement is to be binding upon each subscriber thereto severally but not jointly.

Dated New York, April 26, 1905.

NAME	NUMBER OF SHARES		
	Common	First Preferred	Second Preferred

5141

Defendant's Exhibit A-42.

STATEMENT.

All bills not paid at maturity are subject to sight draft without notice.

New York, Apr 11 1911

Mr. Chas. E. Trory,
Crestline, Ohio.

(Cut)

5142

22 Thames Street—125 Greenwich Street.

1905.			
Oct. 26	To Mdse		7 50
Dec. 21	" "		10 50
1906			
Apr. 10	"	Repair	36
May 14	"	"	15
July 31	"	"	55
Aug. 16	"	Mdse	12 90

1907						
Jan.	26	"	Repair			5143
				35	32 31	

CREDITS.

1905						
Nov.	23	By	Check & Disc.	7 50		
Dec.	29	"	" " "	10 50		
1906						
May	11	"	"	36		
June	7	"	"	15		
Aug.	26	"	"	55		
	25	"	"	12 64		5144
	25	"	" Disc	26		
1907						
Feb.	28	"	Credit, allowance	35	32 31	

5145

Defendant's Exhibit A-43.

1716

5146

LINCOLN FOUNTAIN PENS

(STYLE: LOWER JOINT.)

MADE BY **A. A. WATERMAN & CO.** NEW YORK.

SOLE SELLING AGENT, **MODERN PEN CO.** 22 THAMES ST., NEW YORK, U. S. A.

These Pens Are of REMARKABLE Value. Compare OUR Prices With Those of EQUALLY HIGH-CLASS PENS of OTHER Makes.

OPTIONS. { No. 103 PLAIN BLACK / No. 103 MOTTLED / No. 103 CHASED BLACK } ILLUSTRATION EXACT SIZE. SIZE OF GOLD PEN No. 1—14 KARAT. } LIST PRICE **$1.00**

OPTIONS. { No. 303 PLAIN BLACK / No. 303 MOTTLED / No. 303 CHASED BLACK } ILLUSTRATION EXACT SIZE. SIZE OF GOLD PEN No. 3—14 KARAT. } LIST PRICE **$1.50**

OPTIONS. { No. 503 PLAIN BLACK / No. 503 MOTTLED / No. 503 CHASED BLACK } ILLUSTRATION EXACT SIZE. SIZE OF GOLD PEN No. 5—14 KARAT. } LIST PRICE **$2.00**

Defendant's Exhibit A-44.

5149

In the year of Nineteen hundred and ten and on the 2nd day of July in Milan,

At the instance of the L. E. Waterman Company of New York, in the person of its President Franz Waterman, who for the purpose of bringing the present proceedings elects Milan as his domicile, at the address of his lawyer Mr. Rodolfo Maroni, who will represent him in this suit.

I, the undersigned Judicial Officer of the Civil and Criminal Courts of Milan have summoned Mr. Guido Cabrini, resident of Milan, to appear before the Court of this town at the session which will be held at 11 o'clock A. M. on the 9th of this month, to answer in *re*: the Waterman Company known in the whole world as the first 5150
manufacturers of the stylographic pens known under the name of "Waterman Pens," having likewise registered this name which is the family name of the founder of the said firm and of the respective Industry.

For some time a certain Guido Cabrini, who calls himself the General Agent for Italy and Europe, of a firm of A. A. Waterman & Co., of New York, has put a very loud and showy advertisement on the fourth page of certain periodicals together with the picture of a pen bearing also the name of WATERMAN with the additional name "MODERN."

This action on the part of Mr. Cabrini infringes and injures all the rights in the premises of the plaintiff, viz: the above named company, because the name of WATERMAN be it as a 5151
family name or be it as a commercial name, or be it as a trademark, of the product of the complaining company, cannot be used by any competitors of said Company.

Furthermore, this name used by anybody but the complaining company constitutes a fraud and deception in business inasmuch as the said Cabrini by means of his advertisements makes the Public believe that the stylographic pen which he is selling is a more recent (modern) product of the already well known pen Waterman, made by the renowned New York firm of that name, and furthermore because no such firm as A. A. Waterman exists

5152 in New York which could be represented by Cabrini in Italy and in Europe.

Now therefore in view of the illegitimate use which the said Cabrini is making of the name of WATERMAN for the sake of competition and also for the sake of advertising.

And whilst the complaining Company reserves for itself the right to start also criminal proceedings against Cabrini as well as the numerous agents which he has appointed under the easy attraction of the usurped name, it asks the ILLUSTROUS COURT to reject any contradiction, exception and deduction, and to declare that it neither was nor is permitted to the said G. Cabrini to sell any stylographic pens under the name of Waterman, or to make use of that name and this commercial denomination as a trade-mark to designate the product of his busi-

5153 ness,

That it neither was or is permitted the said G. Cabrini for the sake of advertising or for any other reason to make use of the name of the "FIRM OF A. A. WATERMAN NEW YORK or WATERMAN—NEW YORK that being a false designation of a *firm which does not exist*, and consequently,

To order the seizure of all Stylographic pens bearing the name of A. A. WATERMAN NEW YORK or WATERMAN NEW YORK, whenever and wherever they should be located and found.

To condemn the said G. Cabrini to pay the damages sustained, by provisionally executive sentence.

Copy signed by me of this act left with Mr. G. Cabrini at his

5154 residence in Milan via Metastasio No. 3 and in his own hands. Modern Pen Co. Signed: Ranzi, Judicial Officer. July 12th.

Defendant's Exhibit A-50.

5155

April 29, 1908.

L. E. Waterman Co.,
173 Broadway,
New York City.

Gentlemen:

I have been directed by my client, the Modern Pen Company, to bring an action against you for an infringement of their patents Nos. 523, 234 and 551, 895, in the manufacture of what you call a "safety fountain pen" as advertised in the "Cosmopolitan."

I presume that you have not yet manufactured many of these infringing pens and I call your attention to the matter of infringement presuming that it was inadvertent, and that you will discontinue such manufacture. 5156

Asking for an acknowledgment of this letter and a statement of your purposes in this matter, I remain

Yours very truly,

ALEXANDER S. BACON.

Defendant's Exhibit A-51.

April 30, 1908.

Mr. Alexander S. Bacon,
37-39 Liberty St.,
New York. 5157

Dear Sir:

We have your letter of April 29th regarding alleged infringement of two patents. We have called up our attorney but find he is out of the city. We will refer the matter to him as soon as he returns, and give you a further answer.

We beg to say that we had no idea of infringing anybody's rights, and if our attorney advises us that we are infringing we will immediately discontinue the same.

Yours truly,

L. E. WATERMAN COMPANY.

Defendant's Exhibit A-55.

5158

May 19, 1908.

L. E. Waterman Co.,
Broadway & Cortland Street,
New York City.

Gentlemen:

I have not been favored with the promised further reply to my recent letter, calling your attention to certain infringements of patents owned by the Modern Pen Company.

Since the receipt of your letter promising to examine into the matter and advise me further, I notice that your advertisements
5159 have continued, and my client advises me further that you are infringing their patent Nos. 719,529 on "sleeve" type of Self-filler.

They also advise me that you are apparently infringing their patent 700,909.

Will you kindly give me at once the result of your examination in the matter, as I am instructed to bring suit.

Yours very truly,
ALEXANDER S. BACON.

Defendant's Exhibit A-56.

5160

May 21, 1908.

Mr. Alexander S. Bacon,
37 Liberty St.,
New York.

Dear Sir:

We have your letter of May 19, 1908, and in reply to it and your letter of April 29, 1908, we beg to say that relying upon the representations made by Mr. William L. Chapman whom we understood to be an officer of the Modern Pen Company, your client, that Mr. Chapman and his brothers had the control of

the Modern Pen Company and that terms of sale of all its assets acceptable to him and those associated with him had been arranged, and that formal corporate authorization of such sale was the only thing remaining to be done before it would be consummated *and relying on the fact that our Company would become a licensee under the patents transferred by the sale referred to, this Company began the manufacture of a safety fountain pen which is the one of which we assume you complain.* These negotiations of sale were still pending at the time we received your letter of April 29, 1908. We have since been informed that the proposed sale has failed because Mr. William L. Chapman and his associates did not have the control of the Modern Pen Company. As soon as we learned that these negotiations of sale had been broken off, we forthwith entirely discontinued the manufacture and sale of the safety fountain pen as then constructed and of which we assume you complain. Of the safety fountain pens of which we assume you complain only a few have been sold, probably less than a dozen. 5161 5162

By stopping the above mentioned action we do not wish it to be understood that we recognize the validity of the United States patents Nos. 523,234, 551,895 or 700,909, inasmuch as our attorneys advise us that all of these patents are, in their opinion, invalid because of prior existing patents and prior use of the structures shown and claimed in them. We are taking the course above indicated merely to avoid litigation and the trouble and expense incident thereto, as we feel we can devote our time to better advantage in attending to the immediate business of this Company than in litigation.

We are now using for our safety fountain pen a construction or structure which our predecessors in business used more than twenty years ago and which has been commonly and continuously used for pencils and fountain pens since 1852 and of which we assume you claim no monopoly. If you desire, we would be pleased to submit to you a sample of the safety fountain pen as we are now making and selling the same. We wish to repeat that we have entirely discontinued making and selling fountain pens of the structure of which we assume you complain, and that we do this merely to avoid litigation and not because we recognize the validity of the patents you claim to be infringed or 5163

5164 that the pen as made by us did actually infringe any of these patents.

Regarding patent No. 719,529, referred to in your letter of May 19, 1908, we are at an entire loss to know what style of pen made by us you can conceive infringes this patent. We make a number of styles of fountain pens; we have gone over all of them carefully and fail to discover any pen which in our opinion comes anywhere near infringing patent No. 719,529. If you will indicate to us what style of pen made by us you think infringes this patent, we will be glad to give the matter further consideration.

Yours truly,

L. E. WATERMAN CO.,

(Signed) F. D. Waterman, Treas.

5165

Defendant's Exhibit A-57.

May 26, 1908.

L. E. Waterman Co.,
173 Broadway,
New York City.

Gentlemen:

Your favor of the 21inst. was duly received, stating that you have discontinued the manufacture of any pen that you think
5166 in any way infringes the patents of the Modern Pen Company, and also stating that "if you desire we will be pleased to submit to you a sample of the safety fountain pen as we are now making and selling the same."

We appreciate the politeness of your letter, and would esteem the favor if you would submit sample.

Yours very truly,

ALEXANDER S. BACON.

Defendant's Exhibit A-45.

5167

March 5, 1908.

Mr. Samuel S. Watson,
c/o Watson & Raymond,
10 Wall St., City.

Dear Sir:

I beg to advise you that Mr. W. L. Chapman has been confined to his house, on account of illness, all this week and directed me to write you and state that he has made a thorough search for the copy of contract which you drew up for the Modern Pen Co. to buy out the Modern Pen Co., but has been unable to find same. Mr. Williams has also made a search for this contract, but cannot find it.

5168

Mr. Chapman would like to have you furnish him with another copy of this contract, so that he may take up this matter without further delay.

Yours very truly,

ROBERT ELLIOTT.

Defendant's Exhibit A-46.

New York, March 7, 1908.

W. L. Chapman, Esq.,
17 Battery Place,
New York City, N. Y.

Dear Sir:

5169

Upon my return this morning from a week's absence, I have your letter of March 5th, and regret to hear that you have been ill, but hope you are better and will soon be alright again.

I enclose you *office draft* of the contract, Modern Pen Company with Modern Pen Company which I made some time ago. I can quickly redraft this as soon as the points now under discussion have been determined. Will you kindly return the enclosed draft when you have finished with it as it is the only copy we have in the office.

Very truly yours,

SAMUEL S. WATSON.

SSW/LS

5170 **Defendant's Exhibit A-47.**

March 19, 1908.

Mr. Samuel S. Watson,
10 Wall St., City.

Dear Sir:

I return herewith your draft of proposed contract. I have made a copy of your form for our use.

As I explained over the telephone, I am unable to go further in this deal until the return of my brother, who is now in Bermuda.

Yours very truly,
WM. L. CHAPMAN.

5171 WLE/RE

Defendant's Exhibit A-58.

Know all men by these presents that we, the undersigned, to wit: the Modern Pen Company, a corporation under the laws of West Virginia, Frazier & Geyer Company, a corporation under the laws of the State of New York, and A. A. Waterman & Co., a corpartnership, composed of Isaac E. Chapman and William L. Chapman, with principal place of business at No. 27 Thames
5172 Street, in the City, County and State of New York, parties of the first part, in consideration of the sum of Twenty-five thousand ($25,000) Dollars, to be paid to the parties of the first part by Aiken-Lambert Company, a corporation duly organized and now existing under the laws of the State of New York, party of the second part, the same to be paid Fve thousand dollars ($5,000) on the first day of February, 1908, Five thousand Dollars ($5,000) on the first day of March, 1908, Five thousand dollars ($5,000) on the first day of April, 1908, Five thousand dollars ($5,000) on the first day of June, 1908, and Five thousand dollars ($5,000) on the first day of August, 1908, have bargained, sold, granted, conveyed and transferred, and by these presents do hereby bargain, sell, grant, convey and transfer to the

said party of the second part, its successors and assigns, all office furniture, tools, machinery, equipment, fixtures, appurtenances, etc., of the office, pen shop and rubber shop of the parties of the first part, or either or any of them, contained in their offices, and shops at No. 27 Thames Street, in the City and State of New York, or elsewhere, of which a partial schedule is hereunto annexed; also all notes, Letters Patent and patent rights belonging to the said parties of the first part, of which a partial schedule is hereunto annexed; also all show cases and signs now belonging to the parties of the first part wherever the same may be situate, together with all rights thereto and therein belonging to the parties of the first part, or either or any of them; also *the name and good will* of the said Modern Pen Company, of said Frazier & Geyer Company and of *the firm name and good will of said A. A. Waterman & Co.*, and *all trade-marks and trade names of the parties* of the first part, or either or any of them, together with the exclusive right to use the said corporate names, said firm name, said trade-marks and said trade names, or either or all of them to the full extent as the said parties of the first part, or either or any of them, could or might use the same had this grant, sale and assignment not been made; also all advertising matter, stationery, books, files, records, etc., of the parties of the first part, or either or any of them; it being the purpose and intent of the parties of the first part by this instrument to bargain, sell, grant, convey and transfer to the said party, of the second part, its successors and assigns, all of the assets and property of every kind and nature of the said parties of the first part, and each and all of them, wherever the same may be situated, whether now owned by the said parties of the first part, or either or any of them, or hereafter acquired by them, or either or all of them, prior to February 1st, 1908, except the following which are expressly reserved to the parties of the first part, to wit: all cash on hand, all merchandise accounts receivable, all gold pens and parts, all fountain pens and parts whether the same are finished or in process of manufacture, all raw material now in hand or hereafter provided for the manufacture of gold pens, fountain pens or appurtenances thereto, all fountain pen boxes, clips and ink in hand or which may hereafter be provided to carry on the business of the parties of

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the first part, as herein set forth, up to the first day of February, 1908;

To have and to hold the same unto the said party of the second part, its successors and assigns forever, and the parties of the first part hereby covenant and agree with the said party of the second part to *warrant and defend* the said described property, trade-marks and trade names hereby sold unto the said party of the second part, its successors and assigns, against all and every person, firm, corporation or association whatsoever, and the parties of the first part and each of them further covenant and agree not to engage in the manufacture or sale of gold pens or fountain pens, appurtenances thereto or parts thereof, in any part of the world, either directly or in association, connection or conjunction with any other person, persons, firm, association or corporation, or through or by holding any interest whatsoever, either directly or indirectly, in any concern, firm, association or corporation engaged in the making or selling of gold pens or fountain pens, appurtenances thereto or parts thereof, on and after the first day of February, 1908, provided and excepted only that the parties of the first part shall be free to sell such gold pens and fountain pens, appurtenances thereto or parts thereof, which they or either of them may *have on hand* on the first day of February, 1908, it being agreed and understood that such gold pens and fountain pens, appurtenances thereto or parts thereof, which the parties of the first part may have on hand on the first day of February, 1908, *shall be sold or disposed of* prior to the first day of April, 1908, and that on and after April 1, 1908, the parties of the first part, or either of them, shall cease absolutely, both directly and indirectly, as hereinbefore set forth, to engage in the manufacture or sale of gold pens or fountain pens, appurtenances thereto or parts thereof; it being understood and agreed, however, that such books, files, and records of the parties of the first part, or either of them, may be required by them in closing up and collecting the merchandise accounts receivable may be used for such purpose by the parties of the first part pending the settlement and collection of said accounts.

It is further covenanted and agreed by the parties of the first part and each of them that the said described goods hereby sold,

together with the names, good will, trade-marks and trade names of the said parties of the first part shall be turned over and delivered to the party of the second part on the first day of February, 1908, free and clear of all liens, claims or encumbrances whatsoever, and the said parties of the first part and each of them hereby covenant and agree to make such further and additional assignments or conveyances as may be necessary or proper to complete the absolute sale, transfer and delivery of said described property, names, trade-marks and trade names hereby sold to the party of the second part, including all necessary and proper assignments properly and duly acknowledged of each and all of said Letters Patent and patent rights, the same to be executed by the said parties of the first part, or either or all of them, to complete the absolute assignment of all of said Letters Patent and patent rights to the party of the second part. 5179 5180

It is further hereby agreed and understood by and between the parties hereto that the net amount of said notes hereby assigned and sold which may be collected by or for the account of the party of the second part, its successors and assigns shall be turned over and paid to said

In witness whereof all the parties hereto have hereunto set their hands and seals this day of December, 1907.

Defendant's Exhibit A-59.

5181

KNOW ALL MEN BY THESE PRESENTS that we, the undersigned, to wit: The Modern Pen Company, a corporation under the laws of West Virginia, Frazier & Geyer Company, a corporation under the laws of the State of New York, and A. A. Waterman & Co., a copartnership, composed of Isaac E. Chapman and William L. Chapman, with principal place of business at No. 27 Thames Street, in the City, County and State of New York, parties of the first part, in consideration of the sum of Twenty-five Thousand, ($25,000.00) Dollars, to be paid to the parties of the first part by *Modern Pen Company, a corporation incor-*

5182 *porated and organized under the laws of the State of New York*, party of the second part, the same to be paid Five Thousand Dollars ($5,000.00) on the first day of February, 1908, Five Thousand Dollars ($5,000.00) on the first day of March, 1908, Five Thousand Dollars ($5,000.00) on the first day of April, 1908, Five Thousand Dollars ($5,000.00) on the first day of June, 1908, and Five Thousand Dollars ($5,000.00) on the first day of August, 1908, have bargained, sold, granted, conveyed and transferred, and by these presents do hereby bargain, sell, grant, convey and transfer to the said party of the second part, its successors and assigns all office furniture, tools, machinery, equipment, fixtures, appurtenances, etc., of the office, pen shop and rubber shop of the parties of the first part, or either or any of them, contained in their offices and shops at No.
5183 27 Thames Street, in the City and State of New York, or elsewhere, of which a partial schedule is hereunto annexed; also all notes, Letters Patent and patent rights belonging to the said parties of the first part, of which a partial schedule is hereunto annexed; also all show cases and signs now belonging to the parties of the first part wherever the same may be situated, together with all rights thereto and therein belonging to the parties of the first part, or either, or any of them; *also the name and good will of* the said Modern Pen Company, of said Frazier & Geyer Company, *and of the firm name and good will of said A. A. Waterman & Co.*, and all trade-marks and trade names of the parties of the first part, or either or any of them, together with the exclusive right to use the said corporate names, said firm name,
5184 said trade-marks and said trade names, or either or all of them, to the full extent as the said parties of the first part, or either or any of them could or might use the same had this grant, sale and assignment not been made: also all advertising matter, stationery, books, files, records, etc., of the parties of the first part, or either or any of them: it being the purpose and intent of the parties of the first part by this instrument to bargain, sell, grant, convey and transfer to the said party of the second part, its successors and assigns, all of the assets and property of every kind and nature of the said parties of the first part, and each and all of them, wherever the same may be situated, whether now owned by the said parties of the first part, or either or any of

them, or hereafter acquired by them or either or any of them prior to February 1, 1898, except the following which are expressly reserved to the parties of the first part, to wit: All cash on hand, all merchandise accounts receivable, all gold pens and parts, all fountain pens and parts whether the same are finished or in process of manufacture, all raw material now in hand or hereafter provided for the manufacture of gold pens, fountain pens or appurtenances thereto, all fountain pen boxes, clips and ink now in hand or which may hereafter be provided to carry on the business of the parties of the first part, as herein set forth, up to the first day of February, 1908; 5185

TO HAVE AND TO HOLD the same unto the said party of the second part, its successors and assigns forever, *and the parties of the first part hereby covenant and agree to and with the said party of the second part that they are the owners of the above described property, trade-marks and trade names and have good right to sell the same and that they and each of them will warrant and defend the same free and clear of all claims, liens or encumbrances of every kind whatsoever,* unto the said party of the second part, its successors and assigns, and against all and every person, firm, corporation or association whatsoever, and the parties of the first part and each of them further covenant and agree not to engage in the manufacture or sale of gold pens or fountain pens, appurtenances thereto or parts thereof, in any part of the world, either directly or in association, connection or conjunction with any other person, persons, firm, association or corporation, or through or by holding any interest whatsoever, either directly or indirectly, in any concern, firm, association, or corporation engaged in the making or selling of gold pens or fountain pens, appurtenances thereto or parts thereof, on and after the first day of February, 1908, provided and excepted only that the parties of the first part shall be free to sell such gold pens and fountain pens, appurtenances thereto or parts thereof, which they or either of them may have on hand on the first day of February, 1908, it being agreed and understood that such gold pens and fountain pens, appurtenances thereto or parts thereof, which the parties of the first part may have on hand on the first day of February, 1908, shall be sold or disposed of prior to the first day of April, 1908, and that on and after April 1, 1908, the parties of the first 5186 5187

5188 part, and all and each of them shall cease absolutely both directly and indirectly, as hereinbefore set forth to engage in the manufacture or sale of gold pens or fountain pens, appurtenances thereto or parts thereof: it being understood and agreed, however, that such books, files and records of the parties of the first part, or either of them, as may be required by them in closing up and collecting the merchandise accounts receivable may be used for such purpose by the parties of the first part pending the settlement and collection of said accounts.

It is further covenanted and agreed by the parties of the first part and each of them that the said described goods hereby sold, together with the names, good will, trade-marks, and trade names of the said parties of the first part shall be turned over and
5189 delivered to the party of the second part on the first day of February, 1908, free and clear of all liens, claims or encumbrances whatsoever, and the said parties of the first part and each of them hereby covenant and agree to make such further and additional assignments or conveyances as may be necessary or proper to complete the absolute sale, transfer, and delivery of said described property, names, trade-marks and trade names hereby sold to the party of the second part, including all necessary and proper assignments properly and duly acknowledged of each and all of said Letters Patent and patent rights, the same to be executed by the said parties of the first part, or either or all of them to complete the absolute assignment of all of said Letters Patent and patent rights to the party of the second part, and the said parties of the first part covenant and warrant that no
5190 licenses or shop rights to operate or manufacture under said patents or any of them, have been given or granted by the parties of the first part or either or any of them, to any person, persons, firm, corporation or association whatsoever except as contained in a certain contract made with one Arthur A. Waterman and dated a copy of which contract is attached hereto, referred to and made a part hereof.

It is further hereby agreed by and between the parties hereto, that the net amount of said notes hereby assigned and sold (a schedule of which is hereto attached) which may be collected by or for the account of the party of the second part, its successors and assigns, shall be turned over and paid to said William L.

Chapman, as trustee, and the said party of the second part as a part of the consideration of this contract hereby covenants and agrees to institute and prosecute in good faith such legal proceedings as it may be advised by its counsel to be proper in the premises to enforce the collection and payment of said notes hereby assigned and sold, but such legal proceedings shall be wholly at the joint and several cost and expense of the said parties of the first part, provided however, the parties of the first part, or either of them, may institute and prosecute in their own names and at their own expense, such proper legal proceedings as may be necessary to enforce the collection and payment of said notes, and if the parties of the first part, or either or any of them within sixty (60) days after the date hereof, shall institute and continue to prosecute in good faith such proper legal proceedings to enforce the collection and payment of said notes, then and in that event, the party of the second part shall not be required under the terms of this contract to begin any legal proceedings to enforce the collection and payment of said notes but shall be wholly released from the obligations so to do. 5191 5192

IN WITNESS WHEREOF all the parties hereto have hereunto set their hands and seals this day of December, 1907.

Defendant's Exhibit A-48.

New York, March 28, 1908. 5193

Mr. Samuel S. Watson,
Watson & Raymond,
10 Wall Street,
New York City.

Dear Sir:

The Directors Meeting which I spoke of was held today and there was a strong opposition of the disposing of the pen business at so ridiculous a figure as we have been talking about. However, I succeeded in maintaining the amount of $25,000.00.

The question of the disposing of the merchandise and closing business on September 1st was voted down because they were not

5194 sure of being able to dispose of the merchandise to advantage by that time.

The best terms now, under present circumstances, that will be entertained will be to dispose of the plant and merchandise on May 1st, paying for the plant $25,000.00 and the merchandise, raw, in course of manufacture, finished and returned, at their cost.

Unless your folks are willing to purchase on these terms, it is useless to continue negotiations further.

The directors have given me until Tuesday evening to have this matter decided. Would you be good enough to advise me one way or the other by that time so that I may advise them promptly.

Very truly yours,

5195 WM. L. CHAPMAN.

FH/WLC.

Defendant's Exhibit A-49.

New York, March 30, 1908.

William L. Chapman, Esq.,
17 Battery Place,
New York, N. Y.

Dear Sir:

5196 We have your letter of March 28, 1908, and have submitted the same to the other parties who have instructed me to say that it is agreeable to them to call all negotiations off. The proposition you now present, as you know, has already been considered by the other parties and they do not wish to reconsider that proposition. As your associates have refused to authorize the proposition we have been discussing and as the other parties do not care to entertain the one now proposed by you, there seems nothing to do but to consider all negotiations off.

Yours truly,

WATSON & RAYMOND.

SSW/LS.

Defendant's Exhibit A-52.

5197

May 7, 1908.

Mr. Samuel S. Watson,
10 Wall Street, City.

Dear Sir:

I brought up the question of selling the Pen business at the Director's meeting yesterday afternoon and after a controversy over the matter, I can name you the following: $30,000 for the plant, patents &c., as per our previous negotiations, including the new plant purchased since the inventory. All merchandise on hand at its inventory cost, and merchandise returned from customers after contract is signed, at prices invoiced to said 5198
customers.

It is understood that you will assume the lease for the present premises occupied by the Company, which we have renewed for another year.

Yours truly,

WM. L. CHAPMAN.

Defendant's Exhibit A-53.

New York, May 8, 1908.

William L. Chapman, Esq., 5199
17 Battery Place,
New York, N. Y.

Dear Sir:

I have your letter of May 7, 1908, in re pen business. The proposition you present is impossible, as, of course, you must have known when it was presented.

You have repeatedly represented to me that you were in a position to consummate any proposition which met with your approval, and acting on the strength of your statements I have spent a great deal of time on this matter only to find when we did

5200 agree that you were unable to carry out the proposition. Therefore, I ask you to consider this incident finally closed.

Yours truly,

SAMUEL S. WATSON.

SSW/AL.

Defendant's Exhibit A-54.

17 Battery Place,
New York, May 11, 1908.

Samuel S. Watson, Esq.,
5201 10 Wall Street, City.

Dear Sir:

I acknowledge receipt of yours of the 8th inst.

I take exception to the last part of your letter in which you state that I represented I could consummate anything that met with my approval. I represented to you that between my brothers, myself and the friends we had interested, that we had the majority of the stock; and I would call your attention to the fact that we have never agreed upon any proposition, only the amount of consideration at the time it was made, and not on the other conditions.

I had this matter well in line and could have had the approval
5202 of our friends, *if you had been reasonable in the time for disposing of the product.* The negotiations pending so long, the Company found that they were obliged to increase their plant since inventory was made, consequently a request for an additional amount was perfectly in order.

Yours truly,

WM. L. CHAPMAN.

WLC/RE

Defendant's Exhibit A-60. Thirty-nine Letters of Commendation. 5203

Flat Rock, N. C., June 22nd, 1910.

A. A. Waterman Pen Company,
New York City.

Gentlemen:

Cannot find a firm in Hendersonville, N. C., that handles your pen, all have the L. E. or "Ideal." Bought one of them over a year ago, changed twice then exchanged with a party that had bought one of yours the Modern; found it the best pen I ever owned; lost it a few days ago, want another one. Please give me the best price for one by mail, also price of repairs for same. 5204

Yours truly,

(Signed) GRANT ARLEDGE.

PEARL STREET BAPTIST CHURCH,

Providence, R. I.

Rev. J. A. Hainer, Pastor,
Residence, 49 Arch Street.

July 21st, 1910.

The Modern Pen Company,

Gentlemen: 5205

Pen just received, and it is in fine shape. That was one on me in neglecting to sign the check. You see I had no pen. It is all right now, sorry to necessitate your returning it. I think you have the world beat on pens. I have used this constantly for seven or eight years.

Cordially,

(Signed) J. A. HAINER.

5206

43 Exchange Place,
New York, July 22nd, 1910.

Messrs. A. A. Waterman & Co.

Gentlemen:

I have used constantly for over three years two of your Modern Self-filling pens. I do a great deal of writing. Until my wife dropped one of them the other day, they have done splendid service. If they were sold for double the price of any fountain pen I have yet seen, I would purchase yours because of my satisfactory experience with the "Modern."

Yours truly,

(Signed) C. L. COHN.

5207

Letterhead.

318 Bradbury Bldg.,
Los Angeles, Cal., July 29th, 1910.

Modern Pen Co.,
New York.

Dear Sirs:

I duly received the new #6 pen which is satisfactory, execpt that I like a finer point, such as the one I have been using. I must use this one for a little while until you can return my old one which I am sending you.

5208

By concurrent mail, I am sending you my old No. 6 to have it reshaped or whatever it needs to restore it to what it was.

I have used this pen for several years and it never failed me until a few months ago, when the points got bent in some way. I often hand it to a man to sign his name in my presence and it was after one such time that I found it out of shape. I put it back into its present condition myself, but it is not right.

Kindly correct the condition and return to me at your earliest convenience and then I will return the pen for a finer pointed one. You might set aside the one you will send me from this old one as a sample.

Thanking you for attention to my wants,

Yours truly,

(Signed) FOSTER MACGURN.

Letterhead. 5209

992 Madison Ave., City, Aug. 18, 1910.

A. A. Waterman & Co.,
22 Thames St., City.

Gentlemen:

I am desirous of purchasing one of your automatic self-filling pens, but it is quite impossible for me to get down to your salesroom. Is there a place in this neighborhood where I can get one or have you a salesman up here? Or perhaps a catalogue would do if you issue them.

Have been using one of your pens for the past five years, probably you remember repairing it for me last month, and I 5210
am so pleased with the pen that I wish to get one for a friend, a trimmed one, silver or gold bands, &c.

Hoping you can find some way of supplying me with the pen, I am,

Respectfully yours,
(Miss) CHARLOTTE F. WETTERER.

Orangeburg, S. C., Aug. 23rd, 1910.

A. A. Waterman & Co.,
New York.

Gentlemen: 5211

Under separate cover I am mailing you my pen for repair. Please put it in good condition. Enclosed you will find 30¢ in stamps and if this does not cover cost let me know, and oblige.

Very truly yours,
(Signed) JOHN D. VARN.

P. S. Have used pen in school three years in writing and mathematics and it is still first-class.

5212 Letterhead.

Jamestown, Ohio, Aug. 29th, 1910.

A. A. Waterman & Co.,
New York City.

Gentlemen:

Under separate cover I am sending you one of your fountain pens that has been in use the past six years just as it is, and has not caused me one bit of expense or any trouble. I wish to have a new No. 3 point (medium) exchanged for the old pen point and the feed fixed so it will flow a little more freely. Please send me the amount of the bill and I will forward same at once, as
5213 I am in a great hurry for the pen.

Yours very truly,
DR. F. J. FIFIELD.

Letterhead.

Birmingham, Ala., Sept. 6th, 1910.

The Modern Pen Company,
New York City.

Gentlemen:

5214 I am sending you in today's registered mail, one fountain pen of your make, which I have used satisfactorily for, I think, three years. It is now in such shape however, that it will not refill, and needs a new rubber tube inside. The pen has given good service, and I should like to have it repaired as early as possible and returned to me by registered mail, for which I enclose herewith the necessary postage. At your convenience, advise me as to the charge for repairing it, obliging,

Yours truly,
(Signed) J. W. McQUEEN.

North Fork, Va., Sept. 9th, 1910. 5215

Modern Pen Company,
New York, N. Y.

Gentlemen:

I am enclosing you in a separate package my fountain pen, which I wish you to repair for me.

The trouble seems to be in the point, the cap came off in my pocket one day and in some way the pen point was slightly damaged, and has not given me real good satisfaction since. It is really the very best pen I ever used in my life, and it is almost new, as I had it exchanged with you on May 25th, of this year, as you will see by the enclosed invoice.

It is only a slight matter, but I prefer to have it write a 5216
little easier and I wish you to repair the point for me, or put in a new one if necessary, exactly like the one now in the pen, as it suits my hand exactly.

Send the bill to me, and I will remit at once.

Thanking you in advance, I am,

Very truly,

(Signed) T. W. CARTER.

Letterhead.

Rochester, N. Y., Sept. 15th, 1910.

Modern Pen Co.,
New York, N. Y. 5217

Gentlemen:

I beg to acknowledge receipt of my two pens which have just arrived. I have filled them both and have given them a trial. I am very much pleased with them and you may rest assured that whenever the opportunity affords, I am very strong on the boost for the A. A. Waterman & Co.'s pen, and their treatment to customers. I have been the means of several sales here already. Pardon this kind of stuff but I cannot say enough for your pen when I get started, as I am a very enthusiastic user.

Thanking you very kindly for favors shown me, I remain,

Yours very truly,

(Signed) CHAS. H. McCONNELL.

5218 Hamilton, Mo., Oct. 28th, 1910.

A. A. Waterman & Co.,
New York.

Gentlemen:

Please send me a catalogue of your fountain pens both "Automatic self-filling Modern" and plain, also state whether or not you can repair a self-filling Modern patented 12/12 1899 made by your Company and oblige,

Yours respectfully,
(Signed) GUY A. DAVIS,
217 N. Main St.

5219 P. S. Have used one of your pens for five years with great satisfaction.

Letterhead.

Louisville, Ky. Oct. 31st, 1910.

A. A. Waterman & Co.

Dear Sirs:

5220 Owing to a mistake in the initials, I sent my fountain pen to be repaired to the L. E. Waterman Co. when it should have come to your firm. I have written to ask them to turn it over to you as it takes so long to make the trip back and forth to Kentucky, and I need it very much. It has always been highly satisfactory; the point is exactly what I want. I sent a dollar with the pen as it needs a new barrel or cylinder (it was crushed). They will probably send it and also the money left after the postage they use; please look after it and if there is not enough of change left, I will gladly send the rest, as I am a teacher and my pen is in constant use—have used it for three or four years with most perfect satisfaction. Perhaps on receiving this you will ring them up and say that you have heard from me. I would so much appreciate it.

They were very kind, answering promptly, but were unfortunately the wrong firm. Let me hear from my pen as soon as possible—and if any extra charges, I will gladly remit. 5221

Sincerely,

(Signed) MISS ANNA GRUNDER,
1236 Cherokee Road.

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811 Washington Ave.
Madison, S. D. Nov. 4th, 1910.

A. A. Waterman Fountain Pen Co.,
113 Broadway, N. Y. City.

Gentlemen: 5222

I bought an automatic self-filling fountain pen from Anderson's Drug Store here three years ago. It was warranted for five years, but it has burst at the end where you turn it to fill the pen. I left it in a safe place but the ink must have dried up and shrunk the inside, for when I tried to open the end to fill it, it would not turn around either way. It is a fine pen, and I have always enjoyed using it and singing its praise to the users of another make.

I wish to know what you will do about my broken pen, as Mr. Anderson has sold out his business here and the new firm will not have anything to do with my fountain pen.

Hoping a favorable reply from you soon. 5223

Very truly yours,
(MISS) JESSIE A. BEARDSLEY.

5224 Letterhead.

Des Moines, Iowa, Dec. 2nd, 1910.

A. A. Waterman,
New York.

Dear Sir:

I send you by today's mail a self-filling fountain pen for repairs; my bull dog chewed it up; this pen has become a habit with me, could not get along without it; want same pen No. 4, please send statement for remittance and oblige by promptly returning it, so that it is perfect all over before returning and oblige,

Yours very truly,

5225 (Signed) J. C. FORD,
408 Locust St.

Letterhead.

Detroit, Mich. December 5th, 1910.

A. A. Waterman & Co.,
New York, N. Y.

Gentlemen:

I have used one of your large sized self-filling Modern fountain pens since early in January, 1902, practically nine (9)
5226 years. This is one of your pens which has the rubber tube cemented to the end of the pen for filling. This pen has been used constantly during this period and has never required any attention, until now. The rubber tube has a very small split in it on the end, making it inconvenient for filling, although it does not put the pen out of use.

Kindly forward me one of these tubes and I shall gladly remit to you the cost of same.

For your information, this tube is about 1/4" outside diameter by 3-1/4" long.

Yours very truly,
(Signed) C. R. LOOS,
Purch. Agt.

Academy and Industrial School. 5227

Delorme, W. Va., Dec. 6th, 1910.

A. A. Waterman & Co.,
New York City.

Dear Sirs:

Please send me by mail one fountain pen: Automatic Self-filling Modern, Modern Pen Co., Sales Agts. Pat. Dec. 12th, 1899, Nov. 17th, '09.

Enclosed please find check of party desiring it. We presume pen costs $2.50. Balance to collect check and postage. Please advise if any more is due and will remit.

Yours,
(Signed) ALFRED ERICKSON, 5228
Prest.

P. S. We have found above pen splendid, and we think can't be beat.

White Salmon, Wash. Dec. 7th, 1910.

A. A. Waterman & Co.,
New York City.

Gentlemen:

Six years ago this Christmas while living in North Dakota, I had one of your self-filling pens, retailing at $2.50 given me. That pen has been in constant use, and has never failed me; I wrote this letter with it. 5229

I would like to get a pen exactly like mine for my wife this year. The last patent mark on my pen is Nov. 17th, 1903, and the point is No. 2. Inclosed find money order for $2.50 for the pen, and oblige,

Yours respectfully,
(Signed) HERBERT B. CLARK.

5230 Howard College.

Birmingham, Ala., Dec. 23rd, 1910.

A. A. Waterman & Co.,
New York City.

Gentlemen:

I am sending you in today's mail my fountain pen, which is broken, and you will greatly oblige me by repairing the same. It is an "A1" and I don't want to try for a new one to take its place. Send me the bill and I will remit promptly.

Yours truly,
(Signed) W. A. BERRY.

5231 ———

Lapeer, Mich., Dec. 27th, 1910.

The Modern Pen Co.,
22 Thames St., N. Y. City.

Dear Sirs:

By this mail, I am sending my fountain pen, which is in need of repair. I would like the point straightened and any other repairs necessary to put it in good shape. Please advise me as to the charges so that I may remit at once and receive my pen as soon as possible.

5232 This is the fourth pen I have bought from you, and they have all given the users good satisfaction.

Yours very truly,
(Signed) C. BERENICE SMITH,
R. F. D. No. 8.

Letterhead. 5233

Brockton, Mass. 1-11-'11.

Modern Pen Co.,
22 Thames St., N. Y. City.

Gentlemen:

I herey acknowledge the receipt of my pen today, and I think you have placed it in the condition I desired, and for which I am very grateful.

I am very much pleased with your pens, and have recommended them to a large number of persons.

Yours very truly,
(Signed) E. R. MAHAN. 5234

Letterhead.

San Luis, Col., Jan. 13th, 1911.

A. A. Waterman & Co.,
22 Thames St., N. Y.

Gentlemen:

I am sending you under separate cover one of your automatic self-filling pens which I wish you to look over carefully, and make any repairs necessary. Also adjust or renew the pen as this gold pen is slightly stiff. This pen has had five years usage in Panama and did good service. 5235

Please send bill as soon as the amount is ascertained and I will remit.

Yours very truly,
(Signed) W. D. WALTMAN.

5236 Indianapolis, Ind., Jan. 14th, 1911.

A. A. Waterman & Co.,
New York City.

Gentlemen:

I am sending you my pen under separate cover to have the sack or inside part replaced. I have tried many pens, but this is the "best ever."

I enclose 25¢ in stamps. Please return it soon, as I shall be lost without it.

Yours truly,
(Signed) H. S. CUNNINGHAM,
c/o Linden Hotel.

5237

Letterhead.

Birmingham, Ala., Jan. 17th, 1911.

A. A. Waterman & Co.,
New York, N. Y.

Gentlemen:

Please notice we have sent you for repair seven pens by registered mail. One of these was our individual pen, the best pen we ever used, marked "Joe M. Webb." If you can make it as
5238 before, we shall be satisfied. It slipped out of our hand, and just a few inches, the point striking the show case; do not think you will find it seriously injured. Repair and return at your earliest convenience.

Respectfully,
WEBB BOOK CO.,
2010 Second Ave.

Letterhead.

5239

Honolulu, Jan. 19th, 1911.

Modern Pen Company,
New York City.

Gentlemen:

You will receive under separate cover a Waterman pen which is in need of repair. I herewith enclose my check for $5.00 to cover cost of repairs on same, and also, for two No. 30 Modern self-filling pens, plain barrel with stub point.

I have used an A. A. Waterman self-filling pen for eight years almost constantly. Without it I should be as helpless as if I had lost my right hand. I believe it to be by far the best fountain pen on the market. I want an extra one on hand in case of accident to the one I have. 5240

Yours truly,
(Signed) WADE WARREN THAYER.

Letterhead.

Wilkinson, Ind., Jan. 19th, 1911.

Modern Pen Co.,
New York City.

Gentlemen:

Pursuant to advice in your letter of the 5th of May, 1910, I am returning to you 1 A. A. Waterman & Co. fountain pen, No. 6 point. As I wrote you before, this pen is very satisfactory, and I have used it for several years, but now I desire it for ledger use and the pen is too coarse. 5241

I prefer a fine point, large size pen; you will understand what I need for bookkeeper's use. This point has just the exact flexibility I like, so if you can grind it down and make it all right, do so, but if it will in any way injure point, I would prefer to have you put a new point in this barrel and accept old point in exchange at whatever it is worth. Send me bill for charges and I will remit at once.

Yours truly,
(Signed) J. L. JUSTICE.

P. S. Cap is bursted, kindly fit with new cap like old one.

Pottsville, Pa., Jan. 20th, 1911.

5242

Modern Pen Co.,
22 Thames St., N. Y.

Dear Sirs:

Under separate cover I send you my Modern No. 2 self-filling pen for repairs. Kindly inform me what the charges will be, and I shall forward the price. This I have to say, I have used this pen for four years and find it the best pen I ever used, having used no less than a half dozen of other makes before this one.

Kindly oblige,
FRANK E. MONTAG,
1406 W. Norwegian St.

5243

Letterhead.

Paulding, Ohio, Jan. 23rd, 1911.

A. A. Waterman & Co.,
New York, N. Y.

Gentlemen:

I am returning you one of your fountain pens which I would like to have you either put in a new pen or fix the point and
5244 also furnish me a new cap, as I lost the other one.

I have had this pen for about ten or eleven years, and it is one of the best I have had. Send me the amount for the above repairs and parts, and I will remit by return mail. I do not like the point too sharp.

Yours truly,
(Signed) EWD BUCK.

Postal 5245

St. John, N. D., Jan. 25, 1911.

A. A. Waterman & Co.

Gentlemen:

Please send me your catalogue or price list of fountain pens. I want to purchase a self-filling fountain pen of your make. The last fountain pen owned by me was a self-filling (A. A.) Waterman, and after four years of constant use, was as good as new until stepped upon and broken.

Yours truly,
(Signed) C. M. STARKS.

5246

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216 E. 4th St.,
Duluth, Minn., Jan. 27, 1911.

Modern Pen Co.,
New York City.

Gentlemen:

What is your price on a self-filling fountain pen—medium, for lady uses, with one gold band.

I owned one that gave perfect satisfaction, did not drop the ink, as many of the fountain pens do. I sent it to be repaired once to you, it did good service afterward, but my misfortune 5247
was losing it in a street car. It gave such good service I feel I have lost a steady, reliable friend out of my life.

I wish to find one as good, so write direct to you. Please quote me the style and prices (postpaid).

Yours respectfully,
(Signed) MRS. MARY J. KRIEDLER.

5248 Letterhead.

Chattanooga, Tenn., Feb. 6th, 1911.

Modern Pen Co.,
New York, N. Y.

Gentlemen:

I am sending you my pen under separate cover, to have you put the point in good order. I struck it against something a few days ago, and since then it seems to scratch and spread, not letting the ink flow as freely as it should.

I have been using that same pen continually for nearly five years and have not had a thing wrong with it nor have I had
5249 any new rubber container for the ink put in, but for fear it may need one soon, you will please put one in while you have it.

I recommend the self-filled above all.

Yours,

L. J. PETTUS.

Insurance Company of North America.

Pilot Point, Texas, 2/7/1911.

A. A. Waterman & Co.,
New York.

5250 Dear Sir:

I am sending you by registered mail one automatic self-filling fountain pen; please repair and return as soon as possible.

I have used this pen for five years without any repairs to date. I remain,

Very truly yours,
(Signed) J. EARL SELZ.

Letterhead.

5251

San Antonio, Texas 2/7/'11.

A. A. Waterman & Co.,
22 Thames St., City.

Gentlemen:

Please quote me price on your Modern Automatic self-filling fountain pen. The particular kind that I want to get is the style sent out by the DeLaval Separator Co., and has Modern No. 5 on the point. They sent me one of these pens and I found it the most satisfactory and, in fact the only fountain pen that I could ever write with, but, unfortunately, it has been lost and I am very anxious to procure another.

5252

Trusting to hear from you by return mail, I am,

Very truly yours,
(Signed) WM. HALLORAN,
Box 560.

Carmen, Okla., Feb. 11th, 1911.

Wm. Frazier & Co.,

Dear Sirs:

Enclosed find $1.00 please send me the best Lincoln fountain pen that you can send me for the money. I have used the Lincoln fountain pen for several years and I find them the best pens I can get regardless of the price. I am using one now that cost twice as much as the Lincoln that is not worth half as much. I am using it because I lost mine.

5253

Yours,
(Signed) M. C. LAKEY.

5254 Letterhead.

Birmingham, Ala., Feb. 15th, 1911.

Messrs. A. A. Waterman & Co.,
New York, N. Y.

Dear Sirs:

I have used many fountain pens but none that gave me the satisfaction that the one I have requested my Druggist, Dr. Bushfiel to return to you for repairs. My little boys got a hold of it, and afterward it got a fall that finished it. I will appreciate it if you will send it back as good as it was before.

Very truly yours,
(Signed) C. C. JONES, M. D.

5255

Letterhead.

Riverside, Cal. Feb. 27th, 1911.

The Modern Pen Company,
22 Thames St., New York.

Gents:

Please ship me as follows:

5256 1 Automatic A. A. Waterman pen No. 6 mottled, with No. 4 or 5 pen; No. 4 preferred, very fine point for wife, she being a fine penman, but of course, not so fine that it would not be durable (medium soft). Will enclose you a pen she has used, about the right thing. I have to take the description from my own old No. 5 which you shipped me Nov. 9th, 1908, and no better pen was ever put on the market. $10.00 would not tempt me to sell it. This is my fifth order.

Now as to price. As I don't know just what you will select $2.00 or $3.00 ship at once, I will remit as I did before.

Yours,
(Signed) M. T. CUNNIFF.

P. S. The most Modern, send me catalogue for different styles.

Willits, Cal. Mar. 4th, 1911. 5257

A. A. Waterman & Co.,
New York, N. Y.

Gentlemen:

I am sending you today by registered mail one fountain pen. Please put in new gold pen point, and notify me as to what the charges will be, and I will remit at once.

Please return the pen as soon as possible for I have to use a steel pen in the meantime, and it is hard for me to write with anything but an A. A. Waterman fountain pen.

Yours truly,
(Signed) MRS. F. H. WHITNEY.

5258

F. H. Thomas Company.

691 Boylston St., Boston, Mass., Mar. 6th, '11.

Gentlemen:

We are sending you today, 6 pens for repairs and banding. One of the No. 70 pens, the one which has a clip on the cap, is my personal pen, which I have used for seven or eight years, and which has been entirely satisfactory up to a few days ago, when it suddenly began to drop ink. I am sure you can make this right, and return with the other pens when ready.

Very truly yours, 5259
F. H. THOMAS CO.
(Signed) H. L. Crowley,

5260 Letterhead.

Pittsburg, Pa., Mar. 7th, 1911.

A. A. Waterman & Co.,
New York, N. Y.

Gentlemen:

Five years ago last Christmas my wife gave me the pen with which I am writing this letter. The pen has been used every day on all kinds of paper and filled with all kinds of ink, from indellible to "protective" ink, and the point and filling device are as perfect today as when I first received it, and in fact, I believe better, because it has had so much more experience.

5261 It has not been my practice to write letters of this kind, but, as I am so well pleased with the performance of your product, I feel that it is your due.

The pen is one of your self-filling "Modern."

Yours very truly,
(Signed) P. S. EGGERS.

Letterhead.

Sunnyside, Charlottetown, P. E. I.,
Mar. 17th, 1911.

The Modern Pen Co.,
New York, N. Y.

5262 Dear Sirs:

We will soon be sending you an order for some more of your self-filling Modern Fountain Pens. The L. E. Waterman Co. have been hot on our trail to sell their goods, but we are still staying by your self-filler as it gives a good return and also gives our customers the utmost satisfaction.

We are sending you by mail today our "personal pen" please change the nibs or gold point to one as near the enclosed sample as possible, as the writer finds the present point too coarse. Kindly return same when fixed to us by mail with invoice for amount in exchange of pens, and oblige.

Yours sincerely,
HASZARD & MOORE.

Letterhead.

5263

Henderson, Ky., Mar. 20th, 1911.

Gentlemen:

I am sending under separate cover my fountain pens for repairs, also 25¢ to cover cost of same; if not sufficient amount let me know and I will send same to you. I have used the pen for so long and find it so satisfactory that I am simply lost without it. I think it quite the best pen I have ever used.

Please repair same and return as soon as convenient and oblige.

Yours truly,
(Signed) DR. H. C. BOAZ.

5264

Letterhead.

Greenville, S. C., Mar. 27th, 1911.

The A. A. Waterman Co.,
New York City.

Gentlemen:

Under separate cover and by registered mail, I am returning to you one of your self-filling pens with which I have met with a slight accident as you will note. I have used the pen for several years and has given very good satisfaction, and would like to have the same old pen put back in good condition if possible. 5265

Kindly let me know what the cost of the repairs will be and an allowance will be sent immediately to cover same.

Trusting that you will give this matter your immediate attention, I remain,

Yours very truly,
(Signed) L. M. BANNON.

5266 **Defendant's Exhibit A-61. Nineteen Letters of Denunciation of Plaintiff's Pens.**

W. P. White.

Volga City, Iowa, Mar. 25th, 1911.

Modern Pen Co.,
New York, N. Y.

Gentlemen:

I return to you a Waterman that never gave satisfaction.

Yours truly,
(Signed) W. P. WHITE.

5267

Letterhead.

St. Paul, Minn. Mar. 29th, 1910.

A. A. Waterman,
New York.

Gentlemen:

Kindly repair the enclosed fountain pen which you will find leaks; return at your earliest convenience, and oblige.

Yours truly,
E. A. BROWN CO.

5268

B. & R. R. CO.

Office of Stationer.

Baltimore, June 13th, 1910.

Modern Pen Co.,
22 Thames St., N. Y.

Gentlemen:

Will send you by registered mail my fountain pen, which is in bad shape. It leaks considerably and the metal on the pen has slipped up to the end so far that the cap cannot be reversed.

If this pen can be remedied, would thank you to do so in addition to which, would be pleased to have you repair the point, as it writes too coarsely. In returning, send to address given below with bill. 5269

Yours very truly,
(Signed) E. E. HEROLD.

Letterhead.

Norfolk, Va., June 16th, 1910.

The Modern Pen Co.,
New York. 5270

Gentlemen:

Enclose find pen which does not carry ink. Will please have same fixed and oblige.

Yours truly,
J. B. BENNETT CO.

Letterhead.

Hartford City, Ind., Aug 23rd, 1910.

Modern Ideal Pen Co. 5271

Sirs:

Enclosed you will find one of your pens which feeds too freely. Please repair and return to us as soon as possible, and oblige.

Yours,
WEHRLY BORS.

5272 Letterhead.

Anderson, Ind., Aug. 27th, 1910.

A. A. Waterman & Co.,
New York.

Dear Sir:

We are sending by mail one (1) fountain pen which has never been satisfactory. Please put same in good order and return at once. Thanking you we remain,

Yours truly,
(Singed) D. & J. ROSENBAUM.

5273 E. C. Gow, M. D.

Schulyerville, N. Y., Sept. 5th, 1910.

A. A. Waterman & Co.,
22 Thames St., N. Y. City.

Sirs:

Will you suggest a remedy for an Ideal Pen that leaks when carried upright. If this defect can be repaired only at the factory, let me hear from you.

Yours truly,
(Signed) E. L. GOW.

5274 Letterhead.

Providence, R. I., Sept. 26th, 1910.

Messrs. A. A. Waterman & Co.,
New York.

Gentlemen:

Please repair pens which we send by mail. New pen in the one which is broken, and the other one does not feed well.

Yours truly,
W. J. BRAITSCH & CO.

Letterhead. 5275

408 Odd Fellows Temple, Phila., Pa.
Oct. 5th, 1910.

A. A. Waterman & Co.,
New York, N. Y.

Gentlemen:

I am mailing you my fountain pen today which has always leaked at the joint, also will ask you to lessen the flow.

If any charges, kindly advise me how much before touching the pen, I remain,

Yours truly,
(Signed) N. E. KARPER. 5276

Crescent Jewelry Company,

S. Friedlander.

Memphis, Tenn., Oct. 17th, 1910.

A. A. Waterman & Co.,
New York, N. Y.

Gentlemen:

We are sending you by today's registered mail one fountain pen. Kindly increase flow on same and return to us as soon as possible and oblige. 5277

Yours truly,
S. FRIEDLANDER.

5278 Letterhead.

Sheboygan, Wis., Nov. 15th, 1910.

A. A. Waterman & Co.,
New York.

Gentlemen:

Under separate cover, I am sending you one of your fountain pens; always leaks, which certainly makes it very disagreeable. Will you kindly fix same. The pen has not been in use more than a week.

Hoping you will give this prompt attention, beg to remain,

Yours truly,
BRUHN DRUG CO.

5279

Letterhead.

Albany, Ga., Nov. 22nd, 1910.

A. A. Waterman,
22 Thames St.,
New York City.

Gentlemen:

Enclosed herewith beg to hand you $1.00 and one of your
5280 Ideal pens. Please have new pen put in and reclean. For some reason there is a constant little leak at the valve, no matter how tight you screw it in. Please see if you can adjust this trouble. Return as early as possible and oblige.

Yours very truly,
K. M. DICKSON,
c/o Herald Pub. Co.,
Albany, Ga.

Letterhead.

5281

Centerville, Ala., Dec. 7th, 1910.

Gentlemen:

My customer claims that this pen leaks, so he can't use it. Please repair and return.

Yours,

(Signed) S. C. MEIGS.

Letterhead.

Pensacola, Fla., Dec. 10th, 1910.

Modern Pen Co.,
New York, N. Y.

5282

Gentlemen:

We are sending by today's mail one L. E. W. pen for general repairs, same also flows too freely.

Kindly let us have the pen as early as possible and oblige.

Yours very truly,
BALL BOOK & NOVELTY CO.

Letterhead.

Louisville, Ky., Dec. 17th, 1910.

A. Waterman & Co.,
New York, N. Y.

5283

Gentlemen:

We are sending under separate cover one of your fountain pens which our customer complains of having a great deal of trouble with. Since we have had such perfect satisfaction with several of these pens, we feel sure that you would wish us to return this one to you. Kindly put in good order and return to us at your earliest convenience.

Yours respectfully,
SOUTHERN OPTICAL CO.

5284 Letterhead.

Newark, Ohio, Jan. 12th, 1911.

Waterman Pen Co.

Gentlemen:

The enclosed pen leaks and does not write satisfactory. Please repair at once and return.

Yours etc.,
H. C. BOSTWICK & CO.

5285 Letterhead.

Pensacola, Fla., Feb. 11th, 1911.

Modern Pen Co.,
New York, N. Y.

Gentlemen:

We are sending by today's mail, one pen "Adama"; kindly lessen flow of same.

This pen leaks quite a good deal, and may require other repairs. Return pen as quickly as possible and oblige.

Yours very truly,
BALL BOOK AND NOVELTY CO.

5286

Letterhead. 5287

Tullahoma, Tenn., Feb. 23rd, 1911.

Messrs. A. A. Waterman Co.,
New York, N. Y.

Gentlemen:

Please let me know what makes my pen leak ink as it does at the point end?

I am mailing same to you under separate cover this evening. I should like to have it corrected and returned promptly, though do not like to put much money into it.

Thanking you for kind attention, I await your early reply.

Respectfully,
(Signed) J. L. DANN, 5288
P. O. Box 254.

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330 Central Ave.,
Rochester, N. Y., Mar. 16th, 1911.

A. A. Waterman & Co.

Am sending you my pen which I purchased at McCurdy, Norwell & Co., Rochester, N. Y.

I have the fourth pen, each one a little more expensive. This one I paid four dollars for. When writing the pen often skips and goes into the paper. It also leaks dreadfully unless it is 5289
filled to the very top.

As McCurdy & Norwell had but this one at four dollars at the time and said they would not have more until Easter or June, I concluded to write and ask you to replace this pen with one that will not leak or scratch the way this one has a tendency to do on left-hand strokes.

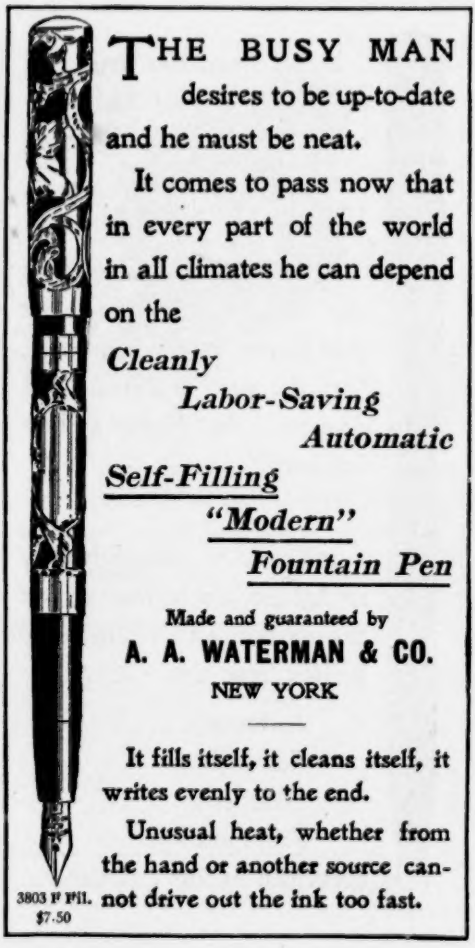
Thanking you for the trouble I am putting you to, I remain,

Truly yours,
(Signed) MISS A. BACHMANN.

P. S. Do not have the pen any finer than this one.

5290 **Defendant's Exhibit A-63.**

Two placards will be exhibited to the Court, in connection with the circular.

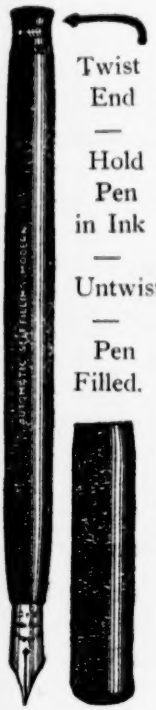


5291

5292

Defendant's Exhibit A-64.

Advertisement in a Magazine called the "Widow," published in Syracuse, N. Y.



Twist End

—

Hold Pen in Ink

—

Untwist

—

Pen Filled.

Automatic Self-filling

MODERN FOUNTAIN PEN

Here is the part that makes it the simplest and most practical of all self-filling pens.

As Easy as Winding Your Watch

Construction simple.
Nothing to take apart to fill the fountain.
No joints to leak.
Cleans itself in filling.

Every pen guaranteed.
It is an economical busy man's pen.

From $2.00 to $6.00.
All Styles of holders and points.

Modern Pen Company
Sole Selling Agent for
A. A. Waterman & Co.

126 Greenwich Street New York 22 Thames Street

"If it isn't an 'A. A.' it isn't a MODERN."

For Sale at the "Co-op."

5296 **Defendant's Exhibit A-65.**

Special meeting of the Frazer & Geyer Co. held at the offices of the Merritt & Chapman Derrick & Wrecking Co., 17 Battery Place, City of New York, at 4 P. M. on the 19th day of April, 1905, pursuant to the following notice which was sent to all the stockholders:

"April 15, 1905.

"The financial condition of this Company is such at the present time that it is deemed necessary by the Directors to have a discussion of matters relating thereto at a meeting of the stockholders. For that purpose, and to consider the question of contributing therefor by the stockholders by way of an assessment
5297 or subscription, I hereby call a meeting of the stockholders, to be held at 17 Battery Place, Room 1914-1922 on Wednesday, the 19th of April, 1905, at four o'clock in the afternoon. There will be considered at this meeting the question of the advisability of an assessment or subscription by the stockholders of substantially fifteen per cent of the amount of stock held by them.

Yours &c.,
(Signed) ISAAC E. CHAPMAN,
President."

Present	Com.	1st Pre.	2nd Pre.
J. E. Chapman, representing in person	109	128	36
W. L. Chapman "	13	21	15
5298 H. W. Harris "			2
G. W. Kerst, "	2	11	8
C. F. Woodward (representing H. Nutty)	1	3	1
W. G. Frazer, representing in person,	60	5	17
A. Edwards, "	1	2	2
A. A. Waterman, "	14	15	17
H. W. Geyer, "	53		3
A. K. Alexander, representing Miss B. Alexander			80
C. P. Carrington, representing in person,		2	5
G. T. Hay, "		12	3

J. W. Foster, also representing J. C. Foster, and Fannie Foster	1	9	5	5299
C. E. Alexander, representing in person,		20	5	
B. F. Jayne, "	2	5	3	
also representing Martha C. Jayne		4	6	
F. A. Wilson, representing in person	2	6	2	
A. Williams, representing W. Williams	1	3	1	
I. E. Chapman, represented Mrs. E. H. Benedict		8		
F. A. Dayton, representing in person			10	
A. N. Chapman, "	5	10	10	
L. F. Chapman, "	5	15		
Est. Wm. E. Chapman, Inc. "	5	20	10	
C. E. Dingee (represented)			10	
C. M. Davidson (represented)	1	2	2	5300
L. S. Davis (represented by Capt. B. F. Jayne)	2	5	3	
Ida A. Dingee (represented)		20	20	
A. C. Van Valer, representing in person			5	
T. S. Snyder, "	2	8		
E. Geyer (represented)			2	
J. S. F. McLeod, representing in person	1	3	1	
P. G. Ridgeway (represented by B. F. Jayne)		4	1	
A. W. Smith (represented by I. E. Chapman)			10	
also Clara A. Smith,	5	5	5	
I. K. Schmidt (represented by I. E. Chapman, through J. C. Seager)	3	6	6	
E. W. Wood represented by I. E. C.)	1	1	1	
J. C. Forsyth, representing in person	1	9		
	—	—	—	5301
	290	362	307	

(After the no. of shares represented had been counted, it was announced that about three-quarters of the stock was represented.)

Col. A. S. Bacon, as attorney, addressed the stockholders in reference to the present condition of the Company and said in part as follows:

"The Chapmans, representing themselves and the Chapman Estate have loaned about $30,000 and do not feel like lending any more money to the Company under the present condition of

5302 affairs. Both they and Mr. Frazer and Mr. Geyer have desired to call the stockholders together to see if you had any proposition to make to tide over the present emergency. The Company must have cash. There have been several propositions suggested, none of which seems to be satisfactory. It has been thought that a voluntary assessment of about $15.00 per share would place the Company beyond ordinary necessities: it would not remove certain matters of management which have not been wholly satisfactory, but that can be passed for the present. This meeting is called a special meeting of the stockholders, yet, it is an irregular one. We can do little more than advise. Stockholders, I take it, have no powers in a corporation except to elect Directors and consent to mortgage, &c. But you gentlemen are deeply interested in this corporation. I think, perhaps, this is all I
5303 ought to say in the present circumstances, and leave it to the gentlemen present to discuss, freely and frankly among themselves. The past is behind us. It is of no use to make explanations only; the future must be met. The Messrs. Chapman have been in the habit of advancing a good deal of money to protect their own interests which are very large, I think perhaps their family own a majority of it. In doing that they have helped you. They do not feel that under present circumstances they should advance further cash. As business men you would not do it with like security. I have advised them that their security is very far from satisfactory. There must be something done to meet the emergency. The intrinsic value of the enterprise is not doubted; the pens, the patents and the business are all of value, and there
5304 is no reason why the Company should not be a success if properly managed in all its departments."

This is entirely informal, gentlemen, and it is highly important that every man should free his mind.

Mr. Frazer then stated that his legal representative was unable to be present on account of illness.

Mr. I. E. Chapman then spoke about the losses of the Company during the past two or three years, its present poor condition, the differences existing between himself and Mr. Frazer, and explained why the business needed more cash.

Mr. Dayton. "What has the loss been up to date, and what has been the cause of this loss?" 5305

Mr. W. L. Chapman. "The loss has been caused because they sold a dollar's worth of goods for 75 cents."

Mr. I. E. Chapman then stated that endeavoring to carry on a larger business without sufficient capital and employing inexperienced salesmen had been among the things which caused the loss, and suggested that the Company be reorganized, and that an assignment be made by getting three-quarters of the stock to consent to it, and that the new company buy out the old company, and that a sort of syndicate be formed for those who could not pay their assessment, which syndicate would pay it for them in return for a part of their holdings, say one-half, which of course would be a personal matter between the parties 5306 interested, and further stated that he thought that in that way most of the assessment would be paid and the Company thus realize from fifteen to eighteen thousand dollars which would be fully sufficient to carry on the business and to prove that the business can be carried on and made to earn dividends.

Mr. Frazer suggested that a sufficient amount of stock be turned in to cover the amount needed by the assessment. This was objected to, however, because (1) it would not raise the money needed, and (2) there would be two methods of stock redemption, which was not feasible.

Mr. Snyder stated that a decided change in the management was necessary; that, even if the assessment were paid, they would be confronted with the same condition a year hence, un- 5307 less there was some change made in the management.

Mr. F. A. Wilson then offered the following:

RESOLVED, that we try and find out how many are willing to put up $15 a share on their holdings, or those that they represent, with the understanding that the management be satisfactory to the stockholder."

Mr. W. L. Chapman seconded the motion which was CARRIED.

The following then said that they were in favor of the provisions of the above motion:

I. E. Chapman,
W. L. Chapman,
H. W. Harris,
G. W. Kerst,
C. F. Woodward,
W. G. Frazer, (conditionally &c)
A. Edwards,
J. C. Forsyth,
A. A. Waterman,
D. C. Van Valer,
H. W. Geyer,
A. K. Alexander,
C. P. Carrington,
F. A. Dayton,
C. E. Alexander,
B. F. Jayne,
F. A. Wilson,
T. S. Snyder.

Mr. F. A. Wilson then offered the following:

RESOLVED, That the Chair appoint a Committee to decide upon the management, which will later report to the stockholders, and that the same Committee also submit a plan of reorganization to the stockholders.

Mr. Snyder seconded the motion, which was CARRIED.

In accordance with the above motion the Chair thereupon appointed the following to act on the Committee named:

Messrs. B. F. Jayne,
Geo. T. Hay,
Wm. G. Frazer,
A. Williams,
I. E. Chapman,
H. W. Geyer,
A. W. Smith,
F. A. Wilson,
A. K. Alexander,
W. L. Chapman,
J. W. Foster.

Mr. F. A. Wilson then offered the following: 5311

RESOLVED, That the report of the Committee be presented in writing, a copy being sent to each stockholder prior to a meeting of the stockholders which will be regularly called to discuss the matters.

Mr. W. L. Chapman seconded the motion which was *carried*.

It was then regularly moved and seconded that the meeting adjourn. Time 5:50 P. M.

April 26th, 1905.

A meeting of the Reorganization Committee of the Frazer & Geyer Co., appointed at the meeting of the stockholders on April 19th, 1905, was held this day at 4:10 P. M. at No. 17 Battery Place, New York City. All members of the Committee except Mr. Geo. T. Hay were present. 5312

Mr. I. E. Chapman was elected Chairman of the Committee, and Mr. W. D. Williams, Secretary.

The Secretary read the draft report of the Committee.

Mr. F. A. Wilson then read a letter from Mr. T. S. Snyder outlining a plan of reorganization.

Mr. A. A. Waterman was unanimously elected a member of the Committee, and Mr. Straley, Mr. Frazer's attorney, then addressed the mtg.

Mr. F. A. Wilson then offered the following:

RESOLVED, That the reorganization be made without bonds. 5313
This motion was seconded by Mr. W. D. Williams, and CARRIED.

The meeting then discussed the draft report which had been submitted, and suggested that the following changes in the report, together with others, be made:

(1) That in order to give confidence to the stockholders something be inserted in the report to show that during the last few months the Company has been holding its own, and that radical economical changes have been made during this time.

5314 (2) That the name of the new Company be left to the Board of Directors.

(3) That the annual meeting be held late in January or early in February.

(4) Mr. W. L. Chapman then offered the following:

RESOLVED, That the number of Directors of the new Company be nine. This was seconded by Mr. A. W. Smith and CARRIED.

Mr. Straley then suggested that the clause in reference to assessment be changed in part as follows: "$18,500 or such other sum as the Committee on Reorganization may fix."

Mr. A. W. Smith then offered the following:

5315 RESOLVED, That Col. Alex. S. Bacon be retained as counsel, to be employed in the reorganization of the Company.

This motion was seconded by Mr. F. A. Wilson and CARRIED.

Mr. F. A. Wilson then offered the following:

RESOLVED, That the Directors of the new Company appoint an Executive Committee which shall have the business of the Company directly in charge, and to whom the Manager, who shall be Mr. I. E. Chapman, shall report at least monthly.

This was seconded by Mr. A. W. Smith and CARRIED.

The meeting then adjourned *sine die*.

5316

Defendant's Exhibit A-62. 5317

WILLIAM E. WEAVER,
Attorney and Counselor,
13-21 Park Row,
New York.

Room 2138, Park Row Bldg.
Telephone, 6614 Cortlandt.

May 10th, 1905.

Col. A. S. Bacon,
37 Liberty Street, City.

Dear Sir:

5318

Since talking with you over the 'phone this morning, I have met Mr. Waterman, and we have carefully gone over the situation in the complicated affairs of Frazer & Geyer Company, and A. A. Waterman & Co. I am compelled to conclude, after careful consideration, that affairs have reached a position which it is desirable, not to say necessary, that the affairs of the corporation should be handled under judicial control, in the best interest of all concerned. Mr. Waterman himself, as you are no doubt aware, is one of the largest stockholders in the corporation, his holdings being exceeded only by four or five others. I have also some interests as a stockholder, and I certainly do not propose to put anything more in the business.

I enclose you draft of a circular letter which I should like to mail to stockholders this evening. I wish you would examine it, and see if the Chapmans will not join with me in it, or at least co-operate along this line. I think it affords a more satisfactory solution, than to prolong the agony with a new concern. Kindly let me hear from you before 4 this afternoon. 5319

Yours very truly,

W. E. WEAVER.

5320 WILLIAM E. WEAVER,
Attorney and Counselor,
13-21 Park Row,
New York.

Room 2138, Park Row Bldg.
Telephone, 6614 Cortlandt.

May 10th, 1905.

To the Stockholders
of Frazer & Geyer Co.:

Dear Sirs:

I am a stockholder of common and preferred stock in the above corporation, and as such I am in receipt of a so-called "Report
5321 of Committee on Reorganization," which bears date April 26th ult., but was mailed May 6th and received by me May 7th. This "Report" makes the startling announcement that the corporation has liabilities, including its capital stock, of over $170,000.00, and to meet its liabilities has assets of only $114,134.10, excluding "good will," which is given no value, and probably has little or none. Its assets include over $60,000.00 "Accounts Receivable," the actual value of which depends of course upon the solvency of its creditors, and in any event will be subject to some depreciation; and items of nearly $20,000.00 for "Patents" and "Royalty," the actual value of which must be more or less speculative. It is probably a conservative estimate to place the actual assets at not over $100,000.

5322 What does this mean ? That in a little over three years time, the Company has lost over $70,000.00 of its capital stock of about $126,000.00 Upon such a record, it was entirely unnecessary for the Committee to tell us "that the management has not been efficient." The figures speak for themselves.

What are you and I now asked to do? Our stock is non-assessable. We cannot be compelled to "throw good money after bad." We are therefore asked to do so voluntarily, to make a gift to the Company of $15.00 in cash for each and every share of our holdings of stock. If it took only about three years to lose over $70,000.00 in this business, how long will it take to use up a paltry $18,000,—assuming that every stockholder was foolish enough to contribute $15.00 per share?

I ask every stockholder to do as I have done,—to pause and consider carefully the proposition which the Committee places before him, before putting any more of his good money into the business. 5323

I am somewhat familiar with the business of Frazer & Geyer Company. Over 80% of all their business is derived from one single order, placed with them by A. A. Waterman & Co., under a contract by which on certain conditions A. A. Waterman & Co. gave Frazer & Geyer Co. an exclusive order for A. A. Waterman & Co.'s pens; this order or contract is by its terms not assignable, and expressly provides that "in case they (Frazer & Geyer Company) cannot furnish goods, the party of the second part (A. A. Waterman & Co.) may procure them elsewhere."

Now, with the proposed dissolution of Frazer & Geyer Co., and the organization of a new corporation (whose stock we are asked to take in lieu of our present stock), the new corporation may at the outset lose over 80% of the present business; for the new concern has no assurance that it will receive orders from A. A. Waterman & Co. The new corporation must start business with an assured annual volume of business of less than $25,000.00,—upon a proposed investment of $114,000, and with a capitalization of over $125,000. What possible or reasonable chance is there for stockholders to receive dividends even upon the fresh cash which it is proposed to put in, to say nothing of their former investment? And by what magic is the loss of $70,000 in the last three years to be converted into dividend paying profits? 5324

I submit that sound business judgment dictates that we should make the best of an inexcusably bad situation, not by putting more money in, but by saving what is still left of the wreck. If the Committee's figures are reliable, there should be assets for stockholders of $70,000,—or approximately 50¢ on the dollar of their stock. 5325

In my opinion, the only safe thing to do is to petition for the appointment of a receiver. The Court will then appoint a proper and competent person, who will at once take in hand the management of the business, will conduct in such manner as best to conserve the interests of all, creditors and stockholders and dissolve the corporation, under the direction and sanction of the

5326 Court, and with regard to the interests of ALL CONCERNED, and not for the benefit of any particular individuals. The interests of stockholders will not, as intimated in the Committee's circular, be "sacrificed." The Court will not permit the sacrifice of their interests by foreclosure of mortgages or otherwise. Certainly their interests cannot be worse "sacrificed" than they have been during the last three years.

I therefore request you to refrain from signing the proposed "Consent to Sale of the Assets" which the Committee have sent to stockholders; and ask you, instead, to sign and return to me at once the enclosed, directing the directors of the Company to present a petition to the Supreme Court, praying for a final order dissolving the corporation, as prescribed by law. The di-
5327 rectors must present such a petition to the Court, whenever directed to do so by a majority of the stockholders in interest of the stockholders.

Kindly sign the enclosed, and return the same to me at once. If you have already signed the Committee's "consent" to the sale of assets, please so inform me, and I will advise you in the premises. I am acting in this matter as a stockholder, not as an attorney; and stockholders will not incur any financial obligation to me whatever by reason of my connection with the matter.

Very truly yours,

W. E. WEAVER.

5328 **Defendant's Exhibit A-66.**

22 Thames Street, New York City,
June 14, 1905.

Oriental Bank,
184 Broadway,
New York City.

Gentlemen:

I am informed by your cashier that a check for $250 is at your Bank for payment today, signed by A. A. Waterman & Co.

in the handwriting of William G. Frazer, payable to the order of Straley & Hasbrouck. 5329

You are hereby notified and forbidden to pay this check, on the ground that Mr. Frazer is not now, and has not been since June 8, 1905, a member of the firm of A. A. Waterman & Co., or authorized to sign the name of the firm.

On June 8, 1905, an order was duly entered in the office of the Clerk of the County of New York appointing Gratz Nathan, Esq., receiver of the property of Mr. Frazer, including his interest in the firm of A. A. Waterman & Co. The fact of Mr. Frazer's insolvency immediately dissolved the firm of A. A. Waterman & Co., and it is now in liquidation, and no person has any right to sign the firm name except Hobart W. Geyer and Arthur A. Waterman.

If you pay this check, we will hold you to strict legal accountability. 5330

We find that one check is missing from the A. A. Waterman & Co. check book. It bears the same number as that now presented to you for payment. This check was taken with the knowledge, consent and connivance of Mr. Frazer and Mr. Geyer, without filling in the stub or leaving any record on the books. Straley & Hasbrouck are not now and never have been the attorneys for the firm of A. A. Waterman & Co., nor are they now or ever have been its creditors. This check is a fraud on its face. Straley & Hasbrouck are the personal attorneys of Mr. Frazer and they have no claim whatever on A. A. Waterman & Co.

Yours truly, 5331

A. A. WATERMAN,

for A. A. Waterman & Co. in liquidation.

P. S. If you wish a bond of indemnity we will give it with pleasure.

5332

Defendant's Exhibit A-67.

Card showing different processes through which the pen is put in its manufacture. Will be exhibited to court.

Defendant's Exhibit A-68.

Six cards showing methods of manufacture. Will be exhibited to court.

5333

Defendant's Exhibit A-69.

Two of plaintiff's pen points; soft iridium. Will be exhibited to court.

5334

Remainder of Saadi Correspondence.

5335

JOHN SAADI, Prop.

SAADI,

Maker of

EGYPTIAN DIAMOND JEWELRY,

and The Royal Ideal Pen,
602 Ninth Street N. W.
Washington, D. C.

308 Hicks Street,
Brooklyn, N. Y.

817 E. Broad Street
Richmond, Va.

Please address reply to

5336

Nov. 20th, 1909.
602 9th St. N. W.
Washington, D. C.

The Modern Pen Co.,
New York City.

Gentlemen:

I am making a new electro of a new design and as I expect to be in New York the 26th or 27th Inst. I will bring it along. Also I will give you the note as requested by you.

Yours Respectfully,

JOHN SAADI.

5337

H. W. G.
W. M. M.
N. H.
E. A. P.
A. M. H.
Order
Credit
Repair
Exchange
Cash
B'keeper

Modern Pen Co., Received Nov. 22, 1909 A. M. P. M. 7, 8, 8, 10, 11, 12, 1, 2, 3, 4, 5, 6.

Mar. 1st, 1910.

5338

Mr. J. Saadi,
Washington, D. C.

Dear Sir:

We have not as yet been favored with your note to cover your past due account.

Kindly give this matter your attention, as we are very anxious to have same adjusted.

Hoping to hear from you favorably, we remain,

Yours truly,
THE MODERN PEN COMPANY,
By A. H. Hoffman, Jr.

5339

———

Mar. 22nd, 1910.

Mr. John Saadi,
Washington, D. C.

Dear Sir:

Enclosed we hand you statement of your account, and we request that you send us a short time note for this.

We have brought suit against the L. E. Waterman Co. to restrain them from suing our customers, but it will probably be some months before the case is finally settled. If you have any of our goods which you cannot use we will be pleased to

5340 give you credit for them, or exchange them for you, whichever you prefer.

We have heard nothing from your attorneys, so do not know whether they are doing anything further in the matter of your suit or not.

Yours truly,
THE MODERN PEN COMPANY,
Hobart W. Geyer,
Ass't. Treasurer.

May 31st, 1910. 5341

Mr. John Saadi,
Washington, D. C.

Dear Sir:

Will you kindly advise us when we may expect check in settlement of the balance due us amounting to $235.15.

This amount is considerably past due.

Yours truly,
THE MODERN PEN COMPANY,
By A. H. Hoffman, Jr.

5342

(Cut)

22 Thames Street—125 Greenwich Street

$258.95/100 May 12, 1910.

At three days sight pay to the order of National City Bank Two Hundred Fifty-eight and 95/100 Dollars.

Value received and charge the same to account of
MODERN PEN CO.,
Sole Selling Agents for A. A. Waterman & Co.,
H. W. Geyer.

To Mr. John Saadi,
No. 602 9th St. N. W., 5343
Washington, D. C.

(Endorsed): National City Bank May 14 1910 Prior endorsements guaranteed, Washington, D. C.

UNITED STATES CIRCUIT COURT. 5347

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Complainant,

vs.

MODERN PEN COMPANY,
Defendant.

In Equity.

5348

New York, November 17, 1911.

Further proofs on behalf of the complainant taken before William H. K. Davey, Deputy Clerk, pursuant to permission granted by the order of the Honorable Alfred C. Coxe, dated November 16th, 1911.

APPEARANCES:

SAMUEL S. WATSON, Attorney for the Complainant.
ALEXANDER S. BACON, Attorney for the Defendant.
MORTON STEIN, of Counsel.

5349

Mr. Watson: The complainant offers in evidence a certified and exemplified copy of the judgment entered in the Royal Civil and Penal Tribunal of Milan, Italy, Part I, on July 1st, 1911, wherein L. E. Waterman Co., the plaintiff herein, is the complainant, and Guido Cabrini is the defendant, and the firm of A. A. Waterman & Co., composed of Messrs. Isaac E. Chapman and William L. Chapman, are interveners.

Mr. Stein: I object to the characteriza-

5350 tion by Mr. Watson of the paper he now offers in evidence. My objection is based on the ground that the paper, if admissible in evidence, must of itself speak for itself, and that it is improper for Mr. Watson to describe it as a certified or exemplified copy of a judgment, and improper in all other ways to further describe it in the manner in which he did; that I particularly object to Mr. Watson's statement that in the action purporting to be described in said paper, the firm of A. A. Waterman & Co., is an intervening party; that such statement as
5351 to the fact is without any foundation in the proofs in this action.

Mr. Watson: (Continuing) The document now offered in evidence marked Exhibit "A" by Judge Coxe at the time of the hearing on motion to reopen the proofs in this action, the complainant asks that the same be received in evidence and marked Complainant's Exhibit 143.

Mr. Stein: Do I correctly understand, Mr. Watson, that you merely offer in evidence a paper purporting to be a copy of a
5352 judgment in the action described by you?

I object to the admission of the paper referred to by Mr. Watson, which was marked Exhibit "A" by Judge Coxe, and which Mr. Watson asks to be marked Plaintiff's Exhibit 143, upon the ground that it is incompetent, irrelevant and immaterial; that it does not and cannot in any way bind the defendant; that it is not proof; that no proper foundation has been laid therefor; that it is neither certified nor exemplified in the manner required of foreign decrees,

judgments, or determinations of foreign courts, so as to make the same admissible in this action. 5353

As to that part thereof which Mr. Watson has described as the opinion, the objection is made on all the grounds heretofore named, and on the further ground that an opinion of the Court is not the subject of proof in this matter; that it is no part of the record, and can have no determinative effect against any party or person, and especially a person not a party to that proceeding.

The objection is made to the whole paper and as to each and every part thereof, and the objections as to those based on general irrelevancy, immateriality and incompetency are not to be deemed objections in limitation of the general objection. 5354

Mr. Watson: The complainant offers the paper marked Plaintiff's Exhibit 143 in evidence as a bar and estoppel of the defendant's claims to the right to use the names "Waterman," "Waterman's," "A. A. Waterman & Co.," "Waterman Modern," "Waterman Modern Fountain Pen."

Also as an adjudication between the plaintiff herein and the concern A. A. Waterman & Co., through which the defendant claims the right to use the names "Waterman" and "A. A. Waterman & Co.," that the agreement of June 12, 1905, between Arthur A. Waterman, Isaac E. Chapman and William L. Chapman, is a fraudulent agreement. 5355

Also an adjudication between the plaintiff and said A. A. Waterman & Co., that the said agreement of June 12th, 1905, was merely an agreement for the sale of a name without any accompanying business.

5356 Also as a bar and estoppel against the defendant of its claims that the said agreement of June 12th, 1905, was an agreement in connection with the reorganization of an already existing business.

Also as a bar and estoppel of the defendant's claims as against this plaintiff to use the names "Waterman," "Waterman's," or "A. A. Waterman & Co." in the fountain pen business, or in connection with the manufacture and sale of fountain pens under said agreement of June 12th, 1905, between Arthur A. Waterman and Isaac E. Chapman and William L. Chapman.

5357

The above are set out in reply to the defendant's objections.

Mr. Stein: The defendant renewing its objections, to the admission of the aforesaid paper heretofore marked Exhibit "A" by Judge Coxe, renews each objection heretofore made by it on the ground that the said paper is inadmissible as against it for the reasons then stated.

The defendant respectfully insists that the statements just made by counsel are statements of the issues or some of them, in this action to be determined upon the trial, and this defendant inter alia respectfully submits that those issues are to be determined as between these American citizens doing business in the United States by this court, and not by any court of any foreign jurisdiction, whether it be that of Italy, China, or any other jurisdiction.

5358

Mr. Watson: I offer in evidence a paper which purports to be a fair translation of said judgment, Complainant's Exhibit No.

143, and ask that the same be marked Complainant's Exhibit 144. 5359

Counsel states that at the next session he will call persons versed in the Italian and English languages to prove that the paper submitted and marked Complainant's Exhibit 144, is a fair translation of the paper marked Complainant's Exhibit 143.

Mr. Stein: I object to the admission of the paper in evidence on the ground that it is incompetent, irrelevant and immaterial as to this defendant, and as to any of the issues raised in this action, that it is hearsay at best; that it is not proof; that no proper foundation has been laid therefor, and that no witness has been called to prove that the paper is a translation, fair translation, or unfair translation; and that at the present time it can in no way have any binding effect against this defendant. 5360

Mr. Watson: In view of defendant's counsel's statement on the record, the Court's attention is called to the unnecessary padding of the record, and in this connection the Court's attention is also called to the long objection previously put on the record regarding the paper marked Plaintiff's Exhibit 143, and respectfully submits that the record on its face shows unnecessary padding; and the plaintiff gives notice that he will move the Court to tax the costs of taking this deposition against the defendant at the final hearing. 5361

Mr. Stein: Defendant's counsel in answer to the last statement refers the Trial Justice to this record itself as to whether there has been any unnecessary padding, and, if so, who has been guilty of said act, particularly

5362

referring as to this session to the unnecessary statement of counsel as to the purpose for which he has offered Complainant's Exhibit 143.

The defendant submits that this record will speak for itself in this and all other connections.

Mr. Watson: The plaintiff renews his objection and gives further notice of his motion.

5363 Adjourned to Saturday, November 18th, 1911, at 11 o'clock A. M.

New York, November 18, 1911. 2 P. M.

Met pursuant to adjournment.

Appearances as before.

Mr. Stein. The defendant objects further to the paper (the Italian decree marked Exhibit "A" by Judge Coxe, and Plaintiff's Exhibit 143), on the ground that the same has not been pleaded and that res adjudicata has not been pleaded.

5364 The defendant objects to the admission of the paper marked Complainants' Exhibit 144, upon all the grounds heretofore enumerated; and upon the further ground that res adjudicata has not been pleaded.

EDGAR R. ACCETTA, a witness called on behalf of the complainant, being duly sworn, deposes as follows:

Direct-examination by Mr. Watson:

Q1. Please state your name, age, residence and occupation?

5365

A. Edgar R. Accetta, 198 Grand Street.

Q2. New York City?

A. New York City, Borough of Manhattan.

Q3. What is your business?

A. Well, I am a lawyer, attorney at law.

Q4. Are you familiar with the Italian language and the English language?

A. I am.

Q5. Are you able to fairly translate from the Italian language into the English language?

A. Yes, sir.

5366

Q6. Have you ever acted as official interpreter for any courts in this State or District?

A. I did.

Q7. What courts?

A. United States District Court.

Q8. In New York?

A. For the Southern District of New York.

Q9. Have you compared the translation, Plaintiff's Exhibit No. 144, with the Italian copy of Plaintiff's Exhibit 143, to determine whether or not Exhibit 144 is a fair translation of Exhibit 143?

A. Yes, sir.

5367

Q10. Will you please state whether or not the Exhibit 144 is or is not a fair translation of Plaintiff's Exhibit 143?

A. Yes, sir, it is a fair translation thereof.

Mr. Watson: The paper marked Exhibit 144 is offered in evidence and the examiner is asked to mark it Complainants' Exhibit No. 144.

Mr. Stein: The defendant objects to the admission of the paper asked to be marked Plaintiff's Exhibit No. 144 on the ground that it is incompetent, irrelevant and im-

material as to this defendant, no proper foundation has been laid therefor, that neither it nor the paper of which it purports to be a translation has been pleaded; that res adjudicata has not been pleaded.

Cross-examination by Mr. Stein:

XQ1. Are you admitted to practice in the courts of New York?

A. Not in the courts of New York, sir.

5369 XQ2. In what courts?

A. Courts of Indiana.

XQ3. How long were you the official interpreter of the United States District Court of the Southern District of New York?

A. For the last couple of years, I think.

XQ4. You are now acting as interpreter there?

A. Yes, sir.

XQ5. And have you your office in the court house?

A. No, I have not.

XQ6. You are simply called in to interpret in cases?

A. Yes, sir.

5370 XQ7. And you are familiar, I presume, with certain Italian dialects?

A. I am.

XQ8. And it is as to those dialects that you interpret?

A. Not only as to dialects, but as to the language.

XQ9. As to the language generally?

A. Yes, sir.

XQ10. When did you first see the paper marked Complainant's Exhibit No. 143?

A. 143,—do you mean this here judgment?

XQ11. Yes?

5371

A. Well, it is about three weeks ago, I think.

XQ12. When did you first see the paper marked Exhibit No. 144?

A. The same time.

Mr. Watson: After this one, after this one. This one was later (indicating).

The Witness: Oh, this is later. I saw the translation, I saw a translation of that paper which I corrected according to my best judgment.

5372

XQ13. Which you personally corrected?

A. I did.

XQ14. And who made that translation which you then saw and is in evidence?

A. Who made that translation then?

XQ15. Yes.

A. I don't know.

XQ16. When did you first see the translation marked Exhibit 144?

A. I saw it last week, I think.

XQ17. What day?

A. Well, if I said last week, it is about a week ago.

373

XQ18. Did you personally make the translation that is found in Exhibit 144?

A. Not this here translation; I corrected the first translation, and I suppose this has been written and I compared the both of them, the original and the translation, and I found it to be correct.

XQ19. Are you sure the paper now marked Exhibit 144 is the translation that you saw?

A. Yes, sir; I had it with me for the last three days, I think.

XQ20. All the time?

A. Yes, sir.

XQ21. Now, did it leave your possession at any time during those three days?

A. Yes, it did once.

XQ22. When?

A. Two days ago.

XQ23. When did you get it back?

A. Same day.

XQ24. And that was Thursday?

A. Yes, sir.

XQ25. And since Thursday it has not been out
5375 of your possession, is that correct?

A. Yes, sir.

XQ26. I now call your attention to the fact that that paper was marked in evidence yesterday, Friday, at a hearing here at which you were not present, and ask you how you reconcile that fact with your testimony?

A. Well, if I had not this one with me I had a copy thereof.

XQ27. Where is that copy?

A. In the printer's.

XQ28. Well what is the best of your recollection
5376 as to what that copy contained that you testify complainant's Exhibit 144 is a fair translation of Complainant's Exhibit 143?

A. Well, I had this all day with me to-day, you see.

XQ29. Yes?

A. And I compared it word for word and I am ready to testify now that this is the proper, just and fair translation of the original.

XQ30. Yes. Now if you were making a new translation would you change any word or any phrase or any sentence from the position or condition in which it now appears in Exhibit 144?

5377

A. No, sir.

XQ31. So that you would agree word for word with everything, word for word, as far as those two exhibits are concerned with the man that translated it; is that correct?

A. I think so.

XQ32. Who did translate this?

A. I don't know.

XQ33. And you would not suggest one change?

A. I did suggest changes, and the changes were made.

XQ34. On the original?

5378

A. Certainly.

XQ35. And who made that original translation?

A. I really don't know, sir.

XQ36. To whom did you make the suggestions?

A. To myself.

XQ37. And to whom did you communicate them?

A. To Mr. Watson.

XQ38. And with whom did Mr. Watson then communicate, if you know?

A. I don't know, sir.

XQ39. What is that paper, Exhibit 143?

5379

A. It is a judgment.

XQ40. Anything else?

A. It is simply a judgment.

XQ41. Is it anything else but a judgment?

A. It is what you call a decree or judgment.

XQ42. Yes, does it contain anything other than what we in the United States Circuit Court for the Southern District of New York, know as a decree or judgment?

A. Why, it contains what we in the Italian law call a decree or judgment.

XQ43. Will you kindly answer my question, Mr. Accetta?

A. Well, I cannot answer your question, really, because this is a different procedure.

XQ44. In other words the Italian procedure is entirely different from the procedure followed in the United States Circuit Court?

A. Well, I suppose it is.

XQ45. Well, do you know?

A. I think I do, yes.

XQ46. Well, what is the difference?

5381 A. Well, you don't want me to start from the beginning of the law and compare—

XQ47. I am asking is it different?

Mr. Watson: Counsel for the complainant has listened here with a good deal of patience to repeated questions of the defendant's attorney which have been fully and frankly and freely answered, and submits to the Court that the witness has fully and freely and frankly answered the questions and that the question now asked is entirely—in the first place has been fully answered,—and in the next place is entirely improper in form.

5382

XQ48. Is it different?

A. Is it different what?

XQ49. (XQ48 read.)

A. Well, if you want to know all that this judgment contains, I can be able to tell you.

XQ50. Well, that is what I am asking. What does it contain besides a judgment?

A. Contains the opinion of the Court, of course, and the statement of facts and then the judgment.

XQ51. Statement of facts, as narrated by the Court?

A. Yes, sir.

XQ52. And its opinion?

A. Yes, sir.

XQ53 Go ahead?

A. Well, it first contains all the facts as the Court in its opinion found.

XQ54. States, rather?

A. Yes, sir, states as to facts found after the presentation of the case, and then contains the points of the law and then it concludes, giving 5384
the opinion and the judgment.

XQ55. Do you find anything in there which shows that the Court determined the facts and the law on anything except what we know as affidavits and the argument of counsel?

A. Yes, sir, the judgment is based upon those affidavits and the argument of counsel.

XQ56. And do you find anything in there that indicates that the Court heard witnesses under oath who were subject to cross-examination?

A. Do you mean to say about the witnesses which were heard in America?

XQ57. I didn't hear what you said? What was 5385
the answer?

A. Which do you refer to?

XQ58. I mean to find out just what my questions call for.

A. All right.

XQ59. (XQ56 read to witness).

A. No, sir.

XQ60. Are you connected with the Polyglot Company in any way?

A. I am not.

Mr. Stein: That is all.

Re-direct Examination by Mr. Watson:

RDQ1. The paper, Complainant's Exhibit 143, is that the usual form of a judgment in the Italian courts?

A. Yes, sir.

Mr. Stein: One moment. I object to the question and move to strike out the answer on the ground that no proper foundation has been laid.

5387

RDQ2. Are you familiar with the practice in the Italian courts?

Mr. Stein: I object to the question on the ground that no proper foundation has been laid and that the question is leading and calls for the conclusion that the court in this action is called upon to determine.

A. I am.

RDQ3. What experience, if any, have you had, or what knowledge have you, of Italian law and

5388 practice?

A. I have been admitted in the lower courts of Italy.

RDQ4. Did you practice law in those courts in Italy?

A. I did.

RDQ5. For how long?

A. For a year or so.

RDQ6. Were you regularly admitted to practice in the courts of Italy?

A. I stated in the lower courts, yes, sir.

RDQ7. Is the paper, Complainant's Exhibit 143.

5389

the usual form of a judgment rendered by the Civil and Penal Court or Tribunal at Milan, Italy?

Mr. Stein: Objected to on the ground that no proper foundation has been laid, and as to the competency of the witness not being established.

A. Yes, sir.

RDQ8. Have you had any experience or knowledge of judgments of the Civil and Penal Court or any courts of Italy? 5390

A. Yes, sir.

RDQ9. Is the paper, Complainant's Exhibit 143, the usual form in which judgments and decrees of the Italian Courts are rendered?

Mr. Stein: Objected to on the ground that no proper foundation for the question is laid, and the competency of the witness to answer not being established.

RDQ10. Now, you may answer.

A. Yes, sir.

RDQ11. What knowledge or exprience have you had with judgments and decrees, proceedings and procedure of the Italian Courts? 5391

Mr. Stein: Objected to unless the question is limited to the particular Italian Court out of which Exhibit 143 purports to issue.

A. Why, the Code, the procedure, etc. are all the same for all the courts. We have one Code only by which we abide.

RDQ12. Does that apply to all the courts of Italy?

A. We have a criminal and civil code, and a code of commerce.

RDQ13. Are you familiar with those Codes?

A. I am.

RDQ14. Do you know whether the judgments and decrees of the courts in Italy are all of the same general form?

A. They are.

RDQ15. Is the paper, Complainant's Exhibit 143, in the form with which you are familiar?

A. Yes, sir.

5393 RDQ16. And is that paper, Complainant's Exhibit 143, the usual form of judgment and decree of the Italian courts with which you are familiar?

Mr. Stein: Objected to upon the same grounds.

A. Yes, sir.

RDQ17. You had this paper, Complainant's Exhibit 144, given to you last night by myself?

A. Yes, sir.

RDQ18. For several days prior thereto you had the identical sworn copy of the same translation in your hands, had you not?

5394 A. Yes, sir.

RDQ19. And that is the one which you referred to when you said you had this paper in your hands for a week?

A. Yes, sir; and as a matter of fact I don't know which was which, I looked them over and they both are the same.

RDQ20. One was a carbon copy of the other?

A. Yes, sir.

RDQ21. And both contain affidavits as appears on the last page identical in form as that last page of Complainant's Exhibit 144?

A. Yes, sir.

RDQ22. Did you since I gave you this paper last evening, Complainant's Exhibit 144, compare this paper with the original Complainant's Exhibit 143?

A. I did.

RDQ23. Did you find Complainant's Exhibit 144 was a fair and correct translation of Complainant's Exhibit 143?

A. Yes, sir.

Mr. Watson: That is all. 5396

Re-cross Examination by Mr. Stein:

RCQ1. Do I understand you to say that all decrees issuing out of Italian Courts are the same?

A. That is what I said, yes.

RCQ2. And that would apply to the petty criminal courts corresponding to our Magitsrate's Court and your court of highest jurisdiction?

A. Yes, sir.

RCQ3. So that the mandates of your highest appellate court would correspond in form with the orders, directions and mandates of your lower 5397 courts?

A. As far as I said, that is a statement of fact, according to the facts stated to the Court and its opinion, and then the point of law, and then the conclusion of the Court and the judgment.

RCQ4. And that would apply—

A. To each and every sentence—to each and every decree and judgment which the courts give.

RCQ5. And that would apply, do I understand, to the case of a man arrested for being drunk, and being sentenced to one day in prison?

A. Exactly the same. We have no Magistrate's court there.

RCQ6. Have you been admitted to practice in the Royal Civil and Penal Court of Milan?

A. No, sir.

RCQ7. That is not one of the courts, the lower courts, to which you were admitted to practice, is that correct?

A. No, sir.

RCQ8. Now, in Italy, when an action is finally brought on for hearing, witnesses are examined,
5399 are they not; and testimony taken, and the witnesses cross-examined by opposing counsel?

A. That depends upon the judgment or decree of the court.

RCQ9. Now, before judgment or decree of the court is entered is it not customary to examine witnesses and have them cross-examined?

A. As I said—

RCQ10. And to take their testimony?

A. That depends upon the judgment or decree of the court.

RCQ11. But the decree of the court is the last
5400 proceeding in the action, is it not?

A. Sir?

RCQ12. The judgment is the last thing done in an action?

A. Before the different stages of the procedure, yes.

RCQ13. Now, is it not customary and usual to examine witnesses in open court with the right to the opposing party to cross-examine?

A. In some of the cases, yes.

RCQ14. Well, does not that apply in commercial cases?

A. In some cases, it does.

5401

RCQ15. And when does it not?

A. When the court gives a judgment by which it disposes of the case without any demand of proof, without any demand of further proof.

RCQ16. For instance, like a judgment on the pleadings or where a cause of action is conceded?

A. Well, yes.

RCQ16. But where the facts are in dispute or certain are in dispute, is it not customary to have a jury to hear the oral testimony of the parties to the transaction, or witnesses to the transaction?

A. Not in civil actions, no.

5402

RCQ17. Not in civil actions.

A. No, sir. If you talk about a jury, yes.

RCQ18. Yes. Well what does the jury hear then in those particular cases?

A. We use the jury in Italy simply for criminal cases.

RCQ19. Well, now, in civil actions?

A. We believe in civil actions—

RCQ20. Where there is no jury?

A. Yes, sir.

RCQ21. Is it not customary for the judge to hear witnesses and to allow counsel to cross-examine?

5403

A. If a decree out of the court is such that further evidence is demanded, then the decree would be—

RCQ22. Demanded by whom?

A. By the judge.

RCQ23. So I understand from you that the law of Italy gives to a judge the absolute right of determining an action without hearing a single witness?

A. I don't say so.

RCQ24. Well, if a judge does not want to hear

witnesses can he determine the action without hearing them?

A. If the evidence as laid before them is such that he can give judgment, yes.

RCQ25. In what particular cases do you refer to that he can give judgment without hearing witnesses?

A. Whenever he decides that no further proof is necessary in the case.

RCQ26. Well, now, where there is a question of fact, and I presume you understand what I mean
5405 by a question of fact?

A. Certainly.

RCQ27. Can the court determine those issues without hearing witnesses?

A. That depends upon the evidence brought before the court.

RCQ28. Well, if there are no witnesses there cannot be evidence, can there?

A. Well, we have different kinds of evidence, have we not?

RCQ29. What is the procedure, as you know it, based on your one year of practice in the lower
5406 courts of Italy, and I refer now more particularly to the procedure of the Royal Civil and Penal Court of Milan?

A. The plaintiff serves a writ of summons and complaint to the defendant. The day is set for trial on the face of the summons. Both parties which are compelled to be assisted by counsel at the trial don't have to appear in person, but their lawyers appear before the court which is composed of three judges. One is the presiding judge, one is the assistant judge, and another is the relator. and they submit then what we call in Italy, what we call "Comparse Conclusivuali," which are

briefs and statements of fact. The papers are submitted to the court, and the court gives the paper to the judge relator in order that he may study the case and find findings. Then the papers are submitted to the judges who sit at what we call "Camera di Consiglio," or Chamber of Council. In the meanwhile, while the judge relator is studying the case, and before he brings the facts before the court, the attorneys on both sides submit what they call "Aggrinta alle comparse conclusionali"—for instance, amended briefs. The court may then desire to be enlightened more upon certain facts and it may be that the court will direct the attorneys on both sides to again file with the court additional briefs, and that is done until the court satisfies itself that all the facts are properly stated. 5407 5408

The court then, upon the relation made by the judge relator, and in the Chamber of Council, gives a judgment based upon the statements of fact submitted, and upon the opinion of the court, of course; in that judgment the court may decide finally; the court may order the plaintiff to prove his cause of action on grounds which the court states only, and the defendant then is allowed to show— 5409

RCQ30. In what way, by affidavits?

A. No, no.

RCQ31. By testimony?

A. By testimony, by testimony; is allowed to show by testimony his contentions.

We call the defendant's testimony "Ripruova." Then the judges,—Oh, pardon me. This here hearing of testimony is made before a judge appointed by the court to hear the testimony, which judge is a sort of referee, relates the facts to the judge relator who submits those facts to the court

5410 The court then may give its verdict upon the evidence submitted or may again demand some sort of explanations in the way of questions, which questions only, witnesses are allowed to answer; and then the court may give a judgment, but if the court finds that the preponderance of evidence is for either of the parties, the court then may order the party which enjoys the preponderance of evidence to be submitted to the final oath; the oath is given upon the statement of facts or questions submitted by the court only.

5411 It is understood that during the progress of the examination—

RCQ32. Pardon me. By oath what do you mean?

A. Pardon me. I will be through in a moment.

Counsel are present at the trial and the judge questions the witness, and counsel may ask the court to question the witness as to certain facts and the other counsel may oppose, and the court, of course rules, just as they do here in the courts of the United States where the common law prevails, the court may rule that the objection is sustained, etc.

5412 RCQ33. Is the right to cross-examine an absolute right or one subject to the discretion of the court in a case such as you have last instanced?

A. Well, in this case, you know, there is no proof by witnesses.

RCQ34. I am asking in the case that you have instanced?

A. Oh.

RCQ35. Is the right to cross-examine absolute or discretionary?

A. Why, they have a sort of—they have rules of evidence there—

5413

RCQ36. Oh, no. You know what I mean by cross-examination, do you not?

A. Of course.

RCQ37. Well, is the right to cross-examine?

A. Oh, yes,—there is,—

RCQ38. Absolute, is it absolute?

A. Certainly.

RCQ39. What did you mean by saying the court may hear under oath or the issue on oath?

A. To the party.

RCQ40. Yes?

A. Who enjoys the preponderance of evidence. 5414

RCQ41. Yes?

A. In his favor.

RCQ42. Yes?

A. Because the parties do not appear as witnesses there.

RCQ43. What do you mean by oath?

A. Why, the court may rule that the plaintiff in the action give the oath.

RCQ44. Take the oath?

A. Yes, take the oath—pardon me—to take the oath and to testify whether the allegations contained in the suit are true or not.

5415

RCQ45. I understand then that there is—that parties to the action are not ordinarily permitted to testify as witnesses?

A. No, sir, they are not.

RCQ46. No?

A. Entirely not.

RCQ47. What form of law prevails in Italy and governs in Italy?

A. The Roman law. Well, we have a lot of laws now. The law that we have now is code law.

RCQ48. Founded upon the old Roman law?

A. Old Roman law, the English law, the Napoleon law, and Church law, and so on.

RCQ49. And that is all worked into one code, is that it?

A. To one code, yes.

RCQ50. And each particular law applies to cover cases such as the one described in Complainant's Exhibit 143?

A. We have a code by itself.

RCQ51. A code commercial?

A. A commercial code, we call it.

5417 RCQ52. And that is based fundamentally on the Roman law, is it not?

A. Well, it is a code by itself and it is based upon Roman law, as well as any other law.

RCQ53. Yes, but fundamentally it is based on Roman law?

A. Yes, sir.

RCQ54. Now, is this paper that has been marked Exhibit 143 a final judgment? Has that conclusively determined all the rights of the parties, or may the courts still take further testimony before it finally determines the action?

5418 Mr. Watson: Counsel for the complainant objects to the testimony as not proper cross-examination, and as to inquiring into new matters not covered by the direct-examination that the defendant is bound by the answer and makes the witness his own.

Mr. Stein: Counsel for the defendant claims that the question is a proper one, and is proper cross-examination of this witness, as to his competency as an expert on Italian law.

The Witness: Shall I answer?

5419

RCQ55. Yes, answer.

A. This is a judgment for the plaintiff with the right to the plaintiff to prove the first two paragraphs of the allegations contained in its brief.

RCQ56. You mean what we know as the complaint?

A. It is not exactly what we know as the complaint, neither is it a brief, you see. The complaint and summons in itself is filed and it is served.

RCQ57. Yes.

A. And then comes this, what we call—

RCQ58. Do you refer by brief, by brief do you 4520
refer to the document that sets forth what the plaintiff claims to be his cause of action?

A. Why, no. The cause of action is stated in the allegations contained in the complaint.

RCQ59. Yes?

A. Now,—

RCQ60. Well, let us get away from that. I don't care enough about it. So under that paper marked Exhibit 143 I understand the plaintiff has now the right to prove—

A. Not only the right to prove the two allegations contained in the conclusion—well, I don't know how you want to call it—in the brief. 5421

RCQ61. Well, in the brief?

A. But he has the right to enforce by order of the Court the illegitimacy of the use made by Guido Cabrini in his own name and as the representative of Isaac and William Chapman of the names "Watermann," "Waterman's," "A. A. Waterman," "Waterman Modern," "Waterman's Modern Fountain Pen," for the introduction in Italy and for sale of the fountain pens, in Italy, of course, and for advertising purposes, and so on.

5422

Because he says the use of the name is unlawful, etc.

RCQ62. Now, do I understand the case is not wholly closed now, but the right to make the proofs referred to is still in the plaintiff in that action?

A. Yes, sir.

RCQ63. Now, from such a judgment, there is the right of appeal, is there not?

A. Certainly.

RCQ64. I understand the case has been appealed. Has the appellate court the right to re-

5423 verse the lower court on the facts and on the law, or either on the facts or on the law?

A. Yes, sir.

RCQ65. And has the appellate court the further right to require the oral testimony of witnesses with the right of cross-examination?

A. If the Court finds—

RCQ66. Just answer the question: Has it the right?

A. You mean to hear additional evidence?

RCQ67. To hear additional evidence?

A. Yes, they have the right.

RCQ68. They have the right to reverse on the

5424 facts, have they not?

A. Certainly.

RCQ69. Also to reverse on the law?

A. Yes, sir.

RCQ70. It also has the right to send it back?

A. No, they don't send it back; they give their own decision.

RCQ71. And has it the right in making up its own decision, to send for further evidence or to require the taking of oral testimony?

A. Certainly.

RCQ72. Yes. Am I correct in understanding

that under the Italian Code the Italian Courts may try criminals who have fled the jurisdiction and who have never been arrested?

Mr. Watson: Objected to as immaterial.

A. Certainly.

Mr. Stein: That is all.

Further Re-direct Examination by Mr. Watson:

RDQ24. Referring to Complainant's Exhibit No. 143, the judgment of the Court is final as respects the agreement of December 12, 1905? 5425

A. Yes, certainly, that is final there.

RDQ25. No further evidence respecting the illegality or the legality of that agreement is required by the Court as shown by this judgment?

A. Yes, sir.

RDQ26. No further evidence is required?

A. No, sir. The only evidence that is required there is on certain points only.

RDQ27. Does the additional evidence required—

A. As I stated— 5427

RDQ28. Now, wait a minute, wait a minute. Does the evidence which the Court requires relate solely to the amount of the damages which the plaintiff has suffered?

A. Yes, sir.

RDQ29. And the additional proof required is only as to the amount of damage which the plaintiff has suffered?

A. That is all.

RDQ30. And the judgment in all other respects is final?

A. Is final, yes, sir.

RDQ31. Is the judgment of the Court as set out in the Complainant's Exhibit 143 final as far as this Court is concerned as to the illegality of the use by Cabrini and William Chapman and Isaac Chapman, finally decided and determined?

A. Yes, sir.

RDQ32. And what does the Court find regarding the use of the names "Watermann," "Waterman's," "A. A. Waterman's," "Waterman Modern," "Waterman's Modern Fountain Pen," by Cabrini, Isaac and William Chapman?

5429

Mr. Stein: Objected to on the ground that the judgment speaks for itself.

RDQ33. You may answer?

A. That it is illegitimate. Wait a minute. Don't you want the rest?

RDQ34. Yes.

A. Is illegitimate, is usurpation, of the firm rights, of the rights of the plaintiff, and is disloyal competition.

RDQ35. That is, that the use of those words constitutes unlawful competition?

A. Yes, sir, and it is ordered here—

5430

Mr. Stein: Now, one moment. I object to any further statement as not being an answer.

Mr. Watson: That is all.

Further Re-cross Examination by Mr. Stein:

RCQ73. The decree as far as it affects the validity of the agreement of June 12, 1905, is of course subject to reviewable action by the Appellate Court, is it not?

A. Of course.

RCQ74. And consequently it is not a final decree until finally,—until the matter be finally determined by the Appellate Court?

A. Well, I don't know the stage of the case at present, so that I can not tell you.

RCQ75. Well, if an appeal be pending from this decree Exhibit 143, that decree is not final until the matter is finally determined by the Appellate Court, is it?

A. We follow the same rules as the United States Courts here.

RCQ76. Where are the first two paragraphs of 5432
the brief that you refer to as to which the plaintiff can give further testimony?

A. I have got a brief here—

RCQ77. Point it out in the original decree; that is the paper (indicating)?

A. Yes, "a" and "b."

RCQ78. Well, where is "a" and "b?" Those are the two specific items, the first two paragraphs in the brief that you refer to, is that correct?

A. Yes, sir.

RCQ79. Let me see anything in this translation, Complainant's Exhibit 144, that says it refers only to damages and assessment of damages. I under- 5433
stand that the "a" and "b" you refer to starts with the last paragraph on page 3 of Complainant's Exhibit 144, and takes in through the paragraph marked "b" on page 4 of Exhibit 144?

A. Yes, sir.

RCQ80. Now, show me, in either of those two, where the only issue left open is as to computation of damages in favor of the plaintiff, and show me anything in either of those two paragraphs which you have marked out or referred to which relates to the assessment of damages?

5434

Mr. Watson: Counsel for the complainant submits that the question is most unfair and is a misconstruction of the witness's testimony, and submits to the Court that it is the evident intent of counsel to confuse the Court and the witness.

Mr. Stein: Counsel for the defendant states that this record will speak for itself and the good faith of counsel can be determined from the record by the Court.

The Witness: Shall I answer?

5435

(Question read.)

A. You must look to the full judgment in order to give a proper answer, because in the judgment it states that these two allegations are stated fully, the proof must be based upon the statement of fact alleged in paragraph "A," which speaks by itself, does it not?

RCQ81. Suppose you read it?

A. "A. That since the said Cabrini placed the pens of Messrs Isaac & William Chapman on the market under the name of 'Waterman' or 'Waterman Modern,' many buyers of these pens called and

5436 are still calling at the office of Mr. Carlo Drisaldi, general representative of the original 'Waterman's Fountain Pens' of the plaintiff company, and keeping same in stock, and protested that the pens which they bought in the belief that they were original 'Waterman' pens of the plaintiff company did either not work at all or they worked badly."

Then at the end of that, of the allegations, the plaintiff demands costs and damages.

RCQ82. Now, read "b?"

A. Which refers, of course, to allegation "A."

RCQ83. Yes?

A. Now, read "b?"

RCQ84. Where is it that the plaintiff demands costs and damages? Show us that in 144?

Mr. Watson: On page 5 of Exhibit 144.

RCQ85. And that reads that, that demand is in the following language: "Likewise with condemnation in the costs and with executory judgment."

(Not answered.)

RCQ86. Do you know where the brief of L. E. Waterman is?

5438

A. I read it, but I don't know where it is now.

RCQ87. Can you tell us offhand the first two paragraphs of that brief?

A. If I see the brief, yes.

RCQ88. Without seeing the brief?

A. No, sir.

RCQ89. Are you willing now, without seeing the brief, to state positively that the first two paragraphs of that brief relate to the assessment of damages in favor of L. E. Waterman Company and against Guido Cabrini and William and Isaac Chapman?

A. As far as I recall it.

5439

RCQ90. Will you state positively?

A. Not positively, no sir.

RCQ91. You will not?

A. No, sir.

RCQ92. So that you cannot now tell us positively what the first two paragraphs of that brief referred to?

A. Unless I see it.

RCQ93. Can you tell it to us now; answer yes or no?

A. No.

RCQ94. And you cannot tell us now as to the two questions left open by this paper or decree marked Complainant's Exhibit 143, is that correct?

A. Yes, sir.

RCQ95. Then was your testimony in answer to Mr. Watson that those two questions merely related to assessment of damages in favor of L. E. Waterman Company, erroneous?

A. No. It is not erroneous. You want each and every word of the allegations, and I am unable
5441 to tell you.

RCQ96. Do you know substantially what those allegations are right now?

A. Yes, substantially I do know; a demand for damages.

RCQ97. The first two allegations of the brief merely demand damages?

A. Not merely, demand among other things.

RCQ98. What other things?

A. That is what I say, I cannot refresh my recollection.

RCQ99. Was the damage question the important one as to each of these two paragraphs?

5442 A. It impressed me so, because I had the judgment before me and I could see what the judges had in mind.

RCQ100. But you cannot tell what other matters were embraced in these first two paragraphs?

A. Not exactly, no.

Mr. Stein I think that is all I want of this witness.

Further Re-direct Examination by Mr. Watson:

RDQ36. Are you able to state now, with your further examination of Complainant's Exhibit 143,

that this judgment is a final determination and to the force and effect of the agreement of June 12, 1905, mentioned in it?

A. Yes, I am.

RDQ37. What is the effect of the typewritten clause which is attached next to the last page of the Exhibit No. 143 which is in English?

Mr. Stein: I object to that as no part of the exhibit.

Mr. Watson: Oh, yes, it is part of the exhibit.

5444

Mr. Stein: It has not been proved. I object now further to the admission of the paper marked Complainant's Exhibit No. 143, upon the ground as shown by the statement of Mr. Watson, just made, that on page 20 thereof there is attached a typewritten paper in English which upon the face thereof is no part of the so-called Italian decree.

RDQ38. Will you answer the question?

A. Why, this is an execution of the judgment.

RDQ39. Is the paper or slip referred to a translation of what appears at the bottom of the last page, or on page 20 of Exhibit 143? 5445

A. Yes, sir—you mean down at the bottom here (indicating).

RDQ40. Yes?

A. Yes, sir.

RDQ41. Does the paragraph at the bottom of page 20 of Exhibit 143 make the judgment enforceable in Italy immediately?

A. Yes, sir.

Further Re-cross Examination by Mr. Stein:

RCQ101. That which you have just referred to at the bottom of page 20 is merely something printed on paper with a rubber stamp, is it not?

A. Yes, sir, and it is signed by the Court.

RCQ102. Which part is signed by the Court? Now, can you tell us what force and effect the Royal Civil and Penal Code of Milan gives to decrees and orders of the United States Circuit Court of the United States of America?

5447 A. Full force and effect.

RCQ103. In all matters and at all times?

A. Well, yes, sir, provided— Well, provided such decrees do not go against the commissioner—I don't know the words exactly in the code.

RCQ104. Well, give it to us in substance?

Mr. Watson: I object to the question as inquiring into new matter, and complainant's counsel gives notice that the defendant makes the witness his own, and therefore he is bound by his answers.

5448 A. Have you the Italian code of civil procedure here, Mr. Watson?

Mr. Watson: Yes, sir.

The Witness: Yes, that they have full force and effect.

Mr. Watson: Here it is.

The Witness: That is the one I want, Code of Civil Procedure. Yes, unless the judgment contains dispositions against the public order or against the public rights of the Kingdom.

5449

RCQ105. Do I then understand that the Italian Courts will give no force or effect or in anyway recognize any decree of the United States District Court or of the United States Circuit Court or the United States Supreme Court involving contracts, made in the United States, between corporations organized in the United States, or individuals, citizens and residents of the United States, if the law of Italy is opposed to the decisions thus rendered?

A. No, no, sir.

RCQ106. By "No, sir" you mean they will not give force and effect?

5450

A. They give force and effect to each and every judgment, with the exception of any judgment which will contain dispositions against the public order. You know what that means?

RCQ107. Yes.

A. Pardon me. And against the rights, the public rights of the Kingdom.

RCQ108. Well, will they give force and effect and recognition to such decrees, orders and judgments if in Italy, by precise rules of Italian positive law contrary legal conclusions have been reached?

5451

A. Yes, sir.

RCQ109. They would still give effect?

A. Yes, sir.

RCQ110. You are positive as to that?

A. I am.

RCQ111. I now call your attention to the opinion of the Court in the Italian litigation found on pages 9 and 10 of Complainant's Exhibit No. 144, which states:

> "The Court, in the previous decision, has already exhausted, forth the motives (which,

in fact, are incontrovertible, because they are settled by precise rules of our positive law) which prevent the recognition in Italy of the legal effect of the decision of July 14th, 1910, of the North American District Court for the Southern District of New York, and of that rendered on appeal on November 15th, 1910, by the Second Circuit Court of the United States, by which, according to the allegations of the defendants, the lawful right of the Chapmans to call by the name of 'Waterman' the
5453 fountain pens in which they dealt in the territory of that State, had been recognized."

I ask you whether or not that which I have just read does not refer to the Italian law as last laid down by its Courts?

Mr. Watson: Counsel for the complainant calls the Court's attention to the evident intent of the counsel to confuse the witness and the Court by quoting one part of the decision and judgment of the Italian Courts where, in the same decision and judgment,
5454 they set out expressly the reasons why these judgments are not recognized in Italy.

RCQ112. Go ahead and answer that?

A. I cannot answer that unless you read it all there.

RCQ113. Does that which I have just read represent the law of Italy?

A. No, it does not.

RCQ114. Does it represent the opinion of the Court in the particular case, the decree in which has been marked Exhibit 143?

5455

A. I suppose so. If it does not represent the law I do not think I am able to answer you.

RCQ115. Does it represent the law in that particular case?

A. I am not able to determine that. I do not pretend to be qualified as such.

RCQ116. Don't you intend to be qualified to read the opinion of the Italian Court and know what that opinion means?

A. That opinion is translated in English and you can give your own opinion about it.

RCQ117. Did you translate it into English? 5456

A. I did.

RCQ118. Did you correctly translate it?

A. I did.

RCQ119. Why not state whether or not—

A. If it is translated, it speaks for itself; I do not want to give an opinion which is not on the law; I am not in a position to give it.

RCQ120. Did the court that rendered the decree marked Complainant's Exhibit 143, have the right to determine that question of law, to wit, how far the decree or order of our United States District Court and of the United States Circuit Court regarding the effect and validity of the agreement of June 12, 1905, had jurisdiction? 5457

A. Why, the court must abide to the court and the court speaks for itself.

RCQ121. But the court must interpret the code?

A. Yes, sir.

RCQ122. And that is one of the provinces of the Italian Court, to interpret the code?

A. Yes, sir.

Mr. Watson: Calling the Court's attention to the fact that counsel is inquiring

5458 into entirely new matter, he is therefore bound by the answers of the witness.

Further Re-direct Examination by Mr. Watson:

RDQ42. Calling your attention to the judgment, Complainant's Exhibit 143, and to the translation of said judgment at the bottom of page 10 of Complainant's Exhibit 144, I ask you if the court does not there expressly state why it does not give full force and effect to the judgments inquired about by defendant's counsel, in these
5459 words: "Because the North American decisions which were invoked do not even contain by virtue of their very nature of judicial provisions made as the result of summary information in preliminary injunction proceedings, a sure and definite acknowledgment of the right claimed by the defendants. Neither does the judgment of November 15th, 1910, rendered by the Circuit Court of Appeals of New York (to which defendant refers, as that which should be the decisive instrument in the case) resolve anything regarding the question submitted at this time for the decision of
5460 the Italian magistrates." I ask you if that is not a fair translation of the judgment?

A. This is a fair translation, of course.

RDQ43. Now, the judgments of the American courts to which the Italian courts give full force and effect are final judgments?

A. Certainly.

RDQ44. They are not preliminary judgments?

A. No, no.

RDQ45. And is that the reason which the court gives for not accepting the judgments or decrees of the Circuit Court of July 14, 1910, and November

15, 1910, because they are preliminary interlocutory judgments?

A. Yes, sir.

RDQ46. In answering counsel's question regarding the force and effect of American judgments in Italy, you were referring to the Italian Code of Civil Procedure, were you not?

A. Yes, sir.

RDQ47. And you stated in your answers the substance of the provision of the Italian Code of Civil Procedure, respecting the force and effect of foreign judgments in Italy? 5462

A. Yes, sir.

RDQ48. How long have you been in the United States?

A. Well, I have been in the United States several times. All told, do you mean?

RDQ49. Yes, sir.

A. I have resided here for about ten or eleven years, I think.

RDQ50. And during that time have you given any attention or study to Italian Law or Italian codes?

A. Why, many times I have sent judgments of 5463
these courts to Italy so that they could be enforced.

RDQ51. And did you ever know of a case where you sent an American judgment to Italy to have it enforced when it was not enforced.

Mr. Stein: Objected to as immaterial.

A. Why, certainly. Every judgment I sent there has been enforced; that is a fact. Of course, I have to take the—

Mr. Stein: Well, Mr. Watson, was not on the other side in any of those cases, was he?

The Witnes: That is right; I done that.

RDQ52. This judgment, Complainant's Exhibit 143, is such a judgment as is in force and effect and could be and can be enforced and put into execution in Italy at the present time, is it not?

A. Yes, sir.

Further Re-cross Examination by Mr. Stein:

5465 RCQ122. Do I understand correctly that the Italian courts would give no effect or heed to decisions of our United States District Court and United States Circuit Court, interpreting a written contract made in the United States between citizens of the United States doing their business in the United States and relating to the business being carried on in the United States unless—which interpretation would merely constitute a question of law—unless it was in final form or in a final judgment; is that correct?

A. Yes, sir.

5466 RCQ123. So that a pure question of law, to wit, the construction of a written contract of such a kind when passed upon by the United States District Court and by all the judges of the United States Circuit Court would not be given effect or heed in Italy unless it were in the nature of a final judgment?

A. The only answer I can give you is by referring to the Code. That is all I can say.

Mr. Watson: And what does the Code provide?

Mr. Stein: As to that?

Mr. Watson: Yes.

5467

RCQ124. See just what foreign decrees are given faith. Look at your Code, although you probably won't find it in your Code?

A. The judgment will be enforcible as far as its execution is concerned, provided it is enforcible as to the execution thereof in the country where it has been rendered. That is satisfactory, is it not?

RCQ125. Yes, that is satisfactory.

A. All right. It is Section 941 of the Code of Civil Procedure, Note No. 3.

RCQ126. What you have just read from the Code is merely an annotation from the Code? 5468

A. Yes, sir. It is what we call jurisprudence.

RCQ127. You know what our Annotated Code is?

A. Yes.

RCQ128. So that is merely an annotation, and not part of the code?

A. Yes, sir.

By Mr. Watson: That means that is a question that has ben determined by the Italian Courts?

A. Certainly.

Q. As to the extent a foreign judgment will be enforced in Italy?

A. Yes, sir. 5469

By Mr. Stein:

Q. Do you mean that was simply an annotator's note as to what he thinks has been decided or should be decided?

A. Oh, no; that is what has been decided.

Deposition closed.

The signature of the witness to the foregoing deposition was waived by consent of counsel.

5470 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Complainant,

vs.

MODERN PEN COMPANY,
Defendant.

5471 I, William H. K. Davey, DO HEREBY CERTIFY that the foregoing proofs for final hearing were taken before me in the above entitled cause on behalf of the complainants, under and pursuant to the order of the Hon. Alfred C. Coxe, made and entered in the above entitled cause on the 16th day of November, 1911.

I do hereby further certify that I am not of counsel nor attorney for either of the parties, nor in any wise interested in the event of the cause.

I DO HEREBY FURTHER CERTIFY that
5472 Samuel S. Watson, Esq., appeared on the part of the complainant, and that Morton Stein, Esq., appeared on behalf of the defendant at the taking of the said proofs.

Dated, New York, November 18th, 1911.

At a Stated Term of the United States Circuit Court for the Southern District of New York, held in the Main Post Office Building, on the 16th day of November, 1911. 5473

Present—Hon. ALFRED C. COXE, United States Circuit Court Judge.

L. E. WATERMAN COMPANY,
Plaintiff,

against 5474

MODERN PEN COMPANY,
Defendant.

The petition of the plaintiff to reopen the proofs in the above entitled action having duly come on to be heard and after hearing Samuel S. Watson, Esq., of counsel for the petitioning plaintiff in support of said petition, and Alexander S. Bacon, Esq., of counsel for the defendant in opposition thereto, and upon reading and filing said petition, verified the 18th day of October, 1911, and the exhibits 5475 thereto annexed, and submitted to the Court therewith, it is

ORDERED that the plaintiff be and hereby is permitted upon payment of twenty-five ($25.00) dollars costs to the defendant to reopen said proofs for the purpose of permitting plaintiff to introduce in evidence a certified copy of a certain opinion, judgment and decree of the Royal Civil and Penal Court of Milan, Italy, in the Italian language, submitted to the Court upon the hearing of said

5476 petition and marked by the Court "Exhibit A" and also a fair translation of the same into the English language and without prejudice to the plaintiff to move the Court upon final hearing for permission to introduce oral testimony of lawyers not to exceed two versed in Italian law for the purpose of showing the force and effect accorded in Italy to judgments, orders and decree of Circuit Courts of the United States of America, and also for the purpose of showing that said judgment and decree (Exhibit A) is a final judgment.

If the judge at final hearing deems such testi-
5477 mony competent and necessary the defendant may make a similar application to be permitted to reply thereto by calling an equal number of lawyers versed in Italian law.

ALFRED C. COXE
U. S. Cir. Judge.

U. S. Cir. Court, filed Nov. 16, 1911,
JOHN A. SHIELDS, Clerk.

5478

1827

PLAINTIFF'S EXHIBIT No. 143.

CANCELLERIA DEL TRIBUNALE DI MILANO

N. 11337 Reg. Copie

Esatto Lire 27.

Milano, 2 Agosto 1911.

Il Cancelliere
C. N. J.

In nome di S. M. Vittorio Emanuele III.

PER GRAZIA DI DIO E PER VOLONTA' DELLA NAZIONE RE D'ITALIA

SEZIONE PRIMA

riunito nelle persone degli Illustrissimi

Avv. RAIMONDI cav. uff. ANTONIO, *Presidente*,
Avv. BANZI ALBERTO, *Giudice*,
Avv. CASATI ETTORE, *Giudice estensore*,

ha pronunciato la seguente

SENTENZA

nella causa commerciale sommaria, promossa con atto di citazione in data 2 *luglio* 1910 *a ministero dell'ufficiale giudiziario addetto a questo Tribunale Ranzini, e con atto di citazione, in ripresa d'istanza, in data* 5 *maggio* 1911 *a ministero dell'ufficiale giudiziario Frigerio, addetto al Tribunale civile e penale di Milano.*

TRA

la SOCIETA' L. E. WATERMAN COMPANY, *avente sede in New York, in persona del suo Presidente*

1828

FRANK WATERMAN, *elettivamente domiciliata in Milano, in via Amedei, n. 3, presso e nello studio del suo Procuratore signor avv. Rodolfo Maroni, dal quale è rappresentata in giudizio per mandato 4 luglio* 1910, *in autentica dott. Giulio Musso, notaio residente in Grugliasco, debitamente legalizzato dal Presidente del Regio Tribunale di Torino, coll'avvocato* EDOARDO BOSIO, ATTRICE.

CONTRO

CABRINI GUIDO, *residente in Milano ed elettivamente domiciliato in via San Paolo, n.* 11, *presso e nello studio dei suoi Procuratori signori avvocato* ALESSANDRO ABBOVE *e* LORENZO BANK, *dai quali è rappresentato in giudizio per mandato* 6 *luglio* 1910, *in autentica dott. Ennio Groppelli, notaio residente in Milano,* CONVENUTO,

CON INTERVENTO DELLA

SOCIETA' A. A. WATERMAN E C. *tvente sede in New York, in persona dei suoi componenti signori* ISAAC E. CHAPMAN *e* WILLIAM L. CHAPMAN, *elettivamente domiciliata in Milano, via San Paolo, n.* 11, *presso e nello studio del suo Procuratore avv.* ALESSANDRO ABBOVE, *dal quale è rappresentata in giudizio per mandato* 18 *novembre* 1910, *in autentica dott. Joseph Statermayer, pubblico notaio residente in New York.*

OGGETTO

USURPAZIONE DI RAGIONE SOCIALE

Intesa la relazione e discussione della causa, fatta alla pubblica udienza del giorno 22 giugno 1911 dai signori Procuratori delle parti, i quali, nell'interesse dei loro clienti, prendevano le seguenti rispettive

CONCLUSIONI

Il Procuratore della Ditta attrice chiese e concluse:

Piaccia al Tribunale Ill.mo,

Dichiarato in base alla sentenza 1. aprile 1911 di questo Tribunale Ill.mo che l'atto 12 giugno 1905, da cui si pretende dal convenuto Cabrini e dagli intervenuti Isaac e William L. Chapman derivare il diritto all'uso del nome "*A. A. Waterman*", è inefficace alloscopo medesimo nei rapporti colla Compagnia L. E. Waterman, ed in relazione agli articoli 5 e 12 della legge 10 agosto 1868 ed agli articoli 296 e 297 codice penale, 1151 codice civile.

Pronunciando definitivamente:

Dichiarare che il Cabrini Guido, tanto in proprio che quale rappresentante delli Isaac e William L. Chapman, non poteva e non può usare legittimamente dei nomi "*Watermann*", "*Waterman's*", "*A. A. Watermann*", "*Waterman Modern*", "*Waterman's Modern Fountain Pen*" per introdurre in Italia o per rendervi penne stilografiche e per iscopo di *rèclame*, e che l'uso di dette denominazioni, o nomi, costituisce usurpazione od imitazione della denominazione o ragione sociale della Società attrice, ed è atto "ad indurre in inganno i compratori sull'origine del prodotto", costituendo, comunque, concorrenza sleale e dolosa.

Ordinare la confisca di tutti gli oggetti, prodotti e *rèclames* portanti una di tali denominazioni e segni.

Condannare il Guido Cabrini ,tanto in nome proprio che quale rappresentante di Isaac e William L. Chapman, ai danni da liquidarsi in prosecuzione di causa, ammettendo, fin d'ora, gli infratenorizzati capitoli di prova testimoniale.

Con sentenza provvisoriamente esecutiva.

CAPITOLI DI PROVA TESTIMONIALE

A) Che, dopo che il Cabrini mise in commercio col nome di "*Waterman*" o "*Waterman Modern*" le penne

dei signori Isaac e William Chapman, molti compratori di esse si presentarono e si presentano tuttora all'ufficio del signor Carlo Drisaldi, depositario generale delle penne stilografiche originali "*Waterman*" della Società attrice, protestando perchè le penne, che hanno comperato, credendole originali "*Watermann*" della Società attrice, non funzionavano o funzionano male;

B) Che qualcuno di questi compratori portò la penna così erroneamente comperata, nella scatola in cui era stata loro venduta, scatola che era, invece, quella delle originali penne "*Watermann*" della Società attrice;

I Procuratori del convenuto chiedono e conchiudono:

Reietta ogni contraria istanza, eccezione e deduzione;

Salvo e impregiudicato l'appello contro la sentenza 1-6 aprile 1191 di questo Tribunale notificata il 19 aprile 1911;

Ammesso in via definitiva l'intervento della A. A. Waterman e C.;

Respingersi le domande tutte dalla attrice L. E. Watermann Company spiegate;

Colle spese e coi danni.

In via riconvenzionale:

Previe quelle declaratorie che del caso, e specialmente:

a) Essere scientemente falsa la affermazione contenuta nell'atto di citazione che "nessuna Ditta A. A. Waterman sussista a New York che possa essere rappresentata dal Cabrini in Italia od in Europa";

b) che tanto la citazione che la prodotta circolare, sia unitamente che separatamente, sono state fatte a scopo di sleale concorrenza;

1° Ordinarsi, a norma dell'articolo 398 codice penale e 63 codice di procedura civile, la cancellazione delle seguenti frasi ingiuriose per il loro cliente che si leggono nella citazione 2 luglio 1910, e cioè: "Inoltre questa de-"nominazione costituisce una truffa ed una frode in "commercio.

" E finalmente nessuna Ditta A. A. Waterman sus-
" siste a New York, che possa essere rappresentata dal
" Cabrini in Italia od in Europa.
" Anche e sopratutto come falsa designazione di una
" Ditta non esistente".

Conseguentemente condannarsi l'attrice Società L. E. Waterman nei danni, a favore del convenuto, salvo poi liquidarli in continuazione di giudizio e salvo al Tribunale di liquidarli come esso meblio sarà per arbitrare.

2° E previa, occorrendo, ammissione delle prove di cui infra, condannarsi l'attrice nei danni tutti morali e materiali causati al convenuto.

Sempre con le spese e con sentenza esecutiva.

TENORE DELLE PROVE PER TESTI.

1° Vero che l'attrice, a mezzo eei suoi agenti e dipendenti, sparse la voce nel pubblico e fece credere che il Cabrini Guido non potesse vendere le sue penne stilografiche, ed in ispecie la " Modern Fountain Pen ", perchè costituenti contraffazioni dei marchi della L. E. Waterman, e che coloro che avessero comprato penne del Cabrini o le avessero rivendute, si esponevano a gravissimi danni morali e materiali, perchè le penne sarebbero state sequestrate, e tenuti responsabili coloro che le avevano commerciate;

2° Vero che per rendere più verosimile il fondamento delle minaccie, ed impedire così la vendita delle penne del Cabrini, venivano invocate e la citazione già spiccata dalla L. E. Waterman e Company e le circolari diramate, circolari da rammostrarsi ai testi;

3° Vero che gravissimo fu il danno per tali fatti risentito dal Cabrini che dall'agosto 1910 in poi si vide ostacolata la vendita delle penne e non potè continuare a darvi quell'incremento che egli aveva ragione di ripromettersi;

4° Vero che il Cabrini, per sè ed a mezzo dei suoi agenti, non solo non cercò mai di far credere al pubblico

od agli altri acquirenti che la penna stilografica, da lui specialmente venduta sotto il nome di *"Modern Fountain Pen"*, fosse costrutta dalla L. E. Waterman Company ma anzi si sforzò sempre ed in tutti i modi di far sapere il contrario, vantando sempre la evidente maggior praticità ed utilità di tale penna su quelle della L. E. Waterman e Company;

5° Che sempre ed in ogni caso il Cabrini diede in tal senso precise istruzioni ai suoi dipendenti e compratori;

6° Vero che la maggiore *rèclame* esercitata dal Cabrini è fatta per mezzo di cassette speciali ad uso vetrine, contenenti n. 24 penne. Che tali cassette-vetrine sono precisamente uguali a quella prodotta in causa, e da rammostrarsi a testi. Che in detta cassetta-vetrina, e nella parte costituente l'alzata, havvi l'iscrizione *" The Modern Fountain Pen "* con sotto *" A. A. Waterman e C."*. Che tali diciture stanno in mezzo a due cerchi in cui, sopra uno sfondo bleu ed argento, campeggiano in rosso le lettere: *"A. A."*, mentre in campo bleu ed in bianco, sono scritte le parole: *"The Mark Of."*. Sotto ed in campo d'argento e bleu, stanno scritte le parole: *"The initials"* mentre nel fondo sul campo bleu è scritta in bianco la parola: *"Superiority"*. Nell'interno della cassetta poi, e sul velluto rosso, in oro ed in grande è scritta la parola:*"Modern"*. Parola che è ripetuta sui due lati della cassetta all'interno. Di fronte poi la cassetta porta la dicitura: *" The Modern Fountain Pen ";*

7° Vero che la L. E. Waterman Company non costruisce essa completamente le penne che mette in vendita, ma ne compera le varie parti da diverse Ditte e poi le riunisce;

8° Vero che la A. A. Waterman e C. invece costruisce essa tutte le parti delle penne che mette in vendita;

9° Vero che la L. E. Waterman Company comperò direttamente dalla Modern Pen Company, che è l'unica Società autorizzata in America a vendere le penne della A. A. Waterman e C., ben 500 *Modern Fountain Pens;*

10° Vero che i brevetti tutti della L. E. Waterman

Company di New York sono da tempo scaduti, per quanto riguardano le penne a serbatoio da lei vendute, mentre sono ancora in pieno vigore i brevetti della A. A. Waterman e C. per quanto riguarda la *Modern Fountain Pen*.

PER PERIZIA

Vero che la penna venduta dal sig. Guido Cabrini, sotto la denominazione "*Modern Fountain Pen*", sia per la materia, sia per la forma, sia pel modo con cui è fabbricata, è di gran lunga superiore per resistenza, utilità e praticità alle penne messe in vendita dalla Ditta L. E. Waterman Company.

Il Procuratore dell'interveniente Società A. A. Waterman

CHIEDE E CONCHIUDE:

Reietta ogni contraria istanza, eccezione e deduzione:

Dichiararsi definitivo l'intervento della A. A. Waterman e C. nella causa fra Cabrini Guido e la L. E. Waterman Co., con accogliersi le conclusioni tutte dal Cabrini spiegate.

Con le spese e coi danni.

FATTO

FRANK WATERMAN nella sua qualità di Presidente della Società L. E. WATERMAN corrente in New York per la fabbricazione ed il commercio delle penne stilografiche chiede col presente giudizio declaratoria di giuridica inefficacia dell'atto 12 giugno 1905 (registrato a Milano il 9 marzo 1911, dal n. 22975 al 22986 con lire 14,60), in forza del quale Guido Cacrini ha fatto uso, sino ad oggi, in Italia, del nome di "*A. A. Waterman*" per il commercio delle penne stilografiche, in concorrenza a quello dello stesso genere esercitato dalla Ditta L. E. Waterman, e conseguentemente quelle inibitorie e condanne che sono portate dagli art. 5 e 12 della legge 10 ago-

sto 1868 e degli art. 1151 codice civile, 370 codice procedura civile, come effetto di questo abusivo esercizio.

Il giudizio veniva iniziato con atto di citazione 2 luglio 1910, e sostenendo il Cabrini la legittimità di quest'uso per essere egli il rappresentante di una Ditta americana denominata anche essa *"A. A. Waterman e C."*, vi intervenivano i componenti questa Ditta (Sigg. Isaac e William L. Chapman) per sostenere e corroborare l'assunto del loro rappresentante italiano.

Questo Tribunale con sua sentenza 1-6 aprile 1911 riconosceva la legittimità di questo intervento, avendo però cura di disciplinarne la portata, secondo gli inconcussi principii di diritto processuale, nel senso dell'inestensibilità, nei confronti degli intervenienti, delle domande dalla Ditta L. E. Waterman proposte contro il Cabrini con l'atto istitutivo del contraddittorio. In secondo luogo riconosceva l'irrilevanza in causa, per evidente difetto di efficacia giurisdizionale in Italia, di alcune sentenze dei Tribunali nord-americani dimesse dal Cabrini e dagli intervenienti a sostegno della asserita legittimità dell'uso da essi fatto del nome *"Waterman"* per designare le penne stilografiche del loro commercio; finalmente disponeva la giudiziale produzione dell'atto sociale 12 *giugno* 1905 da cui il Cabrini e gli intervenienti pretendono derivare il diritto all'uso di quella denominazione, affinchè, dal suo esame, questo Tribunale sia posto in grado di giudicare se i convenuti, in virtù di esso, sieno stati *"legittimamente, seriamente ed effettivamente investiti del diritto di portare il nome di Waterman, oppure se vi sia in mezzo una frode da reprimere"*.

I convenuti ottemperavano al provvedimento giudiziale producendo quell'atto, e così la causa poteva venire riassunta e portata, con tutte le conclusioni superiormente trascritte, al definitivo giudizio di questo Tribunale nell'udienza del 22 giugno p. p.

DIRITTO

Già nella precorsa sentenza il Collegio ha, esaurientemente, esposto i motivi (del resto incontrovertibili perchè fissati da norme puntuali del nostro diritto positivo) che impediscono di riconoscere in Italia efficacia giurisdizionale alle sentenze 14 luglio 1910 della Corte distrettuale nord-americana per il distretto meridionale di New York, e 15 novembre 1910 in sede d'appello della seconda Corte circolare degli Stati Uniti che, secondo l'assunto dei convenuti, avrebbero riconosciuto il buon diritto dei Chapman di chiamare "*Waterman*" le penne stilografiche di cui fanno commercio nel territorio di quello Stato. Alla questione riproposta dai convenuti in questa seconda fase di giudizio, il Tribunale non può rispondere che richiamandosi al suo precedente giudicato, rilevando però soltanto l'equivoco nel quale è incorso il patrocinio del Cabrini coll'attribuire all'Ottolenghi l'opinione che si possa, alle sentenze straniere, riconoscere efficacia giurisdizionale in Italia, anche in difetto del prescritto atto di accertamento da parte dei nostri organi giurisdizionali.

Nella nota controversia dottrinale, se effetto del giudizio di delibazione sia quello di ammettere la sentenza straniera a operare nel nostro Stato, oppure di emanare un atto giurisdizionale che accerti ed attui, per virtù propria, nello Stato quello che il giudice straniero ha potuto con la sua sentenza validamente accertare ed attuare nel proprio Stato, l'Ottolenghi, nell'invocato scritto, dichiara di accogliere la prima opinione. In questo senso, e ristretta a questa disputa, va interpretata la frase di quello scrittore che il Cabrini ha creduto di potere, isolatamente, citare a sostegno di una proposizione manifestamente errata, e cioè che una sentenza straniera, *non riconosciuta*, possa avere giuridica esistenza di fronte ai Tribunali italiani.

E l'opposta norma il Collegio con animo tanto più tranquillo applica alla presente controversia, in cui non v'è

pericolo che il rigore formalistico dei principii contrasti colla equitativa opportunità della pratica soluzione; imperocchè neppure le invocate sentenze nord-americane, per la loro stessa natura di provvedimenti giudiziarii, emanati a seguito di sommarie informazioni in una procedura *"preliminare d'ingiunzione"*, contengono un sicuro e *definitivo* riconoscimento del diritto preteso dai convenuti.

Nè la stessa sentenza 15 novembre 1910 della Corte circolare d'appello di New York (a cui il convenuto si richiama, come a quello che dovrebbe essere il documento decisivo della causa) nulla risolve relativamente alla questione sottoposta oggi al giudizio dei magistrati italiani. Vi si legge infatti: *"essere evidente che la Società di cui Arturo A. Waterman era membro aveva il diritto di far uso del nome 'A. A. Waterman e C." in relazione alla propria azienda e di così marchiare le proprie penne"*; ma per arrivare a questa certamente inovviabile conclusione, lo stesso magistrato americano ha cura di soggiungere che ogni suo giudizio si fonda, ALLO STATO DEGLI ATTI, sulla SUPPOSIZIONE *che la Società A. A. Waterman e Company* ABBIA IL DIRITTO, *a termini del contratto con Arturo A. Waterman, di far uso di quella Ditta.*

Ora è appunto questo l'oggetto (non risoluto dalla Corte New-yorkese) dell'indagine oggi sottoposta all'esame di questo Tribunale: vedere, cioè, se possa ritenersi che, a termini del contratto 12 giugno 1905, Arturo Waterman sia entrato a far parte di quella azienda in modo "REALE, SERIO, ed EFFETTIVO", sì da conferirle il diritto di assumere il suo nome nella ragione sociale.

Spetta ora, dunque, a questo Tribunale di rispondere, in base all'esame del prodotto atto sociale 12 giugno 1905 a tal quesito, vedere, cioè, come si esprime la precedente sentenza, se con quell'atto i signori Chapman siano stati "LEGITTIMAMENTE, SERIAMENTE ed EFFETTIVAMENTE" investiti del diritto di usare, per la denominazione della loro Ditta, della ragione *"A.A. Waterman"*,

oppure se la cessione di questo nome sia il portato di un *artifizioso e fraudolento accordo.*

Ora, sembra al Collegio che non vi sia bisogno di ricorrere alle dichiarazioni rese nel 14 settembre 1910 dallo stesso Arturo Waterman nel suo interrogatorio *"de bene esse"* davanti la Corte circolare degli Stati Uniti (distretto meridionale di New York), ma basti l'esame dell'atto anzidetto perchè si debba riconoscere, senz'altro, che, con quel trasparente accordo, i signori Chapman, no naltro stipularono con Arturo Waterman che la *cessione di un nome.* Questa è la sola pattuizione che, con grande meticolosità di rigorosissime clausole precauzionali, campeggia in quell'atto e costituisce evidentemente per le parti l'UNICA FINALITA' del contratto. Infatti, già le inconsulte e significative disposizioni relative al conferimento (sotto forma di mutuo al tasso del 6 per cento con prelazione sugli utili) del capitale sociale; la assoluta esclusione del Waterman — socio a responsabilità illimitata — da qualsiasi ingerenza nell'amministrazione sociale e la singolare posizione a lui fatta di *cliente* della Società per la fornitura delle penne da smerciarsi nel *Far West,* dànno a questo contratto di società un così stravagante significato, da lasciare fortemente dubitosi della serietà e sincerità delle parti che vollero porlo in essere.

Ma la conclusione anzicennata sgorga irresistibilmente dal patto 9.o che, nell'economia dell'atto, segue quello gravemente vincolativo circa il trasferimento IRREVOCABILE e PERPETUO alla Società dell'uso del nome di *"A. A. Waterman"*. Con questa clausola, si accorda ad Arturo Waterman la facoltà di intraprendere entro il 1.o luglio 1906 per proprio conto, nel territorio occidentale del Nord America, il commercio delle penne stilografiche, stabilendosi però che *"in tal caso egli cessi dall'avere interessenza alcuna nella Società con quell'atto costituita"*, la quale apparterrà esclusivamente ai Chapman ed eredi: ma vi si aggiunge che se di questa facoltà entra il termine suddetto il Waterman non si valga *"egli cesserà nello*

stesso modo ed in ogni rispetto istessamente dal far parte della Società come se di quelle facoltà egli si fosse valso".

In sostanza, nello stesso istante in cui il Waterman veniva assunto in Società con i Chapman, con quel patto si stabiliva la di lui ESCLUSIONE dalla Società stessa, IN OGNI CASO E NEL TERMINE PERENTORIO DI UN ANNO. Si veniva cioè a distruggere, *a priori*, la condizione di uno degli elementi essenziali del contratto, e cioè dell'*affectio societatis*, riposante sulla uguaglianza della situazione contrattuale dei soci rispetto al fine comune, e quindi a togliere al contratto il motivo, giuridicamente sufficiente, a costituirne *la causa*.

I vantaggi con quel contratto promessi al Waterman il compenso accordatogli (veramente inesplicabile in un paese di grande libertà commerciale come il Nord America) di sfruttare il *West*, costituiscono per i Waterman il corrispettivo di una prestazione che è necessariamente *estranea* al contratto di società, perchè di questa le parti nei suoi riguardi pattuirono lo *scioglimento* nell'istante medesimo in cui la costituivano.

E siccome l'unica prestazione che in quel contratto il Waterman si assume, è quella di cedere l'uso del proprio nome patronimico, non v'ha dubbio che questa cessione costituisce la SOLA E VERA MATERIA DELL'ACCORDO, il quale, in tanto i Chapman s'inducevano a stipulare, in quanto sapevano che l'uso di quella denominazione avrebbe potuto metterli in condizione di vantaggiosa concorrenza verso 'autentica Ditta L. E. Waterman, e questa cessione di nome simulavano sotto le mendaci apparenze di un contratto di *società*, conoscendone l'illiceità.

Conclusione questa alla quale gli invocati precedenti storici di quell'accordo nulla conferiscono in contrario.

Si afferma che all'atto 12 giugno 1905 i Chapman addivennero, allo scopo di riorganizzare la loro azienda dopo l'uscita del socio Frazer; ma questo supposto intendimento delle parti non può mutare la portata giuridica

dell'atto, quale risulta dai suoi termini sopra rilevati. — Questi, nella significativa semplicità della forma adottata, non consentono di ritenere che materia d'accordo fosse l'aspetto di un organismo, già legittimamente esistente, sotto la ragione "*A. A. Waterman*," perchè non vi ha una sola disposizione in quel contratto che regoli la sorte di quel patrimonio complessivamente costituito di perfezione industriale, di ritrovati, di avviamento, che, necessariamente, avrebbe pur dovuto raccogliersi sotto l'egida di un nome già commercialmente consolidato. Qualunque possano essere stati i rapporti in precedenza intercorsi fra le parti, è un'azienda, *ex novo*, che sorge originariamente da quell'atto; un'azienda alla quale il Waterman, secondo il contratto, non conferisce alcuno di quegli elementi della propria personalità tecnica, commerciale, che soltanto avrebbero potuto legittimare la cessione alla Ditta di un nome ad essa inscindibilmente legato. Egli v'interviene solo per apportarvi il proprio nome, non perchè significhi o racchiuda un'entità economica concreta, ma per l'equivocità della fortunata omonimia che rappresenta; e dopo questa cessione egli subito deve ABBANDONARE la Società ed allontanarsene, per le vaghe e solitarie vicende dell'estremo Occidente.

Se pertanto l'atto 12 giugno 1905 contiene un'obbligazione fondata sopra una causa *falsa* ed *illecita*, d'uopo è concludere che non possa avere alcun giuridico effetto, e non possa quindi attribuire ai convenuti il diritto di usare di quella denominazione, sia isolatameite che congiunta con altre di fantasia, per contraddistinguere le penne stilografiche del proprio commercio, in concorrenza con l'omonima rivale.

Bene, a diritto, insorge quindi la L. E. Waterman contro il convenuto su questo uso illecito della propria denominazione, la cui repressione è indipendente da ogni esame sulla superiorità tecnico-industriale delle rispettive penne stilografiche, perchè il nome di "*Waterman*", nel comune linguaggio, non ancora si è venuto identificando col prodotto che costituisce la specialità della Ditta che,

per la prima, la lanciò sul mercato, ma rappresenta la rinomanza e la specialità che in questo commercio essa seppe acquistare; e quindi fa parte dei suoi diritti patrimoniali e come tale merita tutela contro l'illegittimo uso che altri ne fanno.

E poichè debbonsi, perciò, accogliere le istanze principalmente proposte dall'attrice, che rappresentano la naturale sanzione della patita violazione ed ammettersi all'esperimento i due capitoli di prova testimoniale diretti ad accertare quella confusione fra i prodotti dei contendenti, che è elemento di danno risarcibile, come conseguenza della sleale concorrenza costituita da quella usurpazione di nome.

Che, conseguentemente, le domande riconvenzionalmente proposte dal convenuto Cabrini debbonsi tutte respingere per il noto principio: *qui jure suo utitur neminem laedit.*

Che è il caso di riservare al definitivo le spese di giudizio.

Visto l'articolo 409 codice di procedura civile;

Per questi motivi:

Ogni diversa istanza respinta;

Il Tribunale;

Dichiara l'illegittimità dell'uso fatto da Cabrini Guido, tanto in proprio che quale rappresentante delli Isaac e William Chapman dei nomi di *"Waterman"*, *"Waterman's"*, *"A. A. Waterman"*, *"Waterman Modern"*, *"Waterman's Modern Fountain Pen"* per introdurre in Italia e per vendervi penne stilografiche e per iscopo di *rèclame.*

Costituire l'uso di dette denominazioni usurpazione della ragione sociale della Società attrice ed atto di concorrenza sleale.

Ordina la confisca di tutti gli oggetti, prodotti e *rèclames* portanti una di tali denominazioni e segni.

Costituire l'uso di u'inc'l?fi12t.icFrset

Ammettersi, per quant'altro, la Ditta Compagnia L. E. Waterman di New York a provare per testimoni le circostanze tenorizzate nei due capitoli delle sue conclusioni, che si dànno per qui letteralmente trascritte, delegandosi l'estensore all'assunzione della prova.

Spese riservate.

Clausola concessa.

Così deciso dalla 1.a Sezione del tribunale civile penale di Milano, oggi primo luglio millenovecentoundici (1.o luglio 1911).

All'originale firmati: RAIMONDI BANZI—CASATI, *est.*

PEZZATI, *V. C.*

La presente sentenza venne dal sottoscritto pubblicata all'udienza d'oggi 13 luglio 1911 avanti la Sezione 1.a

Il Cancelliere, firmato: PEZZATI.

Registrata a Milano addì 19 luglio 1911, n. 1015, vol. 450, *Atti giudiziari*. Esatte lire nove e cent. 15.

Il Ricevitore, firmato: MONTIGLIO.

We command all the sheriff's officers who are called and any others who duty it is, to put this present sentence in execution, and the public minister to give his assistance, and the commanders and officials of the public force to co-operate with it, whenever they are legally called.

La presente prima copia in forma esecutiva è conforme all'originale e si rilascia all'Attrice.

Milano, 2 Ago. 1911.

Il V. Cancelliere
Moreni.

Visto per la legalizzazione della firma *Moroni*, V. C., Milano, 2 Agosto 1911.

Il Presidente
Granati.

1842

CITY OF MILAN)
KINGDOM OF ITALY) ss:

American Consulate,

August 2, 1911.

I, the undersigned, Consul of the United States at Milan, do hereby certify that the signature and seal of President of Civil & Penal Tribunal of Milan attached to the annexed document are his true and genuine signature and seal, to the best of my knowledge and belief.

Given under my hand seal the day and year above written.

Chas. Caughy

Consul of the United States of America
(Seal of the U. S. Consulate)

American Consular Service Stamp.

Fee $2,00 cancelled August 2nd, 1911.

Seal of the U. S. Consulate at Milan

Fee No. 224.

Lit. 10,40 — $2,00.

PLAINTIFFS EXIBIT NO. 144.

Stamp of
Cav. Edoardo Bosio,
Attorney-at-Law,
Via Genova No. 27.
Turin.

Stamped sheet of
the Province of
Turin. Value 3 Lire
plus 20 per cent and 2 per cent
additional.

Exhibit A
Acc.

No. 3054 sent
No. 3419 R.

Stamp of the Clerk of the
Court of Milan No. 11337.
Copy registered. 4 copies
made. Fee exacted, 27 Lire.—
Milan, August 2nd, 1911.
(Signed) illegible, Clerk.

IN THE NAME OF H. M. VICTOR EMANUEL III.
BY THE GRACE OF GOD AND THE WILL OF THE
NATION KING OF ITALY.

(Stamp of the Civil and
Penal Court of Milan).

The Royal Civil and Penal Court of Milan.

PART ONE.

Constituted by Hon. Cav. Raimondi Antonio, Attorney-at-Law, Presiding Judge, Hon. Banzi Alberto, Attorney-

at-Law, Judge, Hon. Casati Ettore, Attorney-at-Law, Recording Secretary, Judge, HAS HANDED DOWN THE FOLLOWING DECISION in the summary commercial action, brought by writ of summons, under the date of July 2nd, 1910, served by Bailiff Ranzini,an officer of the Court, and by another writ of summons served in renewal of the action under date of May 5th, 1911, by Bailiff Frigerio, an officer of the Civil and Penal Court of Milan.

RE

The L. E. WATERMAN CO. a firm doing business in New York, represented by its president FRANK WATERMAN who has elected domicile in Milan, at No. 3 via Amedei, with and in the office of his attorney, Mr. Rodolfo Maroni, who legally represents the company, in virtue of a power of attorney executed on July 4th, 1910, before Giulio Musso a Notary Public residing in Grugliasco, and duly certified by the President of the Royal Court in Turin, in conjunction with Eduardo Bosio, Attorney-at-Law — PLAINTIFF

VERSUS:

Guido Cabrini, a resident of Milan, who has elected domicile at No. 11, via San Paolo, with and in the office of his attorneys, Messrs. Alessandro Abbove and Lorenzo Bank, Attorneys-at-Law, by whom he is legally represented, in virtue of a power of attorney, dated July 6th, 1910 and executed before Dr. Ennio Groppelli, a Notary Public residing in Milan — DEFENDANT

WITH THE INTERVENTION OF THE FIRM OF

A. A. Waterman and Company, doing business in New York, in the persons of its members, Messrs. Isaac E. Chapman, and William L. Chapman, and which elected domicile in Milan, at No. 11, via San Paolo, with and in the office of its attorney Alessandro Abbove, attorney-at-law, by whom it is legally represented in virtue of a

power of Attorney dated November 18th, 1910, and executed before Mr. Joseph Statermayer, a Notary Public, residing in New York.

OBJECT OF THE ACTION:
UNLAWFUL USE OF FIRM NAME.

Considering the statement and arguments in the case, presented at the public hearing of June 22nd, 1911, by the attorneys of the parties, which attorneys acting respectively on behalf of their clients, came to the following

CONCLUSIONS:

The attorney of the said plaintiff pleaded and summed up as follows:

May it please the Court:

WHEREAS IT HAS BEEN DECLARED as the ground for the judgment of April 1st, 1911, rendered by this Hon. Court, that the contract of June 12th, 1905, from which the defendant Cabrini and the interventors Isaac and William L. Chapman, claim to derive the right of using the name of "A. A. Waterman", is not available for such purpose in respect to dealings with the L. E. Waterman Company, and in reference to Arts. 5 and 12 of the law of August 10th, 1868 and Articles 296 and 297 of the penal code and 1151 of the civil code.

NOW WHEREFORE AND BY FINAL JUDGMENT

To declare that Guido Cabrini, either on his own account or as representative of Isaac and William L. Chapman, could not and cannot legitimately assume the names "Watermann", "Waterman's", "A. A. Watermann", "Waterman Modern", "Waterman's Modern Fountain Pen" for introducing fountain pens in Italy or for selling same in said country, for ADVERTISING them, and

that the use of the aforesaid name, or names, constitutes unlawful use or imitation of the names or firm name of the plaintiff Company, and that it is an act "tending to lead buyers in error regarding the origin of the product" and constitutes as such an act of unfair and fraudulent competition.

To order the confiscation of all articles, products and ADVERTISING MATTER bearing any such name or inscription. To condemn the said Guido Cabrini, both on his own account and as representative of Isaac and William L. Chapman, in the damages to be determined in the proceedings in this action, and to admit at this stage of the proceedings the interrogatories for the taking of testimony of witnesses, hereinafter set forth.

This judgment to be provisionally executable.

INTERROGATORY FOR THE TESTIMONY OF WITNESSES.

A) THAT since the said Cabrini placed the pens of Messrs. Isaac & William Chapman on the market, under the name of "Waterman" or "Waterman Modern", many buyers of these pens called and are still calling at the office of Mr. Carlo Drisaldi, general representative of the original "Waterman" fountain pens of the plaintiff company and keeping same in stock, and protested that the pens which they bought in the belief that they were original "Watermann" pens of the plaintiff Company, did either not work at all, or they worked badly.

B) That some among the buyers brought along the pen thus erroneously purchased, in the box in which it was sold to them, such box being, in fact, one belonging to an original "Watermann" pen of the complainant company.

The attorneys for the Defendant pleaded and summed up as follows:

That all contrary motions, exceptions and deductions be dismissed; that the appeal against the judgment of

April 1-6, 1911, of this court, notice of which was served on the 19th of April 1911, be sustained without prejudice; that the intervention of the A. A. Waterman & Co. be finally admitted:

That all the demands made by the plaintiff, the L. E. Waterman Company, be rejected with costs and damages.

IN COUNTER-PLEA:

That in view of the statements appertaining to the mater in hand, and more particularly:

a) WHEREAS the allegation contained in the writ of summons purporting that "no such firm as A. A. Waterman exists in New York, which might be represented by said Cabrini in Italy or in Europe", is knowingly false:

b) WHEREAS both the summons and the exhibited circular, whether jountly or severally, have been drawn up with the intention of unfair competition.

1st. The Court may, on the ground of Article 398 of the penal code and Article 63 of the code of civil procedure, order the cancellation of the following phrases which are damaging to their client and which occur in the writ of summons of July 2nd, 1910, to wit: "Furthermore, such name constitutes a swindle and a commercial fraud.

"And finally, there exists in New York no such firm as A. A. Waterman which might be represented by Cabrini in Italy or in Europe.

"Also and, above all, as a false designation of a non-existing firm".

THAT the Court may consequently condemn the plaintiff, the L. E. Waterman Co. in the damages, in favor of the defendant, with the provision that the same may be determined in the further proceedings in the case, and that the Court may determine same as it may be most proper for the award of such damages.

2nd. And that after admission, if necessary, of the evidence hereinafter set forth, the Court may condemn the plaintiff in all damages, both material and moral, suf-

fered by the defendant. Likewise with condemnation in the costs and with executory judgment.

TENOR OF THE INTERROGATORY OF WITNESSES

1) Is it true that the plaintiff spread the report in public, through his agents and employees, and made the public believe that Guido Cabrini could not sell his fountain pens, and especially the "Modern Fountain Pen", because they constituted counterfeits of the trademarks of the L. E. Waterman Co. and that whoever had bought pens from Cabrini or had resold same, were in danger of suffering the most serious moral and material damage, because the pens would be confiscated and those dealing in the same would be held liable?

2) Is it true that in order to render the grounds for the threats more credible and thus to hamper the sale of Cabrini's pens, reference was had to both the writ of summons previously obtained by the L. E. Waterman & Co. and to the circulars that were issued, which circulars are to be exhibited to the witnesses?

3rd. Is it true that the loss caused Cabrini by such proceedings was exceedingly serious and that from August 1910, on, the sale of the pens was impeded and he was no longer to continue to increase his sales to the extent he had reason to expect?

4th. Is it true that Cabrini either in person or through his agents, not only never did attempt to impress the belief on the public or on the other purchasers, that the fountain pen, especially sold by him under the name of "Modern Fountain Pen" was made by the L. E. Waterman Company, but that, on the other hand, he always endeavored, in every possible manner, to let the contrary be known, by always boasting of the evident greater practical value and usefulness of said pen in comparison with those of the L. E. Waterman and Company?

5th. That Cabrini always and in every instance gave

definite instructions to his employes and purchasers to this effect?

6th. Is it true that the best method of ADVERTISING employed by Cabrini was by means of special cases for purposes of display, which contained 24 pens. That such show cases are exactly the same as the ones exhibited in court and to be shown to the witnesses. That on these showcases, and on the part forming the lid, there appears an inscription reading as follows: "The Modern Fountain Pen", and below it "A. A. Waterman & Co." - That these two above mentioned inscriptions appear mid way between two circles, in which are found the letters "A. A." in red, while the words "The Marx of" (*) are written on a blue and white field.

Below, on a blue and silver field the words "The initials" are inscribed, while the word "Superiority" is written in white at the bottom of the blue field. Furthermore, inside the case and on the red velvet, the word "Modern" is inscribed in large letters in gold. This word is repeated on both sides of the case at the inside. Finally, the front of the case bears the wording "The Modern Fountain Pen"?

7th. Is it true that the L. E. Waterman Company does not entirely make the pens which it puts on the market, but that it buys the several parts from various concerns and that it subsequently assembles these parts?

8th. Is it true, on the other hand, that the A. A. Waterman & Co. makes all the parts of the pens which it sells?

9th. Is it true that the L. E. Waterman Company, bought directly 500 Modern Fountain Pens from the Modern Pen Company, which is the only concern in America authorized to sell the pens of the A. A. Waterman & Co.?

10th. Is it true that all the patents of the L. E. Waterman Company of New York have long since lapsed, as

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(*) Presumably meant for "Marks".

far as they concern the fountain pens sold by them, while the patents of the A. A. Waterman & Co. covering the MODERN FOUNTAIN PEN are still in full force?

INTERROGATORY.

Is it true that the pen sold by Mr. Guido Cabrini under the name of "Modern Fountain Pen", is in respect to the material used and in regard to its shape, as well as to the method of its construction, far superior in strength, usefulness and practical value to the pens put on the market by the firm of L. E. Waterman Company?

The attorney of the intervening A. A. Waterman Company Pleaded and summed up as follows:

That all contrary motions, exceptions and deductions be dismissed.

That the intervention of the A. A. Waterman & Co. in the matter of Cabrini Guido and the L. E. Waterman & Co. be declared final, and that all the conclusions pleaded by Cabrini be accepted with condemnation in costs and damages.

FACT:

FRANK WATERMAN in his capacity as President of the L. E. Waterman Company established in New York for the manufacture and sale of fountain pens demands by this present action a decision declaring the legal invalidity of the instrument dated June 12th 1905 (recorded in Milan, under nos. 22975 to 22986, and assessed at Lit.14,60,on March 9th,1911) and in virtue of whichGuido Cabrini has made use in Italy until the present day of the name "A. A. Waterman" in dealing in fountain pens in competition with the same kind of business carried on by the L. E. Waterman Company, and he consequently demanded such injuctions and penalties as are provided for in Articles 5 and 12 of the law of August 10th, 1868 and in Articles 1151 of the Civil Code and 370 of the

code of civil procedure, as a result of such unlawful practice.

The action was instituted by writ of summons of July 2nd, 1910, and as Cabrini maintained the lawfulness of such use in virtue of his being the representative of an American firm also known as "A. A. Waterman e C.", the members of the said firm (Messrs. Isaac & William L. Chapman) intervened to sustain and corroborate the allegation of their Italian representative.

This Court recognized the lawfulness of this intervention by its decision of April 1-6, 1911, taking care, however, to regulate its extent, according to the unalterable principles of legal procedure, in the sense of prohibiting, at the confrontations of the intervening parties, any extension of the demands on Cabrini, as proposed by the L. E. Waterman Co. in the instrument by which the cross action was instituted. In the second place, the Court recognized, by reason of evident legal effect in Italy, the irrelevancy in this case of certain judgments rendered by North American Courts, exhibited by Cabrini and the intervening parties in order to sustain the alleged unlawfulness of the use made by them of the name "Waterman" for designating the fountain pens in which they dealt. Finally, the Court decreed the production in court of partnership agreement of JUNE 12th, 1905, from which Cabrini and the intervening parties claim to derive the right to use the said designation, in order that this Court might be enabled, by its examination, to judge whether the defendant by virtue of the same, "WERE LAWFULLY, ACTUALLY AND EFFECTIVELY INVESTED WITH THE RIGHT TO USE THE NAME OF WATERMAN, OR WHETHER A FRAUD EXISTED WHICH WAS TO BE SUPPRESSED".

The defendants complied with the judicial provisions by producing said instrument, and thus the case could be taken up once more and prepared with all the above recorded conclusions for the final judgment of the Court at the hearing of June 22nd last.

POINTS OF LAW.

The Court, in the previous decision, has already exhausted forth the motives (which, in fact, are incontrovertible, because they are settled by precise rules of our positive law) which prevent the recognition in Italy of the legal effect of the decision of July 14th, 1910, of the North American District Court for the Southern District of New York, and of that rendered on appeal on November 15th 1910, by the second Circuit Court of the United States, by which, according to the allegations of the defendants the lawful right of the Chapmans to call by the name of "Waterman" the fountain pens in with they dealt in the territory of that State, had been recognized. To the question again brought up by the defendants in this second stage of the action, the Court could only answer by referring to its previous judgment, calling attention, however, to the ambiguity in which Cabrini's counsel was involved by attributing to Ottolenghi the opinion according to which the legal effect of foreign judicial decisions may be recognized in Italy even though the act of confirmation prescribed by our judiciary be lacking. In the notable doctrinal controversy, whether the effect of a summary proceeding is that of admitting the foreign decision to become operative in our country, or whether its effect is that of inducing a judicial act which confirms and makes effective, by virtue of itself, and in this country, that which the foreign judge was able, by his decision, to confirm and make effective in his own country, Ottolenghi, in the work to which reference has been had, declares that he shares in the first mentioned opinion. It is this sense, and as restricted to the aforesaid controversy, that we must interpret the statement of the said author which Cabrini thought he might cite, torn out of its original connection, in support of a manifestly erroneous proposition, to wit that an *unacknowledged* foreign decision can have any judicial standing in the Italian Courts of Law.

The Court with a serene mind applies the opposite ruling to the present litigation, in which there is no danger that the formal strictness of principles will conflict with the equitable opportunity for arriving at a practical solution, because the North American decisions which were invoked do not even contain by virtue of their very nature of judicial provisions made as the result of summary information in "PRELIMINARY INJUNCTION PROCEEDINGS", a sure and DEFINITE acknowledgement of the right claimed by the defendants. Neither does the judgment of November 15th, 1910 rendered by the Circuit Court of Appeal of New York (to which defendant refers, as that which should be the decisive instrument in the case) resolve anything regarding the question submitted at this time for the decision of the Italian magistrates.

In fact, we read in the judgment in question: "THAT IT IS EVIDENT THAT THE COMPANY OF WHICH ARTHUR A. WATERMAN WAS A MEMBER HAD THE RIGHT TO USE THE NAME "A. A. WATERMAN e C." IN CONNECTION WITH ITS OWN AFFAIRS AND TO THUS MARK ITS OWN PENS", but in order to arrive at this certainly incontrovertible conclusion the same American magistrate takes care to add that his decision is wholly based, ACCORDING TO THE NATURE OF THE PAPERS, on the SUPPOSITION that the firm of A. A. WATERMAN AND COMPANY HAS THE RIGHT TO USE THIS FIRM NAME, UNDER THE TERMS OF THE CONTRACT WITH ARTURO A. WATERMAN.

Now this is precisely the subject (left undecided by the New York Court) of the investigation submitted for the consideration of this court, namely, to see whether it may be held, under the terms of the contract of June 12th, 1905, that Arthur Waterman has "*actually, seriously and effectively*" become a partner in the said business, so as to give him the right to assume his own name in the firm name.

It therefore now behooves this Court to answer this question on the ground of the examination of the exhited partnership agreement of June 12th, 1905, and therefore, for such purpose, to ascertain, as stated in the previous decision: whether the Messrs. Chapman are "LAWFULLY, SERIOUSLY AND EFFECTIVELY" invested by that agreement with the right to use the firm name "A. A. Waterman" to designate their firm, or whether the lending of that name falls within the meaning of an ARTFUL AND FRAUDULENT AGREEMENT.

Now it appears to the Court that it is unnecessary to have recourse to the statements made on September 14th 1910, by the said Arthur Waterman in his interrogatory *"de bene esse"* before the Circuit Court of the United States (Southern District of New York) but that the examination of the above mentioned agreement is sufficient to lead in itself necessarily to the conclusion that by such transparent agreement the Messrs' Chapman did not covenant anything else with Arthur Waterman but *the assignment of a Name.*

That is the only covenant which stands out very distinctly, among the rigorous precautionary clauses of said agreement and Constitutes evidently for the contracting parties the ONLY PURPOSE of the agreement. As a matter of fact, the imprudent and significant provisions relative to the allottment of the Company's capital (in the form of a loan at the rate of 6 per cent preferred right to the profits) the absolute exclusion of Waterman — a partner with unlimited liability — from any share in the Company's management and the peculiar position given him, viz: that of a CUSTOMER of the firm for the supplying of pens to be sold in the FAR WEST, imparts such an extraordinary meaning to this partnership agreement as to convey strong doubts as to the earnestness and sincerity of the parties who wished to carry it into effect. But the aforementioned conclusion is irresistibly deduced from the *ninth* clause of the agreement

which in the text of the agreement follows the seriously binding one relating to the IRREVOCABLE AND PERPETUAL transfer to the IRREVOCABLE AND name of "A. A. WATERMAN". Under the terms of the clause in question, Arthur Waterman is authorized to undertake the handling of fountain pens from July 1st, 1906, on, for his own account in the western territory of North America, with the provision, howver that "IN SUCH CASE HE SHALL CEASE TO RETAIN ANY INTEREST IN THE PARTNERSHIP CONSTITUTED BY THAT AGREEMENT" which is to belong exclusively to the Chapmans and their heirs; but it is added that if Waterman does not avail himself of this right within the aforesaid term". HE SHALL LIKEWISE CEASE TO FORM PART OF THE PARTNERSHIP IN THE SAME WAY AND IN EVERY RESPECT SIMILARLY AS IF HE HAD AVAILED HIMSELF OF THIS RIGHT""

In substance, at the same time at which Waterman entered into partnership with the Chapmans, his EXCLUSION from the said partnership in any event, AND WITHIN THE PEREMPTORY PERIOD OF ONE YEAR, was determined on by the agreement itself, so that in this way one of the essential elements of the agreement came to be rendered void A PRIORI, that is the element of EFFECTIO SOCIETATIS based on the equality of the contractual standing of the partners with regard to the common end, and thus deprived the agreement of the motive, legally sufficient to constitute its CAUSE OF BEING.

The advantages promised to Waterman by this agreement, the compensation granted him (really unexplainable in a country enjoying such great commercial freedom as North America) to work the West, constitutes for Waterman the consideration for the rendering of a service which is necessarily FOREIGN to the partnership agreement because the members of the partnership agreed, as far as he was concerned, upon its DISSOLU-

TION at the very instant when it was constituted. And inasmuch as the only service which Waterman assumes to render in the said agreement is that of ceding the use of his own paternal name, there is no doubt that this cession constitutes the *sole and real substance of the agreement* which the Chapmans were led to stipulate, because they knew that the use of that name might place them in a position of advantage in competing with the genuine L. E. Waterman firm, and that they hid this transfer of name under the mendacious appearance of a partnership agreement, knowing it to be unlawful. The historical precedents of such agreement to which reference has been had, afford nothing contrary to this conclusion.

It is asserted that the Chapmans came to make the agreement of June 12th, 1905, for the purpose of reorganizing their business subsequent to the withdrawal of the partner Frazer. This pretended purpose of the parties, however, cannot change the legal significance of the agreement, since the same results from its tenor as above pointed out. The said tenor, in the significant simplicity of the form adopted, does not afford grounds for holding that the subject matter of the agreement referred to an organization that already possessed legal existence, under the name of "A. A. Waterman" because there is not a single provision in the said agreement which regulates the fate of that property made up of industrial improvements,invention and progressive measures, such as would necessarily have accumulated under a name already commercially established. Whatever the status of the previous intercourse between the parties, may have been, it is an "EX NOVO" business, arising originally from this agreement, a business upon which Waterman, according to the agreement, does not confer any of these elements of his own technical or commercial personality which alone would have rendered legitimate the transfer to the firm of a name indissolubly connected with such personality. He intervenes merely for

the sake of contributing his name to the same, not because it has or contains any concrete commercial value in itself, but merely on account of the casual similiarity in names; and after this transfer he must immediately *quit* the firm, and go far away for vague and solitary ventures in the far West.

If therefore, the agreement of June 12th, 1905 contains an obligation based on a *false* and *illicit* motive, it is necessary to conclude that it cannot have any judicial effect, and that it cannot, therefore, confer on the defendants the right of using that name whether severally or jointly with other imaginary names, to differentiate the fountain pens of their own handling in competition with their similarly named rivals. The L. E. Waterman Co. is therefore rightfully entitled to proceed against the defendant for this illicit use of its own name, the suppression of which is independent of examinations into the technical industrial superiority of the respective fountain pens, because the name "Waterman" in common parlance has not yet become identified with the product constituting the specialty of the firm which first placed it on the market, but represents the reputation and specialty which it has been able to acquire in this business, and it therefore forms part of its commercial rights and as such deserved protection against the unlawful use of it made by others.

AND WHEREAS the motions principally made by the plaintiff must be admitted, representing as they do the natural remedy against the injury sustained,

AND WHEREAS also the two interrogatories for the direct testimony of witnesses must be admitted to clear up this confusion between the products of the contending parties, which constitutees an element of indemnifiable damage, as being a result of the unfair competition brought about by this unlawful use of name;

WHEREAS, consequently the motions made by the defendant Cabrini in the Cross-plea be rejected as a

whole on the strength of the well known principle: QUI JURE SUO UTITUR NEMINEM LAEDIT.

WHEREAS THERE IS OCCASION TO RESERVE THE DETERMINATION OF THE COSTS IN THE CASE TO THE FINAL DECISION.

And in view of Art. 409 of the Code of Civil Procedure

NOW, THEREFORE,

All motions to the contrary are rejected.

The Court declares as unlawful the use made by Guido Cabrini, both in his own name and as representative of Isaac and William Chapman, of the names "Waterman" "Waterman's". "A. A. Waterman", "Waterman Modern", "Waterman's Modern Fountain Pen" for the purpose of introducing and of selling fountain pens in Italy and for *advertising purposes.*

The use of said names constitutes an unlawful use of the firm name of the plaintiff company and an act of unfair competition.

And the Court orders the confiscation of all articles, products and *advertising matter* bearing any such names and marks. The L. E. Waterman Company, of New York, on the other hand, is allowed to prove by witnesses the circumstances detailed in the two interrogatories embodied in its conclusions and herein before literally transcribed, the recording judge being appointed to take the evidence.

Costs reserved.

Clause granted.

Thus decided by Part One of the Civil and Criminal Court of Milan on this first day of July,nineteen hundred and eleven (July 1st, 1911).

The original was signed by:

Raimondi, Banzi, Casati, est.

Pezzati (Vice-Clerk)

The present judgment was published by the undersigned at the hearing of this day, July 13th, 1911 in Part One.

The Clerk (Signed) *Pezzati*

Recorded in Milan, on July 19th, 1911, under No. 1015; Vol. 450, Judiciary Acts. Fee exacted: nine Lire and 15 cents.

The Collector (Signed) *Montiglio.*

We command all Bailiffs called upon and any others whose dutly it is, to execute these presents, and the public Prosecutor to give his assistance, and all commanders and officers of the public forces to cooperate with him, whenever legally called upon.

This present first copy drawn in executive form is in conformity with the original and is issued to the plaintiff.

Milan, August 2nd, 1911 — The Vice - Clerk

Inspected for certification to — (Signed) *Moreni*

the signature of Moroni, VC. — Seal of the Civil

Milan, August 2, 1911 — and Criminal Court

(Signed) *Granati,* — ..of Milan

President

Italian Int. Rev. Stamp One Lire cancelled by the stamp of Civil and Criminal Court.

(Signed) (illegible).

Certificate autheticating the signature of the President and of the seal of the Civil and Penal Tribunal of

Milan issued by the U. S. Consul at Milan on August 2, 1911.

(Seal of the U. S. Consulate)

American Consular Service Stamp.

Fee $2,00 cancelled August 2nd, 1911.
Seal of the U. S. Consulate at Milan.
Fee No. 224.
Lit. 10.40 — $2,00.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

Leon Dominian, being duly sworn, deposes and says that he is a resident of the City, County and State of New York and is well acquainted with both the Italian and English languages; that he has carefully compared the attached translation made by THE POLYGLOT COMPANY, viz: COURT DECISION in the L. E. Waterman Company, vs. Cabrini Guido matter, rendered under the date of July 1st, 1911, by the Royal Civil and Criminal Court of Milan; and that he finds the said translation to have been conscientiously and correctly made and that the same is an accurate translation of the said original instrument in every respect.

Leon Dominian.

Sworn to before me this 14th
day of November 1911.

Manuel Muniz

Notary Public (137)

New York Co., N. Y.

Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY

against

MODERN PEN COMPANY.

SAMUEL S. WATSON, for the Complainant.
ALEXANDER S. BACON, for the Defendant.

HAND, District Judge:

The Circuit Court of Appeals has decided that there should be no absolute injunction against the name, "A. A. Waterman and Company," on the showing made. It is not therefore necessary to consider the question whether under any circumstances the court should altogether forbid a man from using his surname in a given business, and whether there may be cases where no accompanying phrase can prevent the result that the business of the first in the field will suffer by the competition of the second. Certainly the general rule is that such damage as so arises the victim must bear as an incident of competition. Further, the decision upon the preliminary injunction determined that upon the proof there presented the agreement of June twelfth, 1905, upon which the defendant depends was not a mere sham, but was a reason-

able part of the reorganization of the business of Frazer and Geyer Company, and it also determined that the old corporation of Frazer and Company had Waterman's right to use his name in the business. The testimony upon the final hearing is conceded to be substantially like that in the affidavits with two exceptions, first, the decree of the Italian court in the suit of this complainant against the Chapmans and Cabrini, and, second, the testimony of the assignment to Rhodes Lockwood of Waterman's business on February first, 1899.

The first question is therefore of the effect of the Italian decree. Regardless of what should be its scope, it does not make an estoppel at all, because it is not a final decree, and only such a decree effects an estoppel by our law, even in the case of a domestic judgment, *Brush Electric Co. vs. Western Electric Company,* 76 Fed. R. 761; *Ogden City vs. Weaver,* 108 Fed. R. 564; *Australian Knitting Co. vs. Gormly,* 138 Fed. R. 90; *Hills & Co. vs. Hoover,* 142 Fed. R. 904. It is true that the reason for this rule is not perfectly plain, but apparently it is that no judgment should be treated as an estoppel until the court that renders it has finally parted with control over the decision, per Lacombe, J., *Walter Baker & Co. vs. Sanders,* 80 Fed. R. 889-890. Thus if a final decree be entered *pendente lite,* it is enough, *Bradley Mfg. Co. vs. Eagle Mfg. Co.,* 57 Fed. R. 980, and possibly, if appeal be taken, and the interlocutory judgment be affirmed, *Bissell Carpet Sweeper Co. vs. Goshen Sweeper Co.,* 72 Fed. 545, if the rule is to be taken literally, it is enough that the Italian decree is confessedly interlocutory; if, on the other hand, the rule means that any decree is a good estoppel if the court that rendered it, has finally parted with the power to revise it, then proof is lacking here, for the complainant must show that it is such a

decree. The proof is silent upon that point. I do not forget that Accetta gave considerable testimony showing that so far as concerned the right to use the name, "Waterman," the decree was "final," but so it would be "final" *pro tanto* in this country. That only means, I take it, that the court has disposed of that part of the dispute, and is retaining the cause for the incidental assessment of damages. It does not mean, at least in the United States it would not mean, that the court did not still retain power to recall the decree, just as indeed it has power till the term be passed, even over a final decree. That the Italian court could not revise the decree is not even suggested in the testimony, the whole of which concerned quite a different matter, *i. e.*, whether the decree was a mere preliminary application analagous to a motion for a preliminary injunction, or whether it was the last action of the court necessary to a decision of the parties' rights. I have no doubt that the decree is the last judicial act necessary upon that branch of the case, but under our law that is not enough. I, therefore, lay aside the Italian judgment.

The remaining question is whether the new testimony of the assignment to Rhodes Lockwood affects the defendant's right to the use of the name "A. A. Waterman and Company." In 1897 Waterman left the complainant's employ and soon after formed a partnership with one Gibson. They did business under the name of "A. A. Waterman Pen Company," and "A. A. Waterman and Company." On September third, 1898, the complainant procured an injunction against the use of the first of these names but not the second. The firm at about this time entered into a somewhat vague relation with one Rhodes Lockwood, a pen dealer, and, eventually becoming financially embarrassed,

they assigned the whole business, good will and name included, to Lockwood, to whom they were heavily indebted. Gibson became Lockwood's employee, and Waterman continued in a small way in business for himself under the name of "A. A. Waterman, Maker," from February, 1899, to June, 1899, when he took into partnership one, Dewey, with whom he continued to do business as "A. A. Waterman and Co." for about eighteen months, until the partnership of Frazer and Geyer. As the assignment to Lockwood of February first, 1899, is lost, just what he got is uncertain; still he never attempted to use the name "A. A. Waterman and Company," except upon pens or parts of pens which were already partly made on the day of the assignment. In short he used his rights only to finish up the goods which he bought. Furthermore, he knew that Waterman was making pens under his own name, and actually supplied him with pens so marked. Thus, it appears that, whatever the exact words of the lost agreement, the parties treated it as in no sense giving Lockwood an exclusive right to use Waterman's name. I can only treat it as in fact giving such rights as the parties eventually accorded each other. Waterman continued the partnership with Dewey until January, 1901, and there is no suggestion in the record that during that time they did not do a real business under the name "A. A. Waterman & Company," making it prosper as much as they could. Now so far as Lockwood is concerned, Waterman, who certainly had the right to use his name, could have given another as good a right to use the name as he had himself, as an incident of the sale of the business. When a business is sold with its old name, the right to keep on using it is perfectly well established, though the significance of the continued use of the name must perhaps be stated in

rather general language, *Kidd vs. Johnson,* 100 U. S. 617, 620. It is basis enough for some recognition of the right to continue the use of the name that the public believes that, though a business changes hands, there may be a continuity of the old habits, a likelihood of persistence in fair dealing, or in the same good standard of wares, which gives assurance to them, and is of value to its possessor. Perhaps the value comes from a tacit recognition of the inertia of original honest practices; perhaps, like "good will" it arises from the mere suggestibility of new customers and the fixed habits of old, who will buy upon a well known name without more; but, whatever it be, the name does truthfully indicate some continuity and that is not a deceit, though the actual person is gone whose name appears, and whose personality originated the very qualities which make the succession of value.

This being the case a name is not something to be sold once, and the title then to be exhausted. All that can be sold is the right to designate the continued business as in fact the same, and I confess I do not see why in the absence of covenants to the contrary, which it is true are generally implied, A. may not engage in the same business in his own name as that which he has already sold to B. and which B. continues to conduct under A's. name. But if A. may start up a second business surely he may sell it, as he might sell his first, and with it the right to keep his name which indicates that it is the same business. The new business which Waterman had started had its own customers, its own reputation, its own methods of business, and the only name which that business had after June, 1899, was "A. A. Waterman & Company." *De facto,* it did have a name then; *de jure* no one could gainsay it. It is irrelevant that there

was another business still incompletely wound up even though Waterman had been one of its founders.

Moreover, if Waterman had sold out his business direct to the corporation of Frazer and Geyer Company they would have had the right to use the name upon the pens; indeed, upon purchasing the business they might have made that their own name, *Howe Scale Co. vs. Wyckoff, Seamans and Benedict,* 198 U. S. 118. It is of no consequence whether the assignee of an existing business is a corporation, a firm or an individual. Therefore, it is equally of no consequence whether the firm of Frazer, Geyer and Waterman was a mere subterfuge or not. At least, if it were not a real firm, that was because Waterman had sold out his business to the corporation and gone into its employ, and that he might do, and they might use his name. At most all that the law forbids is that a corporation at the outset choose a name which imitates another's name. Once a *bona fide* business be started, another may buy it up and develop it as they can, just as a special partner might give it capital to develop it.

In the case at bar, it does not seem to me to be open to any doubt that the whole purchase of Waterman's business and the preservation of the firm name had for its only motive the expectation that the Frazer and Geyer Company could by the resulting confusion pass off its goods under the cover of the complainant's reputation. My reasons for this are first Waterman's own very frank statement that throughout his connection with the enterprise the only serious inducement he could offer was the use of his name. Indeed, no other reason is suggested which could serve as any inducement to coalition with a man in Waterman's position at that time, one who had failed within

two years, and since his assignment to meet his debts, had been doing a small business in a town two hundred and fifty miles away, which came into no competition with the Frazer and Geyer Company and brought nothing to its business. Again, the obviously colorable character of all the contracts with Waterman showed that they valued him chiefly for the right they got to use his name. At no time had he any substantial powers as a partner, and after December twelfth, 1901, he had no rights to any profits or anything more than a salesman's salary or a salesman's commissions. The elaborate efforts to keep up the formal appearance of a real firm with actual business connections with the real enterprise show that the parties thought that they could not avow what was their real intention and the same efforts emphasize what that real intention was; especially is this true when one contrasts the formal relations with the fact that neither firm ever did anything actually but keep a spurious existence upon its books. Surely the chief inducement to combine with Waterman was to get the use of his name. However, I do not think that this is in the least degree relevant to the rights which the Frazer and Geyer Company got by the transfer, for the question is of the effect of the competition, not its purpose or motive. Whatever part motive may play and may be destined to play, in the law of torts, I know of no instance in which the legality of an act depends upon the actor's motives where those motives include his hope of personal gain. Motive has a just share in determining whether a man is in fact pursuing his genuine interests and whether he is therefore acting on his "rights," but when each party is obviously trying to increase his property, his estate, his "universitas," the mutual limitations of activity between them do not depend upon the

motive, so far as I know, but upon the means they use to effect their intentions and the results that ensue. Once it be conceded here that Waterman might in ignorance of the complainant's business have started a business under the name of "A. A. Waterman and Company" and after learning the facts have developed it as he could, I think his rights are not different because he knew from the outset that a part of his profits, if successful would be at the complainant's expense, and through confusion with the complainant's wares, as I have no doubt he did think. If his only motive were to damage the complainants the result might be quite different; so also if his only motive were to sell out as a blackmailer. Moreover if the defendant and its predecessors could have bought innocently, they could have bought with a deliberate purpose of profiting at the complainant's expense. Such consequences are involved in the right to use the name and sell the business with the name.

However, it does not follow that the right to use the name "A. A. Waterman and Company," is not subject to limitations. The record is full of evidence of the constant confusion which results from it, and since as usual the defendant extols its own wares and decries the complainant's there ought to be no ground for protest at any measures designed to avoid a confusion which must be disastrous to the defendant's reputation and its trade. It should welcome anything which, while it preserves its own chosen title in full, will serve to advise the public that they must not confound its superior goods with the complainant's. If it urges its superiority in good faith, the suffix which I shall suggest should be interpreted, at least by a buyer experienced in the business, as a voluntary disclaimer of an association disastrous to the manufacturer and deceitful to the public. There is

plenty of authority for an injunction in this form. *Singer Mfg. Co. vs. June Mfg. Co.,* 163 U. S. 169, 200, 204; *Herring, etc., Safe Co. vs. Hall's Safe Co.,* 208 U. S. 554; *American Waltham Watch Co. vs. U. S. Watch Co.,* 173 Mass. 85; *Walter Baker & Co. vs. Sanders,* 80 Fed. R. 889; *Dr. A. Reed Cushion Shoe Co., vs. Frew,* 162 Fed. R. 887.

I do not interpret the opinion of the Circuit Court of Appeals as meaning to control the final form of any decree which should pass, but only as deciding that there could be no decree absolutely prohibiting the use of the name "A. A. Waterman and Company." That Court certainly meant to leave the general question of what relief might be granted, to the testimony which might develop upon the trial of the cause. Now it is perfectly plain to any candid person that the ordinary buyer pays little attention to such prefixes as "L. E." and "A. A.," an inattention upon which it is quite clear to me the defendant's purchase of the name depended. Dealers will of course, know the difference very well, but they are privy to the fraud. It is the form in which the wares come to the final buyer that counts, and while the defendant is not responsible for the spontaneous representation of dealers, it must not so mark or dress its goods as to create or aid in, any misapprehension by the buyers, *Florence Mfg. Co. vs. J. C. Dowd & Co.,* 178 Fed. R. 73-75; *National Biscuit Company vs. Baker,* 95 Fed. R. 135.

The public means by the "Waterman" pen the complainant's pen; indeed, so the defendant concedes, being punctilious to avoid that name without its prefix. But the public by that very fact looks no further than the name. For myself, although I have used such pen for years, I am sure that I should not have had the least suspicion but that an "A. A. Waterman" pen was a "Water-

man" pen, and this record proves that many others have actually been so misled. Honest competition cannot exist until the defendant puts on its pens that they are not the original "Waterman" pens, which they are not. Therefore, a decree will pass forbidding the use of "Ideal," of "Waterman" and of "A. A. Waterman & Company" except in connection with the following phrase or its equivalent, all words to be written in letters of the same size, "Not connected with the original 'Waterman' pens," *Dr. A. Reed Cushion Shoe Co. vs. Frew, supra.* The complainant may have its costs except the expense of printing its brief; I know of no way of discouraging the printing of such unnecessarily long briefs as both sides present in this case except by refusing to allow them in the costs.

L. H.,
D. J.

Filed Jan. 25, 1912.

Final Decree.

At a Stated Term, to wit: February Term, 1912, of the District Court of the United States of America, in and for the Southern District of New York, held at the Court Room thereof, in the City, County and State of New York, on the 9th day of February, 1912.

Present.—Hon. LEARNED HAND, District Judge.

L. E. WATERMAN COMPANY,
Plaintiff,

against

MODERN PEN COMPANY,
Defendant.

This cause came on to be further heard at the November, 1911, Term of the Circuit Court of the United States for the Southern District of New York and was argued by Samuel S. Watson, Esq., for the complainant, and Alexander S. Bacon, Esq., for the defendant, whereupon on consideration thereof, it is

ORDERED, ADJUDGED AND DECREED, that a writ of permanent injunction in due form go against the defendant, its agents, officers and servants, forbidding it or them, or any of them from using the words "Waterman," "Waterman's" or "Ideal" or any representation of a globe, upon

any part of any fountain pens or in connection with the sale of fountain pens; and under any of the circumstances hereinafter enumerated from using the words, "A. A. Waterman and Company" or "A. A. Waterman" without the words "not connected with the original 'Waterman' pens" in appropriate justaposition therewith written in letters at least as large, and equally conspicuous, as the said words, "A. A. Waterman & Co." or "A. A. Waterman." The following are the circumstances referred to: engraved or otherwise marked upon any parts of fountain pens sold by them or offered for sale; in any way marked upon all such boxes containing such pens; whenever in any other way by advertisement or otherwise they use the words to denote any fountain pens, made, or sold, or offered for sale by them, or that they are the makers or sellers of any fountain pens; but permitting them to use said words without such suffix under all other circumstances.

IT IS FURTHER ORDERED, ADJUDGED And DECREED, that the defendant may within four months next ensuing after the entry of this decree sell any pen points now made and on hand with the descriptive matter now thereon when inserted in fountain pen holders engraved or stamped with the suffix above mentioned.

IT IS FURTHER ORDERED, ADJUDGED And DECREED, that the plaintiff, L. E. Waterman Company, do have and recover of and from the said defendant, Modern Pen Company, its costs, charges and disbursements in this action except its expenses of printing its brief upon this final hearing, such costs, charges and disbursements to be taxed in the usual manner by the Clerk of this Court, and that the plaintiff, L. E. Water-

man Company, have execution against the said defendant, Modern Pen Company, therefor.

IT IS FURTHER ORDERED, ADJUDGED And Decreed, that this decree shall be stayed in respect of the words "A. A. Waterman & Co." and "A. A. Waterman," pending appeal from the date hereof upon condition that the defendant file a bond in the sum of Twelve thousand ($12,000) dollars conditioned upon the payment to the complainant by the defendant of any damages sustained by the complainant by virtue of any violation by the defendant, its agents, officers and servants, or any of them, of the terms of this decree were the same not stayed, and further provided that the defendant effect its appeal within one week of the date of the entry of this decree, and have the appeal and appeal papers filed and the case docketed for hearing in the United States Circuit Court of Appeals on or before March 1, 1912.

LEARNED HAND,
District Judge.

Filed Feb. 9, 1912.

Petition of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Complainant,

against

MODERN PEN COMPANY,
Respondent.

The defendant above named conceiving itself aggrieved by the final decree made in the above entitled action and entered in the office of the Clerk of this Court on the 9th day of February, 1912, wherein it is stated as follows:

"ORDERED, ADJUDGED AND DECREED, "that a writ of permanent injunction in due form "go against the defendant, its agents, officers and "servants, forbidding it or them, or any of them "from using the words 'Waterman,' 'Waterman's' "* * * upon any part of any fountain pens or "in connection with the sale of fountain pens; and "under any of the circumstances hereinafter enu- "merated from using the words, 'A. A. Waterman "and Company' or 'A. A. Waterman,' without the "words 'not connected with the original "Water- "man" pen' in appropriate justaposition there- "with written in letters as least as large, and "equally conspicuous, as the said words, 'A. A.

"Waterman & Co.' or 'A. A. Waterman.' "The "following are the circumstances referred to "engraved or otherwise marked upon any parts of "fountain pens sold by them or offered for sale; "in any way marked upon all such boxes contain- "ing such pens; whenever in any other way by ad- "vertisement or otherwise they use the words to "denote any fountain pens, made or sold, or of- "fered for sale by them, or that they are the makers "or sellers of any fountain pens; but permitting "them to use said words without such suffix under "all other circumstances. * * *

"IT IS FURTHER ORDERED, ADJUDGED "and DECREED, that the plaintiff, L. E. Water- "man Company, do have and recover of and from "the said defendant, Modern Pen Company, its "costs, charges and disbursements in this action "except its expense of printing its brief upon this "final hearing, such costs, charges and disburse- "ments to be taxed in the usual manner by the "Clerk of this Court, and that the plaintiff, L. E. "Waterman Company, have execution against the "said defendant, Modern Pen Company, therefor," does hereby appeal from so much of said decree of February 9th, 1912, as is above quoted, and from each and every part thereof; and the Respondent appeals also from one item in the Bill of Costs, as taxed, which allowed the sum of $250 paid as fees for premium for bond on preliminary injunction, to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors filed herein, and it prays that this appeal may be allowed and that a transcript of the papers, records and proceedings upon which said decree was made, duly authenticated, may be sent to the United States

Circuit Court of Appeals for the Second Circuit.
Dated, New York City, February 9th, 1912.

ALEXANDER S. BACON,
Solicitor for Defendant,
37 Liberty Street,
New York City.

The foregoing petition on appeal is granted and the claim of appeal therein made is allowed.

Done in open court this 10th day of February, 1912.

LEARNED HAND,
U. S. District Judge.

Service of a copy of the above petition for allowance of appeal is hereby admitted this 10th day of February, 1912.

SAMUEL S. WATSON,
Solicitor for Complainant.

(Endorsed:)—U. S. District Court, S. D. of N. Y.—Filed Feb. 14, 1912.

Assignment of Errors.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. E. WATERMAN COMPANY,
Complainant,

vs.

MODERN PEN COMPANY,
Respondent.

The respondent, Modern Pen Company, files the following Assignment of Errors upon which it will rely upon its appeal from the final decree made by this Honorable Court on the 9th day of February, 1912, granting a permanent injunction in the above entitled cause:

The respondent assigns as error upon this appeal the following, viz:

The District Court erred in making the final decree granting a permanent injunction in this cause for the following reasons, to wit:

1. That the complainant is not entitled to an injunction against the use of the name "Waterman" or "Waterman's" but that the respondent is the duly authorized selling agent of the firm of A. A. Waterman & Co., and is entitled equally with the complainant to the use of the family name "Waterman" or "Waterman's" in connection with the manufacture and sale of fountain pens and parts

thereof, when used in connection with its trade name "A. A. Waterman & Co.," and "Arthur A. Waterman & Co." Respondent has never used or authorized the use of the name "Waterman" or "Waterman's" standing alone, in connection with the manufacture and sale of fountain pens and parts thereof, and cannot, therefore, be properly enjoined in relation thereto.

2. That the respondent, as sole selling agent of A. A. Waterman & Co., is entitled to the use of the name "A. A. Waterman" and "A. A. Waterman & Co." and "A .A. Waterman & Company" or "Arthur A. Waterman & Company" as an absolute right, and it is not properly required to place in appropriate justaposition therewith, written in letters at least as large and equally conspicuous as the words "A. A. Waterman & Co." or "A. A. Waterman" the words "not connected with the original 'Waterman' pen" as in said final decree set forth, but on the contrary, this defendant is entitled, as the selling agent of the firm of A. A. Waterman & Co., as a matter of absolute right, to the use of the trade name "A. A. Waterman & Co." and "A. A. Waterman" and "Arthur A. Waterman & Co." in connection with the manufacture and sale of fountain pens and the parts thereof.

3. That the proof shows affirmatively that the word "Waterman" is a family name and that for the ten years prior to the year 1905, the complainant did not have, nor was it entitled to, the right to the exclusive use of said family name as applied to the manufacture and sale of fountain pens and the parts thereof, but on the contrary, for ten years prior to the year 1905, one Arthur A. Waterman, in connection with various firms of A. A. Water-

man & Co., of which he was a partner, had the use and the right to use the name "Waterman" as a part of the firm name "A. A. Waterman & Co.," in connection with such manufacture and sale.

4. That the proof shows affirmatively and without contradiction that this defendant has never used or authorized the use of the word "Waterman" or "Waterman's" alone without the initials "A. A." or in any other way except in the trade name "A. A. Waterman & Co."

5. That as a matter of law and from the undisputed evidence, the complainant is not entitled to the exclusive use of the word "Waterman" except when standing alone, and the firm of A. A. Waterman & Co., of which this defendant is the sole selling agent, has the right to the exclusive use of the trade name "A. A. Waterman & Co." and "Arthur A. Waterman & Co." in connection with the manufacture and sale of fountain pens and the parts thereof, without being required to use in connection therewith the phrase "not connected with the original 'Waterman' pen" nor any qualifying phrase whatsoever.

6. That the proofs show affirmatively and without contradiction that, in the year 1905, one Arthur A. Waterman (who for about ten years prior thereto had been manufacturing and selling fountain pens and the parts thereof, and had stamped them with the trade name "A. A. Waterman" or "A. A. Waterman & Co."), by an instrument in writing for a valuable consideration, conveyed all his right, title and interest in and to said trade name together with the assets and good will of his said firm to the firm of A. A. Waterman & Co.; that said transfer was a valid and legal transfer to

said firm of the right to use said trade name; that said right now vests in said firm as now constituted and respondent is the sole selling agent thereof, and the Court was in error in holding that said transfer did not accompany said transfer of business, good will and assets; and the respondent had no right—not withstanding said assignment—to use said trade name of "A. A. Waterman & Co.," because said A. A. Waterman had ceased to be a member of said firm.

7. That the Court was in error in not holding that the present firm of A. A. Waterman & Co. (of which the defendant is the selling agent), is entitled to the exclusive use, in the Eastern part of the United States, of the trade name of "A. A. Waterman & Co.," in connection with the manufacture and sale of fountain pens and parts thereof.

8. The Court was in error in charging the respondent with costs, and that respondent's costs and disbursements should have been charged against the complainant.

9. The Court was in error in taxing the following items in the bill of costs: "Fees for bond on "preliminary injunction, $250.00" in that the said fee was a premium paid to a surety company on giving, on behalf of complainant, a bond to secure a temporary injunction, and is not properly taxable as a disbursement.

10. The Court was in error in granting said permanent injunction against the respondent.

In order that the foregoing assignments of error may be and appear of record, the respondent presents the same to the Court and prays that such

disposition be made thereof as in accordance with the law and the statutes of the United States in such cases made and provided.

All of which is respectfully submitted.

Dated, New York City, February 9th, 1912.

ALEXANDER S. BACON,
Solicitor for Respondent,
37 Liberty Street,
New York City.

(Endorsed:)—U. S. District Court, Southern District of New York.—Filed February 14, 1912.

Bonds.

On February 14, 1912 a Bond for costs, in the sum of $12,000 was filed in the Clerk's office of the U. S. District Court, pending appeal to the U. S. Circuit Court of Appeals, by the Modern Pen Company.

On February 14, 1912, a Bond for costs, in the sum of $2,700 was also filed in the Clerk's office of the U. S. District Court by the Modern Pen Company.

Citation.

By the Honorable LEARNED HAND, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit,

TO

L. E. WATERMAN COMPANY,

GREETING:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the ninth day of March, 1912, pursuant to a petition of appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein L. E. Waterman Company is complainant-appellee and Modern Pen Company is respondent-appellant, and you are to show cause, if any there be, why the decree in said petition of appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 10th day of February, in the year of our Lord One Thousand Nine Hundred and Twelve, and of

the Independence of the United States the One Hundred and Thirty-sixth.

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

Service of a copy of within citation admitted.
New York City, February 10th, 1912.

SAMUEL S. WATSON,
Complainant's Solicitor.

(Endorsed:)—U. S. District Court, S. D. of N. Y.—Filed Feb. 14, 1912.

Clerk's Certificate.

United States of America, }
Southern District of New York, } ss.:

I, THOMAS ALEXANDER, Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to 1883, consisting of three volumes, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled

L. E. WATERMAN COMPANY,
Complainant-Appellee,
against
MODERN PEN COMPANY,
Defendant-Appellant,

as the same remain of record and on file in said office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the (Seal) Second Circuit, this day of March, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-sixth.

THOS. ALEXANDER,
Clerk.

I hereby certify that the fee for certifying the transcript of record in the above-entitled cause amounted to $823.85.

THOS. ALEXANDER,
Clerk.

United States District Court, Southern District of New York.

L. E. WATERMAN COMPANY, Plaintiff,
against
MODERN PEN COMPANY, Defendant.

Petition for Appeal.

The complainant above named, considering itself aggrieved by the final decree made in the above-entitled action and entered in the office of the Clerk of this Court on the 9th day of February, 1912, wherein it is stated as follows:

"Ordered, Adjudged and decreed that a writ of permanent injunction in due form go against the defendant, its agents, officers and servants, forbidding it or them, or any of them * * * under any of the circumstances hereinafter enumerated from using the words, 'A. A. Waterman and Company', or 'A. A. Waterman', without the words 'not connected with the original "Waterman" pen' in appropriate juxtaposition therewith written in letters at least as large, and equally conspicuous, as the said words, 'A. A. Waterman & Co.' or 'A. A. Waterman.' The following are the circumstances referred to: engraved or otherwise marked upon any parts of fountain pens sold by them or offered for sale; in any way marked upon all such boxes containing such pens; whenever in any other way by advertisement or otherwise they use the words to denote any fountain pens made, or sold, or offered for sale by them, or that they are the makers or sellers of any fountain pens; but permitting them to use said words without such suffix under all other circumstances.

"It is further ordered, adjudged and decreed that the defendant may within four months next ensuing after the entry of this decree sell any pen points now made and on hand with the descriptive matter now thereon when inserted in fountain penholders engraved or stamped with the suffix above mentioned."

And the complainant does hereby appeal to the United States Circuit Court of Appeals, for the Second Circuit, from so much of said decree of February 9, 1912, which permits the use by the defendant in connection with the manufacture, advertising, offering for sale or selling of fountain pens or parts thereof of the words "A. A. Waterman & Co." "A. A. Waterman & Company" or "A. A. Waterman," whether the same be or be not accompanied by the words "not connected with original 'Waterman' pens" or any other qualifying phrase whatsoever; and the complainant also appeals to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors filed herein;

And the complainant prays that this appeal may be allowed upon the transcript of the papers, records and proceedings upon which said decree was made and which have been duly authenticated and

sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated New York City, New York, March 13th, 1912.

WATSON & RAYMOND,
Solicitors for Complainant, No. 10 Wall Street, New York, N. Y.

SAMUEL S. WATSON,
Of Counsel.

The foregoing petition on appeal is granted and the claim of appeal therein made is allowed.

Done this 13 day of March, 1912.

GEO. C. HOLT,
United States District Judge.

Service of a copy of the above petition for allowance of appeal is hereby admitted this — day of March, 1912.

——— ———,
Solicitor for Modern Pen Company, Defendant.

United States District Court, Southern District of New York.

L. E. WATERMAN COMPANY, Plaintiff,
against
MODERN PEN COMPANY, Defendant.

Assignment of Errors.

The complainant, L. E. Waterman Company, files the following assignment of errors upon which it will rely upon its appeal from the final decree made by this Honorable Court on the 9th day of February, 1912.

The complainant assigns as error upon this appeal the following, viz.:

The District Court erred in making the final decree in this cause for the following reasons, to wit:

1. The Court erred in not holding that the alleged partnerships (*a*) between Arthur A. Waterman and Dewey, (*b*) between Frazer, Geyer and Waterman, (*c*) between the two Chapmans and Waterman, were not all mere shams or fraudulent devises used as cloaks and covers to secure the name "Waterman," "A. A. Waterman" and "A. A. Waterman & Co." in the fountain pen business for the purpose of filching the trade and business of the complainant's long prior established and existing business.

2. The Court erred in not passing a decree of injunction absolutely prohibiting the defendant from using in connection with the manufacture or sale of fountain pens or parts thereof (other than fountain pens of plaintiff's manufacture) the name "Waterman" or "Waterman's" or "A. A. Waterman" or "A. A. Waterman & Co." or "A. A. Waterman & Company" or "Arthur A. Waterman & Company."

3. The Court erred in holding that any of the alleged partnerships (of Dewey and Waterman, of Frazer, Geyer and Waterman, or of the Chapmans and Waterman) were bona fide firms, or at any time did a bona fide business.

4. The Court erred in not holding that the agreement of June 12, 1905, upon which the defendant depends for its right to use the names "A. A. Waterman," "A. A. Waterman & Co.," or "A. A. Waterman & Company" was a mere sham or fraudulent device.

5. The Court erred in not holding that neither the defendant nor the alleged partnership of A. A. Waterman & Co., of which the defendant is the selling agent, are the assignees of successors or in privity with any prior bona fide concern entitled to use in any manner whatsoever in the fountain pen business the names "Waterman," "A. A. Waterman," "A. A. Waterman & Co.," "A. A. Waterman & Company," "Arthur A. Waterman & Co.," or "Arthur A. Waterman & Company."

6. The Court erred in not decreeing that the Italian decree put in evidence by complainant was an estoppel and res adjudicata, finally determining between the parties to this action that the agreement of June 12, 1905, (*a*) was a mere sham or fraudulent device, (*b*) that the said agreement was a sale by Arthur A. Waterman of his name disconnected with any business, and (*c*) not a part of the reorganization of any prior or existing business.

7. The Court erred in not decreeing to the complainant the damages which it has suffered by reason of the defendant's infringement of complainant's trade-marks and for damages complainant has suffered by reason of the defendant's unfair trade practices.

8. The Court erred in not decreeing that a writ of permanent injunction issue against the defendant, its agents, officers and servants, forbidding it or them, or any of them, from

(*a*) Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any fountain pen of other manufacture than that of the plaintiff under the name of Waterman or Waterman's, or Waterman Pens, or Waterman's Pens, or Waterman Fountain Pens, or Waterman's Fountain Pens, or Ideal Pens, or any mark or name in imitation thereof or near resemblance thereto as might be calculated to deceive or be likely to cause confusion or mistake in the mind of the public or deceive purchasers, or which would indicate that the fountain pens sold, represented or advertised are fountain pens of plaintiff's manufacture.

(*b*) Infringing the plaintiff's trade-mark, "Waterman's Ideal Fountain Pen, N. Y.," or infringing the plaintiff's trade-mark "Ideal," and from manufacturing or selling fountain pens (other than fountain pens of plaintiff's manufacture) having the said trade-marks or either of them, or any simulation or colorable imitation thereof, on such fountain pens, whether on the holder or on the gold pen, or on labels, boxes, signs, letter-heads, bill-heads, circulars, or advertisements accompanying or used in connection with the making or selling of such fountain pens, or in any manner whatsoever.

(*c*) Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any fountain pens of other manufacture than that of the plaintiff, engraved, imprinted or otherwise marked with any representation of a globe on such fountain pens, or upon boxes containing such pens, or on labels, signs, circulars or advertising accompanying or used in connection with the advertising or selling of such fountain pens.

(*d*) Using in connection with the manufacture or sale of fountain pens or parts thereof, other than fountain pens of plaintiff's manufacture, the name "Waterman" or "Waterman's" or "A. A. Waterman" or "A. A. Waterman & Co." or "A. A. Waterman & Company" or "Arthur A. Waterman & Company."

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the Court and prays that such disposition be made thereof as in accordance with the law and statutes of the United States in such cases made and provided.

All of which is respectfully submitted.

Dated New York, N. Y., March 13th, 1912.

WATSON & RAYMOND,
Solicitors for Complainant,
10 *Wall Street, New York, N. Y.*

SAMUEL S. WATSON,
Of Counsel.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Mar. 13, 1912.

Bond.

On March 13, 1912, a Bond for costs in the sum of $250 was approved by Judge Holt and filed in the Clerk's Office of the U. S. District Court by the Complainant-Appellant, L. E. Waterman Company.

Citation.

By the Honorable George C. Holt, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to Modern Pen Company, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the eighteenth day of March, 1912, pursuant to a petition of appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein L. E. Waterman Company is complainant-appellant and Modern Pen Company is respondent-appellee, and you are to show cause, if any there be, why the decree in said petition of appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 13 day of March, in the year of our Lord One thousand nine hundred and twelve, and of the Independence of the United States the One hundred and thirty-sixth.

GEO. C. HOLT,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

Service of a copy of within citation admitted, New York City, —— —, 1912.

—— ——,
Solicitor for Modern Pen Company.

(Endorsed:) United States District Court, Southern District of New York. Filed —— —, 1912. —— ——, Clerk.

United States District Court, Southern District of New York.

L. E. WATERMAN COMPANY, Plaintiff,
against
MODERN PEN COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, City of New York, ss:

Victor C. Cormier, being duly sworn, deposes and says, that he is an attorney and counsellor at law, associated with Watson & Raymond, solicitors for the plaintiff herein, and that he is a clerk in said office; that on the 13th day of March, 1912, he served a copy of the annexed plaintiff's petition on appeal, assignment of errors and notices and a copy of the annexed citation on Col. Alexander S. Bacon, solicitor for the defendant, by delivering to and leaving with him the same; that he knew the person so served to be Col. Alexander S. Bacon, the said solicitor for the defendant, Modern Pen Company.

VICTOR C. CORMIER.

Sworn to before me this 13th day of March, 1912.
AGNES M. VIKBERG,
Notary Public, No. 27, Kings County.

Certificate filed in New York County.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Mar. 13, 1912.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Thomas Alexander, Clerk of the District Court of the United States of America, for the Southern District of New York, in the

Second Circuit, do hereby Certify that the foregoing pages, numbered from one to twelve, inclusive, contain a true and complete transcript of the Appeal papers filed in said Court, in the cause entitled L. E. Waterman Company, Complainant-Appellant, against Modern Pen Company, Defendant-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of March, in the year of our Lord One Thousand Nine Hundred and Twelve, and of the Independence of the said United States the One Hundred and Thirty-sixth.

[SEAL.] THOMAS ALEXANDER, *Clerk*.

At a Stated Term, to wit: January Term, 1912, of the District Court of the United States of America, in and for the Southern District of New York, held at the Court Room thereof, in the City, County and State of New York, on the 3rd day of February, 1912.

Present:

Hon. Learned Hand, District Judge.

L. E. WATERMAN COMPANY, Plaintiff,
against
MODERN PEN COMPANY, Defendant.

This cause came on to be further heard at the November, 1911, term of the Circuit Court of the United States for the Southern District of New York and was argued by Samuel S. Watson, Esq., for the complainant and Alexander S. Bacon, Esq., for the defendant, whereupon on consideration thereof, it is

Ordered, adjudged and decreed that a writ of permanent injunction in due form go against the defendant, its agents, officers and servants, forbidding it or them, or any of them from using the words "Waterman," "Waterman's," or "Ideal," or any representation of a globe upon any part of any fountain pens or in connection with the sale of fountain pens; and under any circumstances hereinafter enumerated from using the words, "A. A. Waterman and Company," or "A. A. Waterman," without the words "not the original 'Waterman' pen" in appropriate juxtaposition therewith written in letters at least as large, and equally conspicuous, as the said words, "A. A. Waterman & Co." or "A. A. Waterman." The following are the circumstances referred to: engraved or otherwise marked upon any parts of fountain pens sold by them or offered for sale; in any way marked upon all such boxes containing such pens; whenever in any other way by advertisement or otherwise they use the words to denote any fountain pens made, or sold, or offered for sale by them, or that they are the makers or sellers of any fountain pens; but permitting them to use said words without such suffix under all other circumstances.

It is further ordered, adjudged and decreed that the defendant may within four months next ensuing after the entry of this decree sell any pen points now made and on hand with the descriptive matter now thereon when inserted in fountain pen holders engraved or stamped with the suffix above mentioned.

It is further ordered, adjudged and decreed that the plaintiff, L. E. Waterman Company, do have and recover of and from the said defendant, Modern Pen Company, its costs, charges and disbursements in this action except its expense of printing its brief upon this final hearing, such costs, charges and disbursements to be taxed in the usual manner by the Clerk of this Court, and that the plaintiff, L. E. Waterman Company, have execution against the said defendant, Modern Pen Company, therefor.

It is further ordered, adjudged and decreed that this decree shall be stayed in respect of the words "A. A. Waterman & Co." and "A. A. Waterman," pending appeal from the date hereof upon condition that the defendant file a bond in the sum of Twelve thousand ($12,000) Dollars conditioned upon the payment to the complainant by the defendant of any damages sustained by the complainant by virtue of any violation by the defendant, its agents, officers and servants, or any of them, of the terms of this decree were the same not stayed, and further provided that the defendant effect its appeal within one week of the date of the entry of this decree, and have the appeal and appeal papers filed and the case docketed for hearing in the United States Circuit Court of Appeals on or before March 1st, 1912.

LEARNED HAND,
District Judge.

Filed Feb. 5, 1912.

United States District Court, Southern District of New York.

L. E. WATERMAN COMPANY, Complainant,
vs.
MODERN PEN COMPANY, Respondent.

Please to take notice that upon the final decree entered herein on February 5, 1912, and upon the annexed affidavit of Alexander S. Bacon, verified February 8th, 1912, the undersigned will move this Court, at a term thereof, to be held before Judge Learned Hand, at the Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 9th day of February, 1912, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order resettling the said decree in the manner indicated in the copy proposed resettled decree hereto annexed and made part hereof, and for such other, further or different order or relief as may be just.

Dated, New York City, February 8th, 1912.

Yours, &c.,

ALEXANDER S. BACON,
Attorney for Respondent,
37 Liberty Street, New York City.

To Messrs. Watson & Raymond, Attorneys for Complainant.

United States District Court, Southern District of New York.

L. E. WATERMAN COMPANY, Complainant,
vs.
MODERN PEN COMPANY, Respondent.

COUNTY OF NEW YORK, *ss:*

Alexander S. Bacon, being duly sworn, says: That he is the attorney for the respondent above named; that the opinion of Judge Hand contains the following:

"Therefore, a decree will pass forbidding the use of 'Ideal,' of "'Waterman' and of 'A. A. Waterman & Company,' except in con-"nection with the following phrase or its equivalent, all words to "be written in letters of the same size, 'Not connected with the "'original "Waterman" pens.'"

The decree as entered gives the qualifying phrase as "Not the original 'Waterman' pen." Deponent understood that the phrase contained in the opinion was the one intended to be inserted in said decree.

ALEXANDER S. BACON.

Sworn to before me this 8th day of February, 1912.
V. M. TURNER,
Notary Public, New York County, # 36.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Thomas Alexander, Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify, that the foregoing pages numbered one to —— are true copies of the Decree and motion papers thereon filed February 5, 1912, in the cause entitled L. E. Waterman Company vs. Modern Pen Company, as the same remain of record and on file in my office, and that the same were omitted from the transcript of record heretofore filed.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of March in the year of our Lord One Thousand Nine Hundred and Twelve, and of the Independence of the said United States the One Hundred and Thirty-sixth.

[SEAL.] THOMAS ALEXANDER, *Clerk.*

United States Circuit Court of Appeals for the Second Circuit, October Term, 1912.

No. 208.

L. E. WATERMAN COMPANY, Complainant-Appellant,
vs.
THE MODERN PEN COMPANY, Defendant-Appellant.

Appeals from the District Court of the United States for the Southern District of New York.

Argued April 11, 1912. Decided May 14, 1912.

Before Ward and Noyes, Circuit Judges, and Holt, District Judge.

Cross-appeals from a final decree of the District Court, Southern District of New York, in favor of the complainant in a suit charging infringement of trade marks and unfair competition.

This case has been before this court before upon an appeal from an order granting a preliminary injunction, the opinion of this court being reported in 183 Fed., 118.

PER CURIAM:

In our opinion the testimony upon the final hearing was not substantially different from that presented by the affidavits which were before us in the former record. The most important additions to that record consist of the Italian decree and the testimony concerning the Lockwood transactions, but we agree with the conclusions of the District Judge that those items do not materially change the situation.

The case before us, then, is practically the case which came up before and we are not convinced that our conclusions reached at that time were erroneous, or that the final relief granted should vary from the preliminary relief which we then regarded as proper except in one particular.

The record clearly demonstrates the confusion arising from the use by the defendant of the name "A. A. Waterman & Co." in the pen business in view of its similarity to the name of the complainant. The defendant has the right to use the name, but the complainant and the public have the right to insist that provision be made for minimizing the confusion arising from such use so far as practicable. We think that the suffix required in the decree appealed from tends to characterize the defendant's product as inferior to that of the complainant and is unduly prejudicial to it. The defendant should, however, distinguish its goods from those of the complainant and, in our opinion, should do so by employing after the name "A. A. Waterman & Co." or A. A. Waterman," the words "not connected with the L. E. Waterman Co." This notice should be suffi-

cient to put the public upon inquiry. We think it all that the facts of the case require, but it is the very least they do require.

The decree appealed from will be modified by striking out the words "not connected with the original 'Waterman' pens," and inserting in lieu thereof the words, "not connected with the L. E. Waterman Co."

The costs of this court and the costs of the lower court arising after our decision upon the former appeal will be divided equally between the parties. Costs of the lower court accruing before that time are awarded to the complainant.

With the modifications stated the decree of the District Court is affirmed.

S. S. Watson, for the Complainant.
A. S. Bacon, for the Defendant.

United States Court of Appeals, Second Circuit. Filed May 23, 1912. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

No. 208.

L. E. Waterman Company, Plaintiff-Appellant,
against
Modern Pen Company, Defendant-Appellant.

To the Honorable Henry G. Ward, Honorable Walter C. Noyes, Circuit Judges, and Honorable George C. Holt, District Judge:

The petition of the L. E. Waterman Company, the above named plaintiff-appellant, respectfully showeth:

That counsel for the petitioner has carefully examined the opinion of the Honorable Court in the above entitled action and thinks that he with propriety may ask this Court to consider whether this cause is not one in which it will be proper to grant a rehearing to the plaintiff-appellant, (1) as to the form of the suffix, and (2) as to the costs.

(1) As to the form of the suffix:

This Court decided that a suffix "is all that the facts of the case require." Assuming this to be final, your petitioner respectfully requests a reconsideration of the form of such suffix.

(*a*) This Court has directed that the defendant employ after the name "A. A. Waterman & Co." or "A. A. Waterman" the words "not connected with the L. E. Waterman Co." In so doing, this Court evidently overlooked the fact that the complainant's corporate name is not "L. E. Waterman Co.," but is "L. E. Waterman Company," as appears throughout the record. Complainant respectfully submits that if complainant's name is to be used as part of the suffix, it should be "L. E. Waterman Company" and not "L. E. Waterman Co." The defendant itself offered to use the full name "Arthur A.

Waterman & Co." instead of initials only, if the Court should so suggest (see Defendant's Brief, page 28). Defendant's full name, and not initials only, were required in Walter Baker & Co. vs. Baker, 87 Fed., 209, 212; Walter Baker & Co. vs. Baker, 130 Fed., 514; and World's Dispensary Medical Ass'n vs. Pierce, 203 N. Y., 419, and other cases, and in the case at bar the Court should, at least, require "Arthur A. Waterman & Co."

(*b*) The complainant or its predecessor has never marked on its pens "L. E. Waterman" or "L. E. Waterman Co." or its corporate name (see Exhibits 7, 8, 103 and 104), but has always marked its pens with the names "Waterman," "Waterman's," "Waterman Fountain Pen," "Waterman's Ideal" or "Waterman's Ideal Fountain Pen, N. Y." In other words the complainant has always marked its pens with its trade-names and trade-marks only, and not with its corporate name. The decision of this Court now authorizes the defendant to put complainant's name on fountain pens (something never done before), that is, put complainant's name on defendant's pens without sufficiently distinguishing words to differentiate defendant's pens from complainant's pens. Such marking will only increase the existing wide-spread confusion and substitution. Especially will such result be apparent when the Court takes into consideration that complainant's pens are almost universally spoken of and called for as "Waterman Pens" or as the "Waterman Pen" (see Complainant's Brief, pages 18-21), which is the characteristic feature of the names which complainant has always marked on its pens. In this connection the Court is respectfully asked to consider the situation, if the complainant should sell its business, good will, trademarks and trade-names to a concern whose name was entirely different from "L. E. Waterman Company," the total inappropriateness and insufficiency of the suffix ordered by this Court becomes strikingly apparent. It is the "Waterman Pen" which the public has learned to know and which it calls for, and it is the "Waterman Pen" which is the thing to be distinguished. As Judge Hand says:

"Honest competition cannot exist until the defendant puts on its pens that they are not the original 'Waterman' pens, which they are not" (Record, page 1870).

(*c*) Complainant respectfully submits that the suffix ordered by this Court is entirely insufficient to distinguish defendant's goods from complainant's, because its only distinguishing features are the initials "A. A." and "L. E.," which this record shows are no distinguishing features at all. This conclusion was the conclusion of the District Court, as is evidenced by its opinion, and such apparently is also the conclusion of this Court, which says: "This notice should be sufficient to put the public upon inquiry," which it is respectfully submitted is quite a different thing from the duty to "clearly distinguish." Judge Hand in his opinion (Record, page 1869) said:

"The ordinary buyer pays little attention to such prefixes as L. E. and A. A. * * * For myself, although I have used such pens for years, I am sure that I should not have had the least suspicion but that an 'A. A. Waterman' pen was a 'Waterman pen,' and this record proves that many others have been actually so misled."

"But it is said (by defendant), 'We have a right to the use of our whole name and we prefix our initials to "Rogers Bros." and to "Rogers" and we add to the "Rogers" the letters "Co."' In point of fact, these prefixes and suffixes are obscure, and, to the ordinary observer, enigmatical. They actually convey no meaning." International Silver Co. vs. Simeon L. Rogers, et al., 110 Fed., 955, 959.

"He (a purchaser) is not bound to study or reflect; he acts upon the moment. He is without the opportunity of comparison. It is only when the difference is so gross that no sensible man, acting on the instant, would be deceived, that it can be said that the purchaser ought not to be protected from imposition. * * * However that may be, the imitation need only to be slight if it attaches to what is most salient, for the usual inattention of a purchaser renders a good will precarious if exposed to imposition." Pillsbury Co. vs. Pillsbury-Washburn Co., 64 Fed. (C. C. A.), 841, 847.

This Court also finds that "the record clearly demonstrates the confusion arising from the use by the defendant of the name 'A. A. Waterman & Co.' in the pen business," and is evidently desirous of removing such confusion as far as is equitably possible. Complainant respectfully submits, however, that the suffix authorized by this Court contains absolutely nothing which will distinguish, or in any manner indicate, to the purchasing public that defendant's pens are not the pens which for nearly thirty years past they have commonly called for and purchased as "the Waterman Pen."

(*d*) This Court, for the first time, has established a new standard, or formulated a new principle of law, applicable to unfair competition cases, if it permits its decision to stand unmodified. This Court's decision says: "This notice should be sufficient to put the public upon inquiry." Up to this time, the principle of law governing such cases has been that the newer concern "must clearly distinguish," "carefully distinguish," "clearly and unmistakably specifying," "as to guard against any possibility of deceiving the public as to the source of manufacture."

"Therefore such names and phrases could be used only if so explained that they would not deceive." Herring-Hall-Marvin Safe Company vs. Hall's Safe Company, 208 U. S., 554, 559.

"* * * he will be required to use his name of Baker in such a manner as will make it plainly distinguishable from the name of the complainant." Walter Baker & Co. vs. Baker, 77 Fed., 181.

"When he presents his article as W. P. Baker's chocolate, he not only improperly works mischief to the pre-existing manufacturer, but he wrongs the public, because he does not accompany his name 'with such indications that the thing manufactured is the work of the one making it as will unmistakably inform the public of that fact.' Singer Mfg. Co. vs. June Mfg. Co., 163 U. S., 169." Walter Baker & Co. vs. Baker, 87 Fed., 209.

Defendant required "to clearly distinguish the business carried on * * * from the business carried on * * * by the plaintiff." Cash vs. Cash, 19 R. P. C., 181.

"He should not be allowed to designate his article by his own name in such a way as to cause it to be mistaken for the manufacture of

goods of another already on the market under the same or similar name." Water Baker vs. Sanders, 80 Fed. (C. C. A.), 889.

"The opinion of the Supreme Court of the United States, in the Singer case, * * * require the name to be used in connection with such proper statements in advertisements, etc., as to guard against any possibility of deceiving the public as to the source of manufacture." * * *

"The rule is, that what the Court will regard as sufficient notice of the source of manufacture, must be given by such user of another's trade-name, and that such name may not be used without clearly and unmistakably specifying, in connection therewith, that such machines are the product of the defendant, or other manufacturer, and therefore not the product of the original maker and vendor thereof." Ludlow Valve Mfg. Co. vs. Pittsburg Mfg. Co., 166 Fed. (C. C. A.), 26, 29, 31.

"The public do not go into the minuter refinements of the title or the label. * * * so long as the title contains the words which in trade and among customers have come to be the every-day designation of complainant's goods, the chocolate so labeled will naturally be assumed to be complainant's, unless special care be taken to indicate that it is not." Walter Baker & Co. vs. Sanders, 80 Fed. (C. C. A.), 889, at page 894.

"The practical difficulty in this class of cases is to compel the newcomer into the chocolate or cocoa market to swing clear of the complainant, and to use his name in such a way as unmistakably and intentionally to show that he is not the well-known manufacturer; in other words, to carry to a successful result 'a bona fide effort to accentuate the differences' with respect to the origin of the two products, and thus to acquire a reputation for his own genuine work." Walter Baker & Co. vs. Baker, 87 Fed., 209, at page 212.

Royal Baking Powder Company vs. Royal, 122 Fed. (C. C. A.), 337.

Pillsbury Co. vs. Pillsbury-Washburn Co., 64 Fed. (C. C. A.), 841.

Valentine's Meat Juice Co. vs. Valentine, 17 Real Prop. Cases, 673.

(*e*) Complainant and its predecessor, Lewis E. Waterman, had been in business fourteen or fifteen years, and had a widely known and well established reputation, before the name "A. A. Waterman" or "A. A. Waterman & Co." was ever used by anybody in any fountain pen business; and complainant and its predecessor had been in business twenty-three years before the defendant, or the "A. A. Waterman & Co." under which defendant claims, was organized or began business.

Therefore, complainant respectfully urges that the defendant should be required to use the word "original" as part of the suffix, or the present confusion will be in no wise abated. The suffix as now directed by this Court is the form commonly employed by an original manufacturer seeking to warn the trade of other goods which may be "passed off" as his. In this connection the Court's attention is re-

spectfully requested to the suffixes required in Walter Baker & Co. vs. Sanders, 80 Fed. Rep. (C. C. A.), 889, and in International Silver Co. vs. Rogers, 72 N. J. Eq., 933, in which latter decision Mr. Justice Pitney (now of the Supreme Court) joined. We quote from the latter opinion, pages 937, 938:

"It is the word 'Rogers' that is all controlling, and it is that which should be differentiated in order to effectually distinguish the goods.

"In Baker vs. Sanders, 80 Fed. Rep., 889, 895, the defendant (in lieu of more extended changes) was required to affix the statement that 'W. H. Baker is distinct from and has no connection with the old chocolate manufactory of Walter Baker & Company.' * * *

"The words, 'Not connected with any other Rogers,' even if they reached the retail purchaser, would not suffice for that purpose. Those words merely tend to add to the confusion. They might well be, and usually would be, employed by an original manufacturer seeking to warn the trade when he finds on the market other goods which may be passed off as his. They would be the appropriate announcement of an original maker that he has no connection with other wares of similar appearance or wares put out under a similar name. These words also afford an unscrupulous retail dealer opportunity to pass off the product as the original 'Rogers' goods. In employing such words, so misleading and ambiguous, the defendant is clearly guilty of bad faith.

"The defendant having failed in the performance of his duty so to distinguish his silverware that it could not be mistaken for that of the complainant, we think the complainant is entitled to have an injunction restraining the defendant from manufacturing and selling his goods unless he stamps upon them the words, 'Not the original Rogers,' or 'Not connected with the original Rogers.'"

"It should forbid the use of the name Hall, * * * unless accompanied by information that the defendant is not the original Hall's Safe and Lock Company or its successor, * * *." Herring-Hall-Marvin Safe Company vs. Hall's Safe Company, 208 U. S., 554, at page 560.

"The statement that the defendant makes them does not save the fraud. That is not what the public would notice or is intended to notice, and, if it did, its natural interpretation would be that the defendant had bought the original business out and was carrying it on." Jacobs vs. Beecham, 221 U. S., 263, at page 272.

"This dictionary is not published by the original publishers of Webster's Dictionary, or by their successors." Merriam Co. vs. Ogilvie, 170 Fed., 168 (C. C. A., 1st Circuit); Merriam Co. vs. Saalfield, 190 Fed., 934 (C. C. A., 6th Circuit).

"The following is a specific example of such a notice as we deem proper:

'Improved Cushion sole Shoe, Dr. A. Reed, Patentee, 1900, 1901. But this is not the original Dr. A. Reed Cushion Shoe previously patented.'" Dr. A. Reed Cushion Shoe Co. vs. Frew, 162 Fed., 887, at page 891 (2nd Circuit).

"without displaying in connection therewith, plainly and in a prominent manner, a statement that the defendants are in no way con-

nected with Chickering & Sons, of Boston, Mass., and that the defendants' pianos are not the 'original Chickering' pianos * * *

"From doing any and all acts * * * to induce the public to believe that the pianos manufactured or sold by the defendants, or any of them, are genuine Chickering pianos, or the product of the original Chickering Piano Manufacturing Concern." Chickering vs. Chickering & Sons, 120 Fed. Rep. (C. C. A.) 69, 72.

In all of these cases, the Court will note that the word original figures prominently, and we have been unable to find any case where the Court has ordered a suffix which did not contain the word original except Baker vs. Sanders, supra, where the Court directed the use of the expression "old chocolate manufactory." Without the word original as a part of the suffix, the door is open wide for confusion, fraud and deception such as this record shows has heretofore existed.

(*f*) Defendant claims its pens are far superior to the "original 'Waterman' pen." As Judge Hand says, "if it (defendant) urges its superiority in good faith," "it should welcome anything which, while it preserves its own chosen title in full, will serve to advise the public that they must not confound its superior goods with the complainant's." (Record, page 1868.) The suffix directed by the District Court can with equal, if not more, force be used as prejudicial to the complainant. The defendant may, and doubtless will, say that its pens are, "not the original 'Waterman' pen," but a better pen; or, that its pens are not the old, out-of-date, original 'Waterman' pen, but are an up-to-date, modern, improved pen. It is impossible to conceive how the suffix "not connected with, or successors to, the original 'Waterman' pen" can be prejudicial to the defendant, if it urges in good faith the superiority of its pens and honestly desires to market them on their own merits.

(*g*) The suffix should also be modified by inserting the words "or its successors." Such was the stated requirement in the Hall case, supra, and in the Webster Dictionary cases, supra; in the Beecham case, supra, the name was absolutely prohibited, but the Court's opinion on this point was plainly indicated. (See exce-pts from all above cases, supra.) The suffix, to distinguish, should, at least, be "not connected with, or successors to, the original 'Waterman' pen."

(2) As to costs: The Court has evidently overlooked certain facts which have a material bearing upon the adjudication of costs.

The defendant made the offers (mentioned at page 7 of defendant's brief, and set out at pages 601 and 602 of the record) to make the preliminary injunction order permanent, which were urged as the reason why the costs should be taxed against complainant. The Court evidently overlooked the concurrent counteroffer of the complainant to limit the proofs for final hearing to the subject-matter covered by paragraph marked "3" of the preliminary injunction order provided the defendant would consent that at the final hearing an injunction order should be made which would include the prohibitions contained in paragraphs marked "1" and "2" of the temporary injunction order. This offer was made concurrently with defendant's offer of December 12, 1910, and complainant on May 19,

1911, immediately after defendant's second offer, dated May 17, 1911 (Record, page 1602), made the offer set out at Record, page 1122. Neither of the complainant's offers *were* accepted and therefore it became necessary for the complainant to complete its proofs covering the subject-matter contained in paragraphs marked "1" and "2," as well as in paragraph "3" of the preliminary injunction order.

On final hearing, the District Court and this Court granted complainant a permanent injunction covering, in substance, the subject-matter of paragraphs marked "1" and "2" of the preliminary injunction order, and also some relief respecting the subject-matter of paragraph marked "3" of the preliminary injunction order, this Court requiring the defendant to employ with the name "A. A. Waterman & Co." or "A. A. Waterman" the words "not connected with L. E. Waterman Co." In view of this situation, it is respectfully submitted that it is inequitable that complainant be ordered to pay one-half of all the costs arising after the decision of this Court upon the former appeal, and in making such decision this Court must have overlooked complainant's counter and concurrent offers stated above and set out on page 1122 of the Record.

It is therefore respectfully submitted that all of the costs of the lower Court, at least, should be taxed against the defendant, as decreed by the District Court.

If this petition is granted, the costs in this Court should await the result of the reconsideration.

Wherefore, upon the foregoing grounds, your petitioner respectfully prays this Honorable Court to grant to it a rehearing of said cause.

L. E. WATERMAN COMPANY,
By SAMUEL S. WATSON,
Attorney for L. E. Waterman Company, Petitioner.

SAMUEL S. WATSON,
Of Counsel.

I, Samuel S. Watson, of counsel for the appellant-petitioner herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded and that the same is not interposed for delay.

SAMUEL S. WATSON.

United States Circuit Court of Appeals for the Second Circuit, October Term, 1911.

No. 208.

Petition Filed May 23, 1912. Decided May 28, 1912.

THE L. E. WATERMAN COMPANY, Complainant-Appellant,
vs.
THE MODERN PEN COMPANY, Defendant-Appellant.

On Petition for Rehearing.

Appeals from the District Court of the United States for the Southern District of New York.

Before Ward and Noyes, Circuit Judges, and Holt, District Judge.

Per CURIAM:

In addition to the modifications of the decree appealed from stated in the opinion, the order for the mandate may require the defendant to use the name "Arthur A. Waterman & Co." instead of "A. A. Waterman & Co."

If, as stated in its petition, complainant feels that the required suffix "will only increase the existing wide-spread confusion and substitution," the order for the mandate will, at its option, contain no provision for a suffix.

The petition for a rehearing is denied.

United States Circuit Court of Appeals, Second Circuit.

208.

L. E. WATERMAN COMPANY, Plaintiff,
vs.
MODERN PEN COMPANY, Defendant.

To the Honorable Henry G. Ward, Honorable Walter C. Noyes, Circuit Judges, and Honorable George C. Holt, District Judge:

The petition of the Modern Pen Company, the above named defendant-appellant, respectfully shows:

That counsel for the petitioner has examined the per curiam opinion of this court, on petition for rehearing, which petition was presented ex parte by the plaintiff herein, and has learned that the plaintiff has exercised the option indicated in said opinion, and has elected that the defendant should be required to use the name "Arthur A. Waterman & Co." instead of "A. A. Waterman & Co." and has also elected that the suffix should be retained.

The defendant serves a copy of this petition on the plaintiff's

attorneys, and asks that the mandate of the Circuit Court of Appeals to the Court below should contain a direction in relation to the disposal of the defendant's goods now on hand, as indicated in the annexed affidavit of Mr. Hobart W. Geyer, and for the reasons indicated in said affidavit.

The most conspicuous part of the fountain pen is the rubber holder and the marking thereon is, generally speaking, the only marking that would be noticed by a retail purchaser. The marking on the holder can be obliterated and changed. It is a matter of some trouble and expense, but it can be done; but the marks on the gold pen point cannot be changed. Such marks are made when the pen is flat, and it is thereafter fashioned into its final shape. To change that marking is a mechanical impossibility, and if an injunction prevents the use of such pen points, they will have to be destroyed.

The defendant has about 2,000 such pen points on hand, and has many thousands in the hands of dealers, defendant's customers, all of which were marked as prescribed either by this Circuit Court of Appeals or by the District Court. That is to say, each sale when made was strictly in accordance with the law as then laid down.

The changes required by the different court decisions are indicated in the annexed affidavit.

The plaintiff has threatened to sue all dealers having on hand any of these pen points or holders, as soon as the form of the decree on appeal shall be determined, as indicated by the letter set forth in the annexed affidavit.

There are certain pens with much gold and silver ornamental work on the holder that have been marked "A. A. Waterman & Co." with a suffix. This marking is engraved and cannot be changed.

As soon as the opinion of this Court was handed down, the defendant procured new stamps and has marked many thousands of pen holders with the new stamps, i. e. "A. A. Waterman & Co., not " connected with the L. E. Waterman Co." This was done in haste, anticipating that the entry of the decree would summarily prevent the shipping of any goods not so marked, and hundreds of pens are shipped every day. The change from "A. A. Waterman & Co." to "Arthur A. Waterman & Co." is on the election of the plaintiff, and the plaintiff, by electing to make this change, will have cost the defendant very large additional expense. This expense comes not from any act either of the defendant or of the court, but from the election of the plaintiff itself.

The defendant has also ordered large quantities of stationery, advertising cards, and the like, marked "A. A. Waterman & Co. not connected with the original 'Waterman' pen" or "A. A. Waterman & Co. not connected with the L. E. Waterman Co." This printing has been ordered in obedience either to the decree of the court or the suggestion contained in an opinion, and the defendant is not responsible for the changed suffixes. It is also requested that the defendant be permitted to use up the large quantities of stationery and printing matter now marked "A. A. Waterman & Co. with one of the suffixes heretofore decreed or suggested by the court.

The many changes that have been prescribed have been expensive to the defendant, and bid fair to be extremely troublesome on account of the disagreeable conduct of the plaintiff which is threatened by reason of the notice and letters.

The defendant feels itself aggrieved and asks that in the decree, as modified, it may be provided that this defendant and all its customers, may be permitted to dispose of their goods now on hand, either pen points or complete fountain pens, on condition that each complete fountain pen shall bear on its holder, either "A. A. Waterman & Co. not connected with the original Waterman pen," "A. A. Waterman & Co. not connected with the L. E. Waterman Co." or "Arthur A. Waterman & Co., not connected with the L. E. Waterman Co."

Wherefore upon the foregoing grounds and the grounds indicated in the annexed affidavit, your petitioner respectfully prays this Honorable Court to grant the modifications indicated in this petition, and its accompanying affidavit.

MODERN PEN COMPANY,
By ALEXANDER S. BACON,
Petitioner.

ALEXANDER S. BACON,
Of Counsel.

I, Alexander S. Bacon, of counsel for the defendant-appellant-petitioner herein, do hereby certify that in my judgment the foregoing petition is well founded, and that the same is not interposed for delay.

ALEXANDER S. BACON.

United States Circuit Court of Appeals, Second Circuit.

208.

L. E. WATERMAN COMPANY, Plaintiff,
vs.
MODERN PEN COMPANY, Defendant.

COUNTY OF NEW YORK, *ss:*

Hobart W. Geyer, being duly sworn, says that he is the manager of the Modern Pen Company, the defendant above named.

Immediately upon the receipt of Judge Hand's opinion, before his decree was entered, deponent caused to be made stamps and wheels (a wheel is a circular stamp) and marked all holders on hand "A. A. Waterman & Co., not connected with the original Waterman pens."

When the decree was signed, the suffix was made to read "pen" instead of "pens," and deponent immediately had the stamps and wheels changed so as to read "A. A. Waterman & Co., not connected with the original Waterman pen."

At the same time, all new gold pen points were stamped merely "A. A. W. & Co."

The pen points are stamped when they are flat, that is, before they receive their final form, and the stamp on the gold pen point cannot be changed after the pen is rounded up into shape. It is mechanically impossible.

The stay contained in Judge Hand's decree provided for the disposal of pen points then on hand, provided the pen holders contained the name and suffix.

Immediately upon the receipt of the opinion of the United States Circuit Court of Appeals, wherein they indicated that the suffix would be changed to "not connected with the L. E. Waterman Co.," deponent caused new stamps and wheels to be made, and immediately proceeded to restamp the penholders on hand, so as to read "A. A. Waterman & Co., not connected with the L. E. Waterman Co."

Deponent has just learned that on an ex parte application of the plaintiff, the decision of the Circuit Court of Appeals has been modified by changing "A. A. Waterman & Co." to "Arthur A. Waterman & Co." This will require another change in stamps and wheels. Stationery has also already been changed, and large quantities are on hand.

The result of these various changes is that the defendant has now on hand, in stock, about 2,000 gold pen points, and many thousands in the hands of its customers, marked "A. A. Waterman & Co." without a suffix. It also has on hand about 20,000 rubber holders stamped "A. A. Waterman & Co." some with the suffix "not connected with the original Waterman pen" and some with the suffix "not connected with the L. E. Waterman Co."

These changes have been expensive, and unless the defendant is permitted to dispose of the pen points already made, marked "A. A. Waterman & Co." they will have to be destroyed.

The most difficult problem does not relate, however, to the stock on hand. The defendant has as customers about seven or eight thousand dealers who have stocks of pens variously marked. Thousands of pens are sent out every week. The dealers received these stocks of pens when it was perfectly lawful to manufacture and sell them. That is, under the express mandate of the decree of September 23, 1898, reaffirmed by this Circuit Court of Appeals, when it modified and substantially reversed the preliminary injunction of Judge Hough, so that every pen and part of pen that is now in the hands of dealers was received by them when it was strictly legal so to do.

Immediately after Judge Hand's decision, the plaintiff sent out broadcast throughout the country and Canada, printed copies of the decree and writ of injunction, together with the following notice:

"To all whom it may concern:

"Notice is hereby given that infringement of our trade-marks and
" trade-names, and infringement of our rights as shown by the in-
" junction decree and permanent writ of injunction of the United

" States District Court, copy of which is hereby served upon you, " will be vigorously prosecuted.

"L. E. WATERMAN CO.,
"173 *Broadway, New York, N. Y.*

"Watson & Raymond, Attorneys, 10 Wall street, New York, N. Y."

The plaintiff has sent out with said printed writ, decree and notice, originals of which are herewith submitted, letters similar to the following:

"NEW YORK, N. Y., *Feb.* 20, 1912.

"Mr. L. R. Rubenstein, Birmingham, Ala.

"DEAR SIR: We are enclosing herewith copy of a Writ of In- " junction and a Decree of the United States District Court. The " Defendant has taken an appeal from a portion of this Decree, but " we hereby notify you that we shall hold all persons violating or " infringing our rights as adjudicated by the enclosed Decree, in the " event that the Decree is affirmed upon appeal, *from* all profits and " damages which we may suffer on account of the violation or in- " fringement of our rights.

"We are advised that you have been violating or infringing our " rights as adjudicated to us by said Decree, and we have instructed " our attorneys to prosecute all infringements and violations of our " rights immediately upon the determination of the same by the " United States Circuit Court of Appeals.

We ask that you acknowledge the receipt of the above and within notice.

" Yours very truly,

"L. E. WATERMAN CO.
"F. P. SEYMOUR.

From this letter and notice it is evident that the plaintiff intends to bring legal proceedings against customers of the defendant who have stocks of pens on hand which they bought when it was perfectly legal to buy and sell the same under the express mandate of this Circuit Court of Appeals. When Judge Hand granted four months in which to dispose of pen points contained in holders stamped with the suffix, he evidently intended that it should be lawful for the dealers to retail the stock that the defendant was permitted to sell them. The above threatening letter and notice are evidently intended to interfere with the defendant's business that was impliedly at least sanctioned by Judge Hand.

On the receipt of this threatening notice, a very large number of the defendant's customers have sent back their stock to the defendant and have had the holders restamped with the suffix called for by Judge Hand's decree.

As soon as the decree of this court is entered, a large proportion of the defendant's customers will probably send in their stock to be stamped again, but the restamping of the gold pen points is mechanically impossible.

And under the terms of the injunction, the pen points (which the retail purchasers rarely ever notice) would have to be stamped with the new suffix which is mechanically impossible.

Therefore, inasmuch as the court has modified its opinion, requiring "Arthur A. Waterman" instead of "A. A. Waterman" without notice to the defendant, defendant respectfully requests that the decree be further modified by permitting the sale of all gold pen points now on hand, or in the hands of customers of the defendant, if contained in holders marked with either the suffix directed by Judge Hand or by this Circuit Court of Appeals in its last decision.

HOBART W. GEYER.

Sworn to before me this 4th day of June, 1912.

V. M. TURNER,
Notary Public, New York County, #57.

(Endorsed:) 4452. United States Circuit Court of Appeals, Second Circuit. L. E. Waterman Company, Plaintiff, vs. Modern Pen Company, Defendant. Copy. Petition for modification of decree. Alexander S. Bacon, Attorney for defendant, 37 Liberty Street, Borough of Manhattan, New York City. To —— ——, Attorney for —. Due, timely and proper service of a copy of the within is hereby admitted. Dated ——, —. —— ——, Attorney for —. United States Circuit Court of Appeals, Second Circuit. Filed Jun-7, 1912. William Parkin, clerk.

United States Circuit Court of Appeals for the Second Circuit, October Term, 1911.

No. 208.

Motion Filed June 7, 1912; Decided June 7, 1912.

THE L. E. WATERMAN COMPANY, Complainant-Appellant,

vs.

THE MODERN PEN COMPANY, Defendant-Appellant.

Appeals from the District Court of the United States for the Southern District of New York.

Before Ward and Noyes, Circuit Judges, and Holt, District Judge.

Per CURIAM:

It is equitable that the penholders which the defendant has in good faith marked in accordance with Judge Hand's decree with the suffix "not connected with the original Waterman pen," or in accordance with the opinion of this Court before the use of the name "Arthur" was required, should be permitted to be sold and the order for the mandate may so provide.

The application for further changes in the order is denied.

United States Circuit Court of Appeals, Second Circuit.

L. E. WATERMAN COMPANY, Complainant,
against
MODERN PEN COMPANY, Defendant.

Pursuant to the opinion upon petition for rehearing, the L. E. Waterman Company hereby elects that the order for the mandate require the defendant to use the name "Arthur A. Waterman & Co." instead of "A. A. Waterman & Co." and the L. E. Waterman Company also elects that the order for the mandate require the defendant to use the suffix as determined by the original opinion upon the appeal from the final decree of the District Court.

Dated June 3, 1912.

L. E. WATERMAN COMPANY,
By SAMUEL S. WATSON,
Its Attorney.

SAMUEL S. WATSON,
Of Counsel.

Endorsed: Waterman vs. Modern Pen. Co. Election. United States Circuit Court of Appeals Second Circuit. Filed Jun- 4, 1912. William Parkin, Clerk.

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, Held at the Court Rooms in the Post Office Building, City of New York, on the 7th Day of June, 1912.

Present:

Hon. Henry G. Ward,
Hon. Walter C. Noyes,
Circuit Judges.
Hon. George C. Holt, District Judge.

THE L. E. WATERMAN COMPANY, Complainant-Appellant,
vs.
THE MODERN PEN COMPANY, Defendant-Appellant.

A petition for a rehearing having been filed herein on behalf of the complainant, upon consideration thereof it is

Ordered that said petition be and hereby is denied.

W. C. N.

Endorsed: United States Circuit Court of Appeals Second Circuit. L. E. Waterman Co. vs. Modern Pen Co. Order. United States Circuit Court of Appeals Second Circuit. Filed Jun- 10, 1912. William Parkin, Clerk.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms in the Post Office Building, in the City of New York, on the 10th Day of June, One Thousand Nine Hundred and Twelve.

Present:

Hon. Henry G. Ward,
Hon. Walter C. Noyes,
Circuit Judges;
Hon. George C. Holt, District Judge.

L. E. Waterman Company, Plaintiff,
against
Modern Pen Company, Defendant.

Appeals from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the Decree of said District Court be and it hereby is modified as follows:

The writ of injunction must also forbid the use of the words "A. A. Waterman & Co.," "A. A. Waterman & Company," and "A. A. Waterman."

Under the circumstances enumerated in said decree the defendant must use the words "Arthur A. Waterman & Co.," instead of "A. A. Waterman & Co." or "A. A. Waterman," and the suffix "not connected with the L. E. Waterman Co." in lieu of the suffix "not connected with the original 'Waterman' pen."

The penholders which the defendant has in good faith already marked in accordance with the decree of the District Court with the suffix "not connected with the original Waterman pen," or in accordance with the opinion of this Court before the use of the name "Arthur" was required, may be sold.

The costs of this Court and the costs of the lower Court arising after the decision of this Court upon the former appeal will be divided equally between the parties; costs of the lower Court accruing before that time are awarded to the complainant.

With the modifications stated above the decree of the District Court is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

W. C. N.

Endorsed: United States Circuit Court of Appeals, Second Circuit. Waterman Co. vs. Modern Pen Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jun 10, 1912. William Parkin, Clerk.

L. E. WATERMAN COMPANY, Appellant,
against
MODERN PEN COMPANY, Appellee.

The above named appellant, L. E. Waterman Company, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals, for the Second Circuit, and that a judgment has therein been rendered on the 10th day of June, A. D., 1912, modifying and as modified affirming the decree of the District Court of the United States, for the Southern District of New York, and that the matter in controversy in said action exceeds Ten thousand dollars ($10,000) besides costs, and that said judgment is a final judgment; that this cause is one in which the United States Circuit Court of Appeals, for the second Circuit, has final jurisdiction and that this is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellant, L. E. Waterman Company, prays that an appeal be allowed it in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals, for the Second Circuit, to send the records and proceedings in said cause, with all information concerning the same, to the Supreme Court of the United States in order that the errors complained of in the Assignment of Errors herewith filed by the said appellant, may be reviewed, and if error be found, correct it according to the laws and customs of the United States.

SAMUEL S. WATSON,
Attorney for Appellant.

United States Circuit Court of Appeals for the Second Circuit.

L. E. WATERMAN COMPANY, Appellant,
against
MODERN PEN COMPANY, Appellee.

STATE OF NEW YORK,
County of New York, ss:

Frank D. Waterman, being duly sworn, on his oath, says, that he is the President of the appellant and is personally acquainted with its business affairs; that the business and sales of said appellant during the last three years have been in excess of one million, five hundred thousand dollars ($1,500,000) per annum and appellant's profits in said business during the last three years have been more than Twenty-five thousand dollars ($25,000) per year; that the appellant has expended upwards of two millions and a half ($2,500,000) in creating its good will and making known and popularizing its goods under its trade-names and trade-marks now in suit; that the value of appellant's good will is more than one million dollars ($1,000,000); that the amount of damages suffered by appellant by reason of appellee's acts herein complained of and the matters in con-

troversy in this action exceeds the sum of Two hundred fifty thousand dollars ($250,000), exclusive of interest and costs.

FRANK D. WATERMAN.

Sworn to before me this 23d day of July, 1912.

[NOTARIAL SEAL.] AGNES M. VIKBERG,
Notary Public, Kings County, No. 26.

Certificate filed in New York County, #24.

United States Circuit Court of Appeals for the Second Circuit.

L. E. WATERMAN COMPANY, Appellant,
against
MODERN PEN COMPANY, Appellee.

Assignment of Errors.

The appellant in the above entitled cause in connection with its petition for appeal herein, presents and files therewith its Assignment of Errors as to which matters and things it says that the judgment and decree entered herein on the 10th day of June, 1912, is manifest error and that the United States Circuit Court of Appeals, for the Second Circuit, erred in this, to wit:

1. The Court erred in holding and deciding that the appellee could use the name "Arthur A. Waterman & Co.," or "Arthur A. Waterman & Company" if used with the suffix "not connected with the L. E. Waterman Co." in marking, advertising and selling fountain pens.

2. The Court erred in not passing a decree of injunction absolutely prohibiting the appellee from using in connection with the manufacture or sale of fountain pens, or parts thereof, the name "Arthur A. Waterman & Co.," or "Arthur A. Waterman & Company" or "Arthur A. Waterman."

3. The Court erred in not holding that the alleged partnerships (*a*) between Arthur A. Waterman and Dewey; (*b*) between Frazer, Geyer and Waterman; (*c*) between the two Chapmans and Waterman, were all mere shams or fraudulent devices used as cloaks and covers to secure the name "Waterman," "A. A. Waterman," "Arthur A. Waterman," "A. A. Waterman & Co.," "Arthur A. Waterman & Co." and "Arthur A. Waterman & Company" in the fountain pen business for the purpose of filching the trade and business of the appellant's long prior established and existing business.

4. The Court erred in holding that any of the alleged partnerships ((*a*) of Dewey and Waterman; (*b*) of Frazer, Geyer and Waterman; or (*c*) of the Chapmans and Waterman) were bona fide firms, or at any time did a bona fide business.

5. The Court erred in not holding that the agreement of June 12, 1905, upon which the appellee depends for its right to use the names

"Arthur A. Waterman," "Arthur A. Waterman & Co.," or "Arthur A. Waterman & Company" was a mere sham or fraudulent device.

6. The Court erred in not holding that neither the appellee, nor the alleged partnership of which the appellee is the selling agent, are the assignees or successors, or in privity with any prior bona fide concern entitled to use in any manner whatsoever in the fountain pen business the names "Arthur A. Waterman," "Arthur A. Waterman & Co.," or "Arthur A. Waterman & Company."

7. The Court erred in not decreeing to the appellant the damages which it has suffered by reason of the appellee's infringement of appellant's trade-marks, and for the damages appellant has suffered by reason of the appellee's unfair trade practices.

8. The Court erred in not decreeing that a writ of permanent injunction issue against the appellee, its agents, officers and servants, forbidding it or them, or any of them, from—

(*a*) Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any fountain pen of other manufacture than that of the appellant under the name of Waterman or Waterman's, or Waterman Pens, or Waterman's Pens, or Waterman Fountain Pens, or Waterman's Fountain Pens, or Ideal Pens, or any mark or name in imitation thereof or near resemblance thereto as might be calculated to deceive or be likely to cause confusion or mistake in the mind of the public or deceive purchasers, or which would indicate that the fountain pens sold, represented or advertised are fountain pens of appellant's manufacture.

(*b*) Infringing the appellant's trade-mark "Waterman's Ideal Fountain Pen, N. Y.," or infringing the appellant's trade-mark "Ideal", and from manufacturing or selling fountain pens (other than fountain pens of appellant's manufacture) having the said trade-marks or either of them, or any simulation or colorable imitation thereof, on such fountain pens, whether on the holder or on the gold pen, or on labels, boxes, signs, letter-heads, bill-heads, circulars, or advertisements accompanying or used in connection with the making or selling of such fountain pens, or in any manner whatsoever.

(*c*) Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any fountain pens of other manufacture than that of the appellant, engraved, imprinted or otherwise marked with any representation of a globe on such fountain pens, or upon boxes containing such pens, or on labels, signs, circulars or advertising accompanying or used in connection with the advertising or selling of such fountain pens.

(*d*) Using in connection with the manufacture or sale of fountain pens or parts thereof, other than fountain pens of appellant's manufacture, the name "Waterman" or "Waterman's" or "A. A. Waterman," or "A. A. Waterman & Co.," or "A. A. Waterman & Company" or "Arthur A. Waterman & Co." or "Arthur A. Waterman & Company" or "Arthur A. Waterman."

9. The Court erred in not taxing all of the costs against the appellee.

Wherefore appellant prays that said judgment and decree of said

United States Circuit Court of Appeals, for the Second Circuit, may be corrected according to the laws and customs of the United States.

SAMUEL S. WATSON,
Attorney for Appellant.

United States Circuit Court of Appeals for the Second Circuit.

L. E. WATERMAN COMPANY, Appellant,
against
MODERN PEN COMPANY, Appellee.

It is hereby ordered that an appeal in the above entitled cause to the Supreme Court of the United States be and is hereby allowed as prayed upon condition that appellant, within ten (10) days, give bond according to law in the sum of One Thousand Dollars, which shall operate as a supersedeas bond for all costs taxed against the appellant.

WALTER C. NOYES,
United States Circuit Judge, Second Circuit.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. L. E. Waterman Company, appellant, against Modern Pen Company, appellee. Petition for Appeal, Assignment of Errors, Order Granting Appeal. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 8, 1912. William Parkin, Clerk. Copy received this 8th day of August, 1912. Alexander S. Bacon, Attorney for Modern Pen Company. Samuel S. Watson, Attorney for Appellant, 10 Wall Street, New York.

United States Circuit Court of Appeals for the Second Circuit.

L. E. WATERMAN COMPANY, Plaintiff in Error (Plaintiff Below),
against
MODERN PEN COMPANY, Defendant in Error (Defendant Below).

Know all men by these presents That the Massachusetts Bonding and Insurance Company, a Corporation organized and existing under the laws of the State of Massachusetts and authorized to transact business in the State of New York, having an office and place of business at # 84 William Street, Borough of Manhattan, City of New York, is held and firmly bound unto the Modern Pen Company in the sum of One Thousand ($1,000.00) Dollars, lawful money of the United States, to be paid to the said Modern Pen Company above-named, and for which payment well and truly to be made, it binds itself and its successors, jointly and severally, firmly by these presents.

Sealed with its seal and dated this 9th day of August, 1912.

Whereas, the above-named L. E. Waterman Company has prosecuted its Appeal to the United States Supreme Court to modify and correct the Decree rendered in the above entitled cause by the United States Circuit Court of Appeals on the 10th day of June,

1912, and entered and filed in the office of the Clerk of said Court on the 10th day of June, 1912.

Now, therefore, the condition of the above obligation is such that if the above-named L. E. Waterman Company, Plaintiff in Error, shall prosecute its Appeal with effect and answer all damages and costs if it fail to make its appeal good, and shall, in the event of the affirmance of the judgment aforesaid or dismissal of the Appeal, comply with the said Decree therein, and pay the damages and costs as provided therein, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Dated New York, August 9th, 1912.

MASSACHUSETTS BONDING AND
INSURANCE COMPANY,
By WILLIAM H. CONROY,
Resident Vice-President.

Attest:
EDWARD H. ROWLEY,
Attorney-in-Fact.

STATE, CITY AND COUNTY OF NEW YORK, *ss:*

On this 9th day of August A. D. 1912, before me personally appeared William H. Conroy to me known, who being by me duly sworn, did depose and say: that he resided in the City of New York; that he is the Resident Vice President of Massachusetts Bonding and Insurance Company, the corporation described in and which executed the attached instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets, as ascertained in the manner provided in chapter 33 of the Consolidated Laws of the State of New York for the year 1909.

And the said William H. Conroy further said, that he was acquainted with Edward H. Rowley and knew him to be the Attorney-in-fact of said corporation; that the signature of said Edward H. Rowley subscribed to the said instrument is in the genuine handwriting of said Edward H. Rowley and was thereto subscribed by like order of said Board of Directors and in the presence of him, the said William H. Conroy.

MARGARET ACRES,
Notary Public, Kings County, N. Y.

Certificate filed in New York County.

At a regular meeting of the Board of Directors of Massachusetts Bonding and Insurance Company, held at the principal office of said Company, in the city of Boston, on the 18th day of January, 1912, the following resolution was adopted, and is still in force:

'Resolved, that this Company do and it hereby does appoint William H. Conroy its Resident Vice President, George E. Hayes its Assistant Manager, O. Wilson Gott and Albert C. Spooner its Resident Secretaries, and E. M. Connolly and Edward H. Rowley its

Attorneys-in-fact, and authorizes and empowers any two of them jointly to execute, deliver and attach the seal of this Company to any and all Contracts guaranteeing the fidelity of persons holding places of public or private trust, guaranteeing the performance of Contracts, other than insurance policies, and executing or guaranteeing Bonds and Undertakings required or permitted in all actions or proceedings or by law allowed."

STATE, CITY AND COUNTY OF NEW YORK, *ss:*

I, E. M. Connolly, Attorney-in-Fact of Massachusetts Bonding and Insurance Company, have compared the foregoing resolutions with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution. Given under my hand and the seal of the Company at the Borough of Manhattan, City of New York this 9th day of August, 1912.

E. M. CONNOLLY,
Attorney-in-Fact.

Statement of the Financial Condition of the Massachusetts Bonding and Insurance Company at the Close of Business, December 30, 1911.

Assets.

Massachusetts State, County and Municipal Bonds	$1,118,898.00
Other Municipal Bonds	180,450.00
Railroad Bonds	365,550.00
Miscellaneous Bonds	50,000.00
Bank and Miscellaneous Stocks	69,500.00
Cash in Office and Banks	181,816.93
Accrued Interest	18,505.78
Premiums in Course of Collection (less Commission)	200,430.65
Other Assets	34,187.01
Total Assets	$2,219,338.37

Liabilities.

Premium Reserve	$404,122.43
Claim Reserve	133,065.61
Reserve for Taxes	12,287.31
Total Reserves	549,475.35
Reserve for all other Liabilities and Contingencies including Reinsurance	41,065.46
Capital	1,000,000.00
Total Liabilities	$1,590,540.81
Net Surplus	628,797.56
	$2,219,338.37

Surplus to Policy-Holders $1,628,797.56

[SEAL.]

STATE, CITY AND COUNTY OF NEW YORK, *ss:*

E. M. Connolly, being duly sworn, says that he is the Attorney-in-Fact of Massachusetts Bonding and Insurance Company, and that the above is a correct statement of the financial condition of the Company on December 30th, 1911.

E. M. CONNOLLY,
Attorney-in-Fact.

Sworn to and subscribed before me this 9th day of August A. D., 1912.

MARGARET ACRES,
Notary Public, Kings County, N. Y.

Certificate filed in New York County.

(Endorsed:) Approved: Walter C. Noyes, U. S. C. J. Bond. Amount, $—. L. E. Waterman Company vs. Modern Pen Company. Massachusetts Bonding and Insurance Company: Our bond your security. Massachusetts Bonding and Insurance Company. New York Office, 84 William Street, William H. Conroy, Resident Vice-President. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 15, 1912. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 1943 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of L. E. Waterman Company against Modern Pen Company as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of September in the year of our Lord One Thousand Nine Hundred and Twelve and of the Independence of the said United States the One Hundred and Thirty-seventh.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

The United States Circuit Court of Appeals, Second Circuit.

L. E. WATERMAN COMPANY, Appellant,
against
MODERN PEN COMPANY, Appellee.

THE UNITED STATES OF AMERICA,
Second Circuit:

To the Modern Pen Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty (30) days after the date of his citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals, for the Second Circuit, wherein the L. E. Waterman Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter C. Noyes, United States Circuit Judge and Judge of the United States Circuit Court of Appeals for the Second Circuit, this 7th day of August, A. D. 1912.

WALTER C. NOYES,
Judge United States Circuit Court of Appeals, Second Circuit.

Service of citation admitted and copy of citation received this 8th day of August, 1912.

ALEXANDER S. BACON,
Attorney for Modern Pen Company.

[Endorsed:] United States Circuit Court of Appeals for the Second Circuit. L. E. Waterman Company, appellant, against Modern Pen Company, appellee. (Original.) Citation. Samuel S. Watson, Attorney for Appellant, 10 Wall Street, New York. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 8, 1912. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

L. E. WATERMAN COMPANY, Appellant-Appellee,
vs.
MODERN PEN COMPANY, Appellee-Appellant.

The above named appellee-appellant, Modern Pen Company, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals, for the Second Circuit, and that a judgment was rendered herein on the 10th day of June, A. D. 1912, modifying, and as modified, affirming the decree of the District

Court of the United States, for the Southern District of New York, and that the matter in controversy in said action exceeds $10,000, besides costs, and that said judgment is a final judgment; that this cause is one in which the United States Circuit Court of Appeals for the Second Circuit has final jurisdiction and that this is a proper cause to be reviewed by the Supreme Court of the United States, on appeal.

Wherefore, the said appellee-appellant, Modern Pen Company, prays that an appeal be allowed it in the above entitled cause (said L. E. Waterman Company, having heretofore been permitted to take such appeal) directing the Clerk of the United States Circuit Court of Appeals, for the Second Circuit, to send the records and proceedings in said cause, with all information concerning the same, to the Supreme Court of the United States in order that the errors complained of in the Assignment of Errors herewith filed by said Appellee-Appellant, Modern Pen Company, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

ALEXANDER S. BACON,
Attorney for Appellee-Appellant, Modern Pen Company, No. 37 Liberty Street, Manhattan, New York City.

United States Circuit Court of Appeals for the Second Circuit.

L. E. WATERMAN COMPANY, Appellant-Appellee,
vs.
MODERN PEN COMPANY, Appellee-Appellant.

COUNTY OF NEW YORK, *ss:*

Hobart W. Geyer, being duly sworn, says that he is the manager of the appellee-appellant, Modern Pen Company; that the amount involved in this controversy is far more than $10,000; that the Modern Pen Company has spent hundreds of thousands of dollars in advertising, and that it purposes to spend large sums annually in such advertising. The most important controversy on this appeal is to determine whether or not A. A. Waterman & Co. of which the Modern Pen Company is the sole sales agent, shall be required in all advertisements and in marking their goods, to place in such advertisements and on all their fountain pens and parts thereof the suffix "Not connected with the L. E. Waterman Co." The Modern Pen Company claims that such suffix was improperly required, and that to require the Modern Pen Company to place such suffix in connection with the trade name of A. A. Waterman & Co., damaged the Modern Pen Company in far greater a sum than $10,000 per annum. The complainant's application to appeal to the U. S. Supreme Court has already been allowed.

HOBART W. GEYER.

Sworn to before me this 23d day of November, 1912.
V. M. TURNER,
Notary Public, New York County, # 57.

United States Circuit Court of Appeals for the Second Circuit.

L. E. WATERMAN COMPANY, Appellant-Appellee,
vs.
MODERN PEN COMPANY, Appellee-Appellant.

The appellee-appellant, Modern Pen Company, in the above entitled cause, in connection with its petition for appeal herein, presents and files herewith its Assignment of Errors, as to which matters and things it says that the judgment and decree entered herein on the 10th day of June, A. D. 1912, is manifest error and that the United States Circuit Court of Appeals, for the Second Circuit, erred in this, to wit:

1. The Court erred in holding and deciding that the defendant, the Modern Pen Company, the appellee-appellant could not use the words "Waterman," "Waterman's," "A. A. Waterman & Co.," or "A. A. Waterman & Company," or any representation of a globe upon any part of any fountain pen or in connection with the sale of fountain pens, the bill of complaint herein making no reference whatever to the representation of a globe or the use thereof by either of the parties herein; and there being no evidence showing that the said Modern Pen Company had ever used any representation of a globe or the words "Waterman" or "Waterman's" alone in connection with the manufacture and sale of fountain pens or any parts thereof.

2. The Court erred in holding and deciding that the said Modern Pen Company, could not use and had not the right to use the words "Arthur A. Waterman & Co." or "Arthur A. Waterman & Company" without the words "not connected with the L. E. Waterman Co." in appropriate juxtaposition therewith, under the circumstances set forth in the decree appealed from to said United States Supreme Court;

3. The Court erred in not holding and deciding that the defendant, the Modern Pen Company, as the sole selling agent of the firm of A. A. Waterman & Co., (manufacturers of fountain pens and the parts thereof) had not the right to use the trade name "A. A. Waterman & Co." or "Arthur A. Waterman & Co." upon its fountain pens or the parts thereof, without any suffix or prefix or limitation whatsoever;

4. The Court erred in not holding and deciding that the present firm of A. A. Waterman & Co., (Messrs. I. E. and W. L. Chapman), as assignees of their retiring partner, Mr. Arthur A. Waterman, were and are entitled to all the rights and privileges in relation to the use of the trade name "A. A. Waterman & Co." the same is if said Arthur A. Waterman were still a member of said firm;

5. The Court erred in not holding and deciding that the words "Waterman" or "Waterman's", being a family name, may not be appropriated as a trade name to the exclusion of the use thereof to any

other person named Waterman, or to his assigns, if used bona fide, with his true Christian name or initials;

6. That the Court erred in holding that said Modern Pen Company must pay to said L. E. Waterman Company, its costs and charges and disbursements paid or incurred in this action prior to November 14th, 1910, and that the costs thereafter be equally divided between them, but that said Modern Pen Company was entitled to costs of this action, from the beginning, against the said L. E. Waterman Company, the complainant;

7. That the Court erred in holding that said Modern Pen Company had not the right to use the name "A. A. Waterman & Co." in making its fountain pens and parts thereof and in the manufacture and sale thereof, without any prefix or suffix, and without changing the same to "Arthur A. Waterman & Co."

Wherefore said Modern Pen Company, appellee-appellant, prays that said judgment and decree of said United States Circuit Court of Appeals, for the Second Circuit, may be corrected according to the laws and customs of the United States.

ALEXANDER S. BACON,
Attorney for Appellee-Appellant, Modern Pen Company, No. 37 Liberty Street, Manhattan, New York City.

United States Circuit Court of Appeals for the Second Circuit.

L. E. WATERMAN COMPANY, Appellant-Appellee,
vs.
MODERN PEN COMPANY, Appellee-Appellant.

It is hereby ordered that an appeal in the above entitled cause to the Supreme Court of the United States be and is hereby allowed as prayed upon condition that the appellee-appellant, Modern Pen Company, within ten (10) days, give a bond according to law in the sum of one thousand dollars, which shall operate as a supersedeas bond for all costs taxed against the appellee-appellant, Modern Pen Company.

WALTER C. NOYES,
United States Circuit Judge, Second Circuit.

A. E. G.

(Endorsed:) U. S. Circuit Court of Appeals, 2nd Circuit. L. E. Waterman Co., App'l't-Resp't vs. Modern Pen Company, Resp't-App'l't. Petition for Appeal, Assignment of Errors and order allowing appeal. Alexander S. Bacon, Attorney for Modern Pen Co. 37 Liberty Street, Borough of Manhattan, New York City. To ——— ———, Attorney for —. Receipt of a copy of the within petition, assignment and order is hereby admitted. Dated N. Y. Dec. 2, 1912. Samuel S. Watson, Attorney for L. E. Waterman Co. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 4, 1912. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

L. E. WATERMAN COMPANY, Appellant-Appellee,
against
MODERN PEN COMPANY, Appellee-Appellant.

Know all men by these presents, That the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 49 Cedar Street, in the City of New York, County and State of New York, is held and firmly bound unto L. E. Waterman Company, in the sum of One Thousand Dollars ($1,000), lawful money of the United States, to be paid to the said L. E. Waterman Company above-named, and for which payment well and truly to be made, it binds itself and its successors, jointly and severally, firmly by these presents.

Sealed with its seal and dated this 5th day of December, 1912.

Whereas, the above named Modern Pen Company has prosecuted its appeal to the United States Supreme Court to modify and correct the Decree rendered in the above entitled cause by the United States Circuit Court of Appeals on the 10th day of June, 1912, and entered and filed in the office of the Clerk of said Court on the 10th day of June, 1912.

Now, therefore, the condition of the above obligation is such that if the above-named Modern Pen Company, Appellee-Appellant, shall prosecute its Appeal with effect and answer all damages and costs if it fail to make its appeal good, and shall, in the event of the affirmance of the judgment aforesaid or dismissal of the Appeal, comply with the said Decree therein, and pay the damages and costs as provided therein, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Dated New York, December 5th, 1912.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By ALONZO GORE OAKLEY,
Attorney-in-Fact.

Attest:

WILLIAM H. ESTWICK,
Attorney-in-Fact.

Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.

[Emblem:] Contract, Fidelity, Judicial, Casualty.

STATE OF NEW YORK,
County of New York, ss:

Before me personally came Alonzo Gore Oakley, known to me to be Attorney in Fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the an-

nexed bond of Modern Pen Company as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney in Fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Modern Pen Company is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney in Fact of said Company; and that he is acquainted with William H. Estwick and knows him to be Attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is the genuine handwriting of said William H. Estwick and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

ALONZO GORE OAKLEY.

Sworn to, acknowledged before me, and subscribed in my presence this 5 day of Dec. 1912.

C. D. MARSAC,
Notary Public, New York County.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. L. E. Waterman Company, Appellant-Appellee against Modern Pen Company, Appellee-Appellant. Bond. The within bond is hereby approved as to the form and sufficiency thereof. Dated, Dec. 5th, 1912. Walter C. Noyes, U. S. Circuit Judge. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 5, 1912. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 11 inclusive, contain a true and complete transcript of the appeal papers on the cross-appeal of defendant, in the case of L. E. Waterman Company, against Modern Pen Company as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of December in the year of our Lord One Thousand Nine Hundred and twelve and

of the Independence of the said United States the One Hundred and thirty-seventh.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

United States Circuit Court of Appeals for the Second Circuit.

L. E. WATERMAN COMPANY, Appellant-Appellee,

vs.

MODERN PEN COMPANY, Appellee-Appellant.

To the L. E. Waterman Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals, for the Second Circuit, wherein you are appellant and appellee and the Modern Pen Company is appellee and appellant, to show cause, if any there be, why the decree rendered, as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter C. Noyes, Judge of the United States Circuit Court of Appeals, for the second circuit, this 25th day of November, A. D. 1912.

WALTER C. NOYES,
Judge United States Court of Appeals.

[Endorsed:] City Clerk's, County Clerk's Index No. —, ——, 191–. U. S. Circuit Ct. of Appeals, 2nd Circuit. L. E. Waterman Co., Applt.-Respt., vs. Modern Pen Co., Respt.-Applt. Original. Citation. Alexander S. Bacon, Attorney for Modern Pen Co., 37 Liberty Street, Borough of Manhattan, New York City. To —— ——, Attorney for —— ——. Receipt of a copy of the within citation is hereby admitted. Dated N. Y. Dec. 2, 1912. Samuel S. Watson, Attorney for L. E. Waterman Co. 6.95. United States Circuit Court of Appeals, Second Circuit. Filed Dec. —, 1912. William Parkin, Clerk.

Endorsed on cover: File No. 23,350. U. S. Circuit Court Appeals, 2d Circuit. Term No. 340. L. E. Waterman Company, appellant, vs. Modern Pen Company. Filed September 7, 1912. File No. 23,451. Term No. 393. Modern Pen Company, appellant, vs. L. E. Waterman Company. Filed December 10th, 1912. File Nos. 23,350 and 23,451.

1

SUPREME COURT, U. S.
FILED
MAY 4 1914
JAMES D. MAHER

Supreme Court of the United States

L. E. WATERMAN COMPANY,
Plaintiff-Appellant,

against

MODERN PEN COMPANY,
Defendant-Appellant.

OCTOBER TERM, 1913

54&72

Brief of Defendant-Appellant

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of

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Supreme Court of the United States

L. E. WATERMAN COMPANY, Plaintiff-Appellant, against MODERN PEN COMPANY, Defendant-Appellant.	October, 1913 Term # 340 # 393

BRIEF OF DEFENDANT-APPELLANT

Writ of Error from the United States Circuit Court of Appeals, Second Judicial Circuit, which modified a Final Decree entered on the hearing of the issues, before Hon. Learned Hand, Judge.

Action in equity: unfair competition; trade marks registered 1900 and 1901, &c.

Short Statement; The Issue.

The Modern Pen Company is the sole selling agent of A. A. Waterman & Co. (now composed of Isaac E. and William L. Chapman, Mr. A. A. Waterman having assigned to them all rights in the firm name, on his retiring from the firm), who manufacture fountain pens.

The issues: Plaintiff claims that defendant is not entitled to use the name "Waterman" at all, now that A. A. Waterman has retired from the firm.

Defendant claims the unrestricted right to use its trade name, unhampered by the suffix required by the Circuit Court of Appeals, viz: "not connected with the L. E. Waterman Co."

The plaintiff is a New York corporation, organized in 1887, and took over by assignment the good will, trade name, trade marks, &c., of Lewis E. Waterman. It sells fountain pens; its claim to manufacture pens is denied.

The L. E. Waterman fountain pens are also known as the "Ideal" (trade mark registered 1900, fols. 54, 55).

The defendant, Modern Pen Company, is a corporation organized in 1905, and is the sole selling agent of the firm of A. A. Waterman & Co., who actually manufacture fountain pens, and who are the successors of the preceding firms of A. A. Waterman & Co., who have manufactured and/or sold fountain pens since before 1898.

The A. A. Waterman pens are known as the "Modern."

The alleged unfair competition consists in nothing outside of the bare fact that the name "Waterman" is contained in both trade names.

There is no claim of "simulation" or imitation of plaintiff's devices, etc. The characteristic color of the defendant in its boxes, advertising, etc., is primrose or canary. The plaintiff's characteristic color is dark blue. Their methods of advertising, etc., are distinctive.

The present firm of A. A. Waterman & Co. was organized in 1905, but Mr. Waterman retired from the firm on July 1, 1906, and *assigned* (fol. 5006) all his right, title and interest in the firm to his copartners, including the good will, exclusive use of his name, etc. (p. 1669, fol. 5006). Mr. A. A. Waterman took the Western District of America and his partners the Eastern District.

This action was begun on the theory that be-

cause Mr. Waterman had ceased to be a member of the Eastern firm, his partners (to whom he had assigned all rights) had no right to continue the use of the firm name. We understand that this theory has been abandoned; no court has sustained it; but Judge Hand made a decree which required the defendant (or A. A. Waterman & Co., which we will speak of as the same, although the defendant has many stockholders, and A. A. Waterman & Co. is a firm now composed of Isaac E. Chapman and William L. Chapman), to use a suffix "NOT CONNECTED WITH THE ORIGINAL 'WATERMAN' PEN."

The Circuit Court of Appeals changed this suffix to "NOT CONNECTED WITH THE L. E. WATERMAN COMPANY," and required the use of the name "Arthur A. Waterman & Co." instead of "A. A. Waterman & Co."

The defendant objects to any suffix and claims that it has an absolute right to use the firm name of A. A. Waterman & Co., and therefore appeals.

The plaintiff appeals because the defendant is permitted to use the name Waterman at all, as it claims, in violation of its trade mark rights, dating back in use to 1883, and registered as early as 1901. Plaintiff makes no claim to the *exclusive* use of the word "Waterman" for the ten years before 1905, i. e., under the Trade Mark Act of 1905.

Before 1895—19 years ago—A. A. Waterman had been an employe of the L. E. Waterman Company as a salesman. He was not related in any way to L. E. Waterman then connected with the plaintiff. He went into business for himself with a man named Gibson under the *firm* name of "The A. A. Waterman Pen *Company*."

The plaintiff brought an action against Waterman and Gibson in the Supreme Court, New York County, and a decree was entered (September 3, 1898) restraining the defendants from using the

corporate name "A. A. Waterman Pen Company," but the decree contained the following:

"But defendants are *not prohibited* from indi-
"cating that fountain pens made by them are made
"or prepared or sold for or by Arthur A. Waterman
"& Company or A. A. Waterman & Company."

That decree was not appealed from; became final and binding upon all the parties, and is now believed to have been entered on consent. Defendant claims that it is still binding on all the parties and their privies.

A. A. Waterman and Mr. Gibson then continued to manufacture and sell fountain pens under the *firm* name of "A. A. Waterman & Co.," and from 1898 until 1906, when Mr. Waterman retired from the present firm of A. A. Waterman & Co., he continuously, without molestation from the plaintiff or any one else, continued openly and aggressively to manufacture and sell fountain pens under the name of A. A. Waterman or A. A. Waterman & Co. On July 1, 1906, he left to his partners the Eastern field, while he took over the Western field, and continued to manufacture and sell fountain pens under the name "A. A. Waterman & Co., Inc.," in the West. Between 1906 and 1910 plaintiff made no objection to the new conditions, but, on the contrary, sought to purchase defendant's assets, trade name, etc., etc., although plaintiff well knew that A. A. Waterman & Co. consisted of the Messrs. Chapman only.

The defendant's business is not new, neither is the connection with it of the Messrs. Chapman, recent. They furnished substantially all the money for the enterprise in 1901. The defendant actually manufactures its pens—every part of them—the plaintiff does not; defendant's wares are superior; the best that skill and recent patents can procure; its principal pen (self-filler, "Modern") is patented, while plaintiff's principal pen, the old-fashioned, leaky, "end joint" pen is unpatented.

Recent Litigation.

All parties acquiesced in the decree of September 3, 1898, until 1909—11 years.

In the year 1909, the L. E. Waterman Company brought an action in the United States Court in Cleveland against the Standard Drug Company, a stranger to the defendant, and another similar action in Washington, D. C., against John Saadi, on bills of complaint which stated that defendants were advertising and selling pens under the name of "Waterman" not made by the plaintiff (Cleveland complaint, p. 1694; decree, p. 1704; Saadi complaint, p. ..; decree, p. 842). The bills of complaint in these two actions made no reference to A. A. Waterman & Co., but the plaintiff obtained judgments by default, and the judgments entered specifically enjoined the sale by the defendants of any pens bearing the name "A. A. Waterman & Co." That is to say, the decrees taken by default were very much broader than the complaints. The complaints were innocuous; the decrees were exceedingly hurtful to A. A. Waterman & Co. The defendant has never claimed the right to use the word "Waterman" alone.

The plaintiff had the Cleveland decree printed with a large red seal, and, with a printed notice (p. 1706), sent it broadcast throughout the United States and Canada, warning everybody not to sell pens of "A. A. Waterman & Co." and threatening the dire results indicated in this default or rather, "consent" decree. The public would think from this formidable looking decree and notice that the plaintiff had obtained a decree after due litigation, binding upon everybody.

Thereupon the Eastern firm of A. A. Waterman & Co. (Messrs. Isaac E. and William L. Chapman) began an action in the Supreme Court, New York County, to restrain the plaintiff from bringing any

further similar actions, and to restrain the spreading of this deceitful circular.

After A. A. Waterman & Co. had brought that action against the L. E. Waterman Company, the L. E. Waterman Company brought *this* action in the United States Court (April 11, 1910) to restrain the defendant from selling the fountain pens of A. A. Waterman & Co. marked with the manufacturers' name.

A motion was made for a preliminary injunction. This was denied by Judge Coxe (see opinion, p. ....). Thereupon the plaintiff amended its complaint, alleging an infringement of its trade mark "Ideal" (registered in 1900). [There had been a trifling, inadvertent infringement], and made another motion for a preliminary injunction, and this was granted by Judge Hough (see opinion, p. 1108). An appeal was taken to the Circuit Court of Appeals. As defendant understood it, the parties were to abide by that decision, and Judge Hough stated to counsel that such an appeal, revealing all the facts in the affidavits, would save the enormous expense of a trial.

The defendant understood that both sides were to abide by the decision of that appeal.

The Circuit Court of Appeals, Second Judicial Circuit, reversed Judge Hough's order and vacated the preliminary injunction, except as to the use of "Ideal" and "Waterman" standing alone (fols. 3361-2), (see opinion, p. 1114; decree, pp. 1118-21). The defendant thought this was the end of the matter, but after long delay the plaintiff began taking testimony at enormous expense over many parts of the United States and Canada. The record is found in three large volumes, and the writer has no hesitancy in saying that if the present practice had prevailed and the evidence had been taken in open court, the record would have been far less than one of the present volumes. Most of the testimony is irrelevant.

The plaintiff took over six months to gather in its testimony, and before it began to be taken, the plaintiff's attorney had been throughout the West, visiting customers and trying to get *somebody* to admit that *some* salesman of the defendant had said that he represented "Waterman pens" without using the letters "A. A." There was no such testimony, as the defendant was always very careful to designate its superior product as "A. A. Waterman" to distinguish it from the inferior out-of-date product sold by the plaintiff. Defendant's instructions to salesmen were very emphatic and were carried out conscientiously. The instructions were not controverted.

The defendant's testimony was all taken in New York City and taken within twenty-four days, and consists largely of exhibits.

Long after the beginning of this action, this plaintiff began an action against an agent of the defendant in Milan, Italy, on a complaint that the plaintiff knew in many respects to be false. This action was begun long *after* the plaintiff itself had submitted the controversy to this court. The Italian court interpreted the partnership agreement between Waterman and the Chapmans (Exhibit A-13, p. 1668); refused to take any testimony in explanation of it, and declared that agreement to be fraudulent [no American Judge has held that], (see opinion of the Italian court, p. 1843), and gave a temporary judgment in favor of L. E. Waterman Company. This has caused many thousands of dollars damage to this defendant, cutting off its Italian trade. That Italian decree is still in force; has been appealed, and its decision is, apparently, awaiting this decision of the United States Supreme Court. The Italian Court refused to follow the Circuit Court of Appeals which had then already passed upon this case.

The issues were tried before Judge Hand, and

before his decision, the plaintiff got permission to set up the Italian judgment (which has been appealed from and the appeal not yet decided), and took testimony in relation to it. Judge Hand did not take the Italian decree seriously (see opinion at p. 1862). This Italian judgment had not, of course, been pleaded.

Judge Hand, going beyond anything that *ever* had been done in similar circumstances, decreed that the defendant *had* the right to use the name A. A. Waterman & Co., but that they should always use a suffix, "NOT CONNECTED WITH THE ORIGINAL 'WATERMAN' PEN." The defendant appealed. The plaintiff did not.

Defendant contends that to require a suffix at all is entirely unprecedented, and error.

The Circuit Court of Appeals modified the decree of Judge Hand by requiring a suffix, "NOT CONNECTED WITH THE L. E. WATERMAN COMPANY" and required the use of the name "Arthur A. Waterman & Co." instead of "A. A. Waterman & Co."

The defendant takes a writ of error to the Supreme Court of the United States, complaining of the suffix and the requirement of the use of the name Arthur A. instead of A. A.

The plaintiff takes a writ of error on the ground that the defendant has no right to use the word "Waterman" at all.

This claim is not based on an *exclusive* use for the ten years preceding February 20, 1905 (see Trade Mark Law of 1905). Such claim is not pleaded nor advanced in any proof or brief. That A. A. Waterman was during that period openly and energetically using the trade name of "A. A. Waterman & Co." is admitted.

There is no question of violating the plaintiff's trade mark "Ideal." Defendant has always admitted the validity of that trade mark. The trifling infringement was inadvertent. It was too trifling to cause the Court to order an accounting.

There is no question of simulation or attempt to deceive by imitating plaintiff's trade name or trade colors. That claim is not in the case and there was no such proof.

The entire question is this: (1) Did A. A. Waterman have a right to use his own name, notwithstanding the fact that L. E. Waterman had previously used his name in connection with the sale of fountain pens, and had sold the use of his name to the plaintiff corporation? (2) Did Mr. Waterman, who was christened Arthur A. Waterman, have an absolute right to use his own name in connection with his own business, notwithstanding the fact that another Mr. Waterman had been christened Lewis E. Waterman and had first started in the business of manufacturing and selling fountain pens? Each Mr. Waterman has assigned the right to use his name, one to the plaintiff *corporation*, the other to his partners, in the defendant *firm*. (3) Did Arthur A. Waterman have the right to convey to his partners the exclusive right to use his name?

(4) Will the Supreme Court of the United States sanction this new departure of the Circuit Court of Appeals, which requires a man, entering into a legitimate business *after* another man of the same name, to annex a suffix to his business name *three times as long as the name itself?*

Had the Court the right to re-christen Mr. Waterman "ARTHUR A. WATERMAN, NOT CONNECTED WITH THE L. E. WATERMAN COMPANY," when he is doing a legitimate business in a legitimate way? The Court conceded that A. A. Waterman had a right to convey to his partners every right in the name that he possessed, so that the rule would be the same if applied to Mr. Waterman personally.

The defendant cares little about the requirement to use the name Arthur A. Waterman instead of A. A. Waterman, as the writer suggested in his

former brief that the full name was more dignified, but the defendant maintains that it has *an absolute right of property* in the name *A. A.* Waterman, and that no court has a right to say that the full given name must be used, or that a suffix of any kind shall be required, as long as the defendant has never by word of mouth or by any advertisement done anything to indicate that the *superior* goods manufactured by the defendant are the same as the *inferior* goods sold by the plaintiff. A long suffix is intolerable, and is wholly unwarranted. The same principle applied to Rogers Bros. (silverware) would require a new Rogers in the field to use twelve suffixes. This application of the rule shows how it might become ridiculous.

It will be remembered that the defendant's business is *not* new; that A. A. Waterman had been *continuously* and openly manufacturing and selling pens since 1895, and that the Chapmans (present members of A. A. Waterman & Co.) put substantially all of the capital ($50,000) into this business in the year 1901, when A. A. Waterman & Co. were the selling agents of Frazer & Geyer Company, which was the manufacturer of the pens. The Chapmans have put substantially all of the capital into the A. A. Waterman enterprises during the last *fourteen years*. By a formal written conveyance, they have all the rights in the name A. A. Waterman & Co. that Mr. Waterman formerly had.

The defendant's business is not only not new, but it has never sought to confuse the public and make it think that it was the plaintiff. Its fountain pens are manufactured under patents of Mr. Waterman and are of the highest possible workmanship, while the plaintiff's pens are old, out of date, "under-the-fingers-joint," that have to be filled with an old-fashioned "filler," and are not substantially different from what they were thirty years ago.

The only question that the United States Supreme

Court will consider seriously is, probably, "Has Mr. A. A. Waterman a right to use his own name in his own business without the use of a suffix?"

L. E. Waterman entered the fountain pen field in 1883. Had he a right to preempt the name "Waterman" and prevent every other Waterman from doing business under his own name, without putting a three-foot tail upon a one-foot kite?

A. A. Waterman was christened "Arthur A. Waterman"; as long as he behaves himself and does business legitimately, has the Court the right to rechristen him "Arthur A. Waterman, not connected with the L. E. Waterman Company"? The name has 15 letters; the suffix has 36.

We wish to emphasize to the Court that the defendant is not a new "fake" enterprise, selling a cheap pen on the strength of the name "Waterman."

We wish it distinctly understood that the "A. A. Waterman" pen is the best pen in the world; manufactured exclusively by them under Mr. A. A. Waterman's patents, and by the aid of patented devices used in the manufacture of fountain pens. Modern science does not know how to make a better pen than the "A. A. Waterman."

A. A. Waterman & Co. actually manufacture their pens and every part of them. This firm and its predecessor concerns (all backed financially by the Chapmans) have manufactured every part of A. A. Waterman pens since 1901—for 13 years—and have spent many thousands of dollars in advertising their "self-filler," which is their specialty.

Mr. Arthur A. Waterman was and is a genius—a genius as an inventor and in the details of manufacture, and a genius as a salesman. Like so many geniuses, he is not a financier. In his peculiar spheres, he is a marvel. He brought 80 per cent of the business to the original enterprise (1901). His customers were scattered from Portland, Me., to Portland, Ore.

On the other hand, L. E. Waterman—long since dead—never was a genius at anything as far as known, except getting into certain troubles, hinted at in 130 N. Y. 301.

Neither L. E. Waterman nor the L. E. Waterman Company *ever did, or ever has manufactured even one fountain pen* (except very recently a cognate corporation in Canada, on account of the tariff). Their principal, and much advertised pen is thirty years old, never was patented in its principal features; is about the poorest high-priced pen on the market; and the plaintiff's business is largely advertising and "bluff."

A fountain pen consists of the holder of rubber and the pen point of gold. The distinctive features of a *fountain* pen relate to the "fountain." *All the rubber parts of the plaintiff's pens are manufactured by H. P. & E. Day* of Connecticut, with whom the plaintiff has no connection even as a stockholder. Plaintiff's gold pen points have been bought in the open market from various makers, including the defendant, except that very recently, plaintiff has manufactured a few pen points itself. It still buys pen points in the open market.

The L. E. Waterman Company merely "assemble" the purchased parts in its so-called factory. Most of this work is done by unskilled girls.

A. A. Waterman & Co. manufacture every part of every one of their pens, and they and their predecessors have done so since before 1900. *Their self-filler is the best pen ever made.* It would be business suicide to claim that their A. A. Waterman "Modern" self-filler was the same as the L. E. Waterman "Ideal," with a joint under the fingers, that has to be unscrewed every time it is filled, and is bound to leak and smear the fingers.

The Whole Law.

1. The plaintiff's claim to the exclusive use of the word "Waterman" either by virtue of Mr. L. E. Waterman having first used it in the sale of fountain pens, or by virtue of the registry of a trade mark, is, at this late day, wholly inexcusable. As Judge Lacombe said in *Thaddeus Davids Co.* v. *Cortlandt I. Davids*, in denying an injunction: "In "view of the decision in the Remington typewriter "(Rem-Sho) case, I do not see how the Court could "enjoin a defendant from the use of their own name "when they do not otherwise label their goods to "produce confusion."

"It is manifest at the outset that the personal "name 'Davids' is not a valid common law trade "mark. It is also clear that its registration would "have given it no validity as a registered trade "mark under the Trade Mark Act of 1881. In *Howe "Scale Co.* v. *Wyckoff, Seamans & Benedict* (198 "U. S. 118, 134) the Supreme Court said: 'But it "'is well settled that a personal name cannot be "'*exclusively* appropriated by any one as against "'others having a right to use it, and as the name "'"Remington" is an ordinary family surname, it "'was manifestly incapable of exclusive appropria- "'tion as a valid trade mark *and its registration as "'such could not in itself give it validity.*'" (*Thaddeus Davids Co.* v. *Cortland I. Davids*, N. Y. Law Journal, May 7, 1910.)

This case is reported in 178 Fed. Rep. 801, & 192 Fed. Rep. 915.

There might be some foundation for the plaintiff's claim to the exclusive use of the word "Waterman" if it could qualify under the Trade Mark Act of 1905, but the plaintiff makes no claim under that act, nor to having had the exclusive use of the word "Waterman" as a trade name during the ten years

preceding 1905. The decree of September 3, 1898, in *L. E. Waterman Company* v. *Arthur A. Waterman and Gibson*, in the Supreme Court, New York County, alone would negative that fact. Proof of Mr. A. A. Waterman's continuous use of his name in trade from 1895 until long after the beginning of this action, is undisputed.

The plaintiff's claim rests upon the bare fact that L. E. Waterman was first in the field to use the name "Waterman" in connection with the sale of fountain pens, and the plaintiff's position is wholly untenable.

An excellent brief on this subject is *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

2. A trade mark or trade name is assignable.

Mr. Arthur A. Waterman had just as much right to sell his trade mark or his trade name as he had to sell his horse. Both are property. Or he had as much right to assign his trade name to his continuing partners as L. E. Waterman had to assign his trade name to the plaintiff corporation.

In *Burton* v. *Stratton*, 12 Fed. Rep. 696 * * * Brown, *J.*, said that "the cases were numerous in "which it had been held that a *party may lawfully "sell*, not only a trade mark indicative of origin in "himself, but even *the right to use his own name*, "in connection with a particular business." (From note to *Selchow* v. *Baker*, 93 N. Y. 60, book 19, of Brown & Cook's 5-vol. edition, Court of Appeals reports.)

"Where, however, the proper name has been so "used as to lose its personal nature, and has become "only a designation of a particular establishment, "character of goods, or business, *it may be assigned* "in connection with an assignment of the establish- "ment, the right to make the particular character "of goods, or the business, and a contract, *express*

"*or implied*, upon the part of the assignor not to "use such name, *even though his own name* upon a "similar article or in a similar business is valid "and will be enforced." (Book 19, Am. & Eng. Enc. of Law, Title Trade Marks, p. 401.)

Mr. A. A. Waterman's assignment to his partners is as follows (fol. 5006):

"VIII. Arthur A. Waterman hereby *grants* to "this said firm of A. A. Waterman & Co. *the right* "*to use the name* of A. A. Waterman & Co., in con- "nection with the manufacture and sale of foun- "tain and other pens and articles *perpetually and* "*exclusively*, except as hereinafter reserved to said "Waterman to make use of said firm name, and "hereby *conveys* to said firm all the *good will* now "existing and attaching to the name of A. A. Water- "man and A. A. Waterman & Co.; this *grant* shall "not be modified or diminished by said Waterman "ceasing to have an interest in this said firm under "the terms of this agreement, or by his death or "otherwise."

3. The defendant had the right to use the trade name A. A. Waterman & Co. by virtue of the common law, the statutes and the decree of the Supreme Court, New York County:

"BUT *the defendants are not prohibited* from "indicating that fountain pens made by them are "made or prepared or sold for or by Arthur A. "Waterman & Co. or A. A. Waterman & Co." (From the decree of September 3, 1898, *L. E. Waterman* v. *Arthur A. Waterman & ano.*, which decree was not appealed from, but acquiesced in by plaintiff, fols. 4828-9.)

4. Even if the defendants (Isaac E. and William L. Chapman: A. A. Waterman & Co.) had never seen Mr. A. A. Waterman before June 12, 1905.

they had a perfect right under the law to have purchased from him all of his right, title and interest in and to the firm of A. A. Waterman & Co., including its assets, good will, trade marks and trade name. The cases are numerous where such purchases have been upheld. The only thing necessary is that Mr. Waterman should have been actually doing a *bona fide* business under his own name, and the proof is undisputed that from before 1895 until June 12, 1905 (the date of Exhibit A-13, p. 1668), there never was a day when A. A. Waterman was not openly manufacturing, selling and advertising his fountain pens under his own name.

However, when in 1901, A. A. Waterman, the salesman, combined forces with Frazer and Geyer, the manufacturers, and A. A. Waterman produced 80 per cent of the business of the new combination, thereby multiplying the former manufacturing business of Frazer and Geyer by five, it was the Chapmans' money (1901) which made this combination possible, and the Chapmans have been the principal parties interested in the enterprise of A. A. Waterman & Co. since 1901. The *bona fides* of their connection with the enterprise cannot be disputed. They put in the *real money* and have it in the enterprise still.

It was A. A. Waterman who became dissatisfied with his various contracts of the year 1901 that tied him up for 40 years; and he it was that wished to go into business for himself in the Western territory, and it was that fact that inspired the agreement of February, 1905, between A. A. Waterman and the Frazer & Geyer Company. That contract was practically the same as the contracts of June 12, 1905, when, on the reorganization, the Modern Pen Company took the place of the Frazer & Geyer Company (see temporary agreement of May 27, 1905, p. 1666). The whole transaction arose from

the desire of Mr. Waterman to go into business for himself in the West.

The partnership agreement of June 12, 1905, was no mere trick or pretense for an assignment of the trade name. The insolvency and incompetency of Mr. Frazer required a reorganization and a new management. The business had lost money after 1903. The Chapmans' investment had been in the business for years, and the new partnership agreement was modeled after former—similar—agreements. The trade name of A. A. Waterman & Co. had been in use for more than 7 years before 1905.

Besides, it will be noted that, in the cases sustaining the assignability of trade names in nearly every case the assignment was made to a stranger, and only in a few to continuing partners. If the sale had been made to total strangers, not to backers for four years, it would have been perfectly good.

5. CONFUSION:

There is undoubtedly some slight confusion owing to the similarity of names. We do not think "L. E. "Waterman Company" is so nearly like "A. A. "Waterman & Co." that an intelligent man would be deceived. This inevitable confusion is increased by the improper business methods of the plaintiff, and is decreased by the universally polite business methods of the defendant. This confusion is nothing compared to the confusion arising from the name of the twelve firms of Rogers in the silverware business.

As the Court of Appeals said in the *Meneely* case, 62 N. Y. at p. 432: "Where the only confusion "created is that which results from the similarity "of the names, the Court will not interfere." And the law applicable to this case is well stated in

Carr Adv. Co. v. *New York City Adv. Co.*, 107 N. Y. Supp. 546; 141 N. E. Rep., where the Court said:

"It is plain that there has been in the past, and "doubtless there will continue to be in the future, "more or less of *confusion* and of mistakes made, "*such as in sending mail, telegrams and telephone* "*messages to the two companies.* But this ought "not to be held due to the act of the defendant, but "rather to the act of the plaintiff, which adopted "a *generic* and descriptive term for its *corporate* "*name* without adding any distinguishing word "whatever. *There is no evidence to show that the* "*defendant has done anything to encourage or in-* "*crease such mistakes on the part of the customers* "*of the two companies.* * * * So far as incon- "venience to the public is concerned, a remark made "by the Court of Appeals in *Hygeia Water Ice Co.* "v. *N. Y. Hygeia Ice Co., Lim.*, 140 N. Y. 94; 35 "N. E. 417, is in point, which was to the effect that "courts of equity must in cases like this *assume that* "*the public will use reasonable intelligence and dis-* "*crimination with reference to names of corpora-* "*tions with which they are dealing or intend to* "*deal, the same as in the case of individuals bear-* "*ing the same or similar names.*"

The Court will of course distinguish between a new business organizing a *corporation* where it picks out its own name, as the plaintiff did, and that of either a new or old business taking a *firm* name from a member of the firm, and who did not select his own name. The law is wholly different, and most of the cases heretofore cited by the plaintiff related to new corporations, not new or old firms.

6. LACHES AND ACQUIESCENCE.

Why has the plaintiff remained quiet between the decree of September 3, 1898, and the unethical

Cleveland litigation in 1909? Mr. A. A. Waterman was confessedly doing business openly, notoriously and aggressively under his own name.

The defendant has, for years, developed a large business, relying upon the decree of September 3, 1898. That decree is both *res adjudicata* and *stare decisis*.

Why, during 1906, 1907 and 1908, did the plaintiff try to buy out the trade name of A. A. Waterman & Co., and offer $10,000 for the trade name alone.

This *laches* and acquiescence have never been explained.

7. UNFAIR COMPETITION.

If the defendant has the right to use the trade name A. A. Waterman & Co., there is no unfair competition, for the complaint and the record will be searched in vain for a suggestion that the trade name A. A. Waterman & Co. was used otherwise than in a straight legitimate way. There is no allegation of fact that shows that the defendant ever used its trade name in such a way as to resemble any particular method employed by the plaintiffs in advertising or otherwise.

The only allegation of unfair competition is the mere fact of using the defendant's own trade name. Even the attempt to prove that some salesman, somewhere, had said he represented "Waterman "pens" failed utterly.

8. CONSIDERATION.

The consideration of the bill of sale (Exhibit A-13, p. 1668), cannot be attacked by a stranger. Besides, it was more than adequate. Mr. Waterman has never complained of it. However, Mr.

Waterman had a right to give away his property if he wished to. Moreover, the new contracts of 1905, first (February), with Frazer & Geyer, and later (June), with the Chapmans, was his own seeking. It was he who wanted the United States divided into two districts, that he might have the Western District as his own.

9. SUFFIX.

This is, we take it, the only original proposition that the United States Supreme Court will have to determine. All other matters have been settled by many decided cases. Never before has any man or firm been required to use a suffix of this character, so far as we can determine. We cannot, therefore, refer to reported cases.

The suffix is not only unprecedented in law, but it is offensive and inartistic, as is evidenced by mere inspection:

A. A. WATERMAN & CO.
NOT CONNECTED WITH THE L. E. WATERMAN COMPANY.

To make the argument more impressive, let us assume that John Doe Rogers should start a New York business in the manufacture of silver-ware, and that he should be sued in succession by each one of the Rogers firms, of whom we think there are now twelve. There may be more. His ultimate condition would be something like the following:

JOHN DOE ROGERS,
NOT CONNECTED WITH THE J. ROGERS SILVER PLATE COMPANY,
NOT CONNECTED WITH THE ROGERS SILVER PLATE COMPANY,

NOT CONNECTED WITH THE SIMEON L. & GEO. H. ROGERS COMPANY,
NOT CONNECTED WITH THE WM. ROGERS MFG. COMPANY,
NOT CONNECTED WITH WM. A. ROGERS, LTD.
NOT CONNECTED WITH ROGERS & BRO.
NOT CONNECTED WITH ROGERS BROS.
NOT CONNECTED WITH ROGERS & HAMILTON COMPANY.
NOT CONNECTED WITH ROGERS, SMITH & COMPANY,
NOT CONNECTED WITH WM. A. ROGERS, NIAGARA FALLS,
NOT CONNECTED WITH W. A. ROGERS, NORTHAMPTON, MASS.,
NOT CONNECTED WITH THE BIGGINS-ROGERS COMPANY.

The Modern Pen Company (A. A. Waterman & Co.) have exactly the same rights that Mr. A. A. Waterman, the individual, has in the use of the name A. A. Waterman. The controversy resolves itself to this: Has Mr. A. A. Waterman a property right in the name that his parents gave him? He was christened Arthur A. Waterman. He had an absolute right to use the initials A. A. Waterman in business. He has done nothing wrong. The law permits him to do business under his own name, no matter how many Watermans have entered the field before him. Mr. A. A. Waterman had nothing to do with what his name should be. His parents named him. The plaintiff corporation chose its own name. Had Mr. L. E. Waterman christened his business child "The Ideal Pen Co." (130 N. Y. 301), there would have been no complications with a family name.

If there has been slight confusion, it was not his

fault. Has the Court a right to re-christen Mr. Waterman and say henceforth, "Whenever you do "business with fountain pens, your name must be "'A. A. Waterman-not-connected-with-the-L. E. "'Waterman-Company'?"

From an artistic standpoint, the re-christened name is certainly not desirable. From a business standpoint, it is offensive to both sides.

Suppose, for instance, A. A. Waterman & Co. should wish to advertise on a barn along a railway. They might put A. A. Waterman & Co. on an ordinary sized barn in letters large enough to be seen from the car windows, but they would have to have a whole flock of barns to contain both the name and the suffix.

We are not prepared to say that very many people who see the advertisement of this suffix will not think that it was voluntary and that the defendant uses it merely to call attention to the fact that the superior "self-filler" Modern is not in any way connected with the inferior "end joint" Ideal.

At best, the plaintiff has no rights except the bare fact that L. E. Waterman was first in the field. That fact could not change Mr. A. A. Waterman's father's name, and should not require him to advertise an adversary's business by an offensive suffix.

The Various Opinions and Decrees.

This action was begun with a motion for a preliminary injunction based on voluminous affidavits. Judge Coxe denied the motion. Later, having discovered from an examination of Mr. Saadi, in Washington, that he had obtained a few cheap pens from the defendant stamped "Royal Ideal" (on the holders), the plaintiff served an amended complaint (p. 18), alleging an infringement of that trade mark (registered twice in 1900), although

in open court and in a preceding brief, the defendants had admitted the validity of that trade mark. The infringement was trifling and inadvertent, and no accounting has ever been directed. Only about one gross were sold to the public.

However, this amended complaint was made the basis of another motion for a preliminary injunction before Judge Hough, who granted the motion with a memorandum found at page 1108.

Judge Hough's Opinion.

Although the moving papers were substantially like those that were presented to Judge Coxe, excepting in relation to the trifling infringement of the trade mark "Ideal," Judge Hough's decision was exactly the opposite of Judge Coxe's, and his memorandum is substantially wrong in every particular, and has not been sustained by the higher courts. He states (p. 1109):

"Whatever may be thought of the right of some "parties to make and sell fountain pens described "as these of A. A. Waterman, the admitted facts [?] "show an endeavor to sell defendant's goods on "complainant's reputation—and this branch of the "motion is granted."

[This statement is wholly wrong.]

He states at folio 3326: "I find no proof of use "by defendant of the exact trade mark 'Water-"'man's.' There is clear proof of misuse of the "word 'Ideal,' and injunction may issue accord-"ingly."

Commenting upon the attempt to restrain the use of the trade name "A. A. Waterman & Co." (fol. 3327), he states (fol. 3328): "On this point, "from the undisputed facts, I think that, while "*Arthur A. Waterman* may have the right to use "some or all of the trade names so objectoinable to

"complainants,—*the Modern Pen Company* has no "such right. Mr. Arthur A. Waterman is not in- "terested in the defendant, nor in the concern for "which it is the selling agent." [Where Judge Hough got the idea that Mr. Waterman could not assign the use of his name, we cannot understand, and from what fact he assumed that this trade name "does not, in defendant's hands, accompany "any business," we cannot comprehend. Besides, Mr. Waterman was a stockholder and director in the Modern Pen Company.]

Judge Hough's sweeping injunction was reversed by the Circuit Court of Appeals in an opinion found at page 1114.

First Opinion of Circuit Court of Appeals.

This opinion sets forth the New York State decree of September 3, 1898 (fol. 3343), and states:

"Subsequent to this decision, the name A. A. "Waterman & Company was used by successive "partnerships of which said Waterman was a mem- "ber. The business was not successful, and in 1905 "a reorganization took place and an agreement was "entered into whereby in effect said Waterman "assigned to Isaac E. and William L. Chapman, who "had been previously interested with him in the "business, the right to use in connection therewith "the name 'A. A. Waterman & Co.'

"The defendant was shown to have sold a limited "number of fountain pens marked 'Royal Ideal "'Pen.' The evidence also tended to show some use "of the word 'Waterman' in connection with the "sale of the goods of the firm A. A. Waterman & "Company without the distinguishing initials." [This quotation is correct, except the statement that the evidence tended to show some use of the

word "Waterman" in connection with the sale of the defendant's goods. No such evidence can be found in the affidavits or in the present proof.] Judge Noyes says:

"The complainant's trade mark 'Ideal' is con-"ceded to be valid. The defendant infringed it by "the sale of the pens marked 'Royal Ideal Pen.' "Consequently the second paragraph of the injunc-"tion order was proper.

"Assuming that the present co-partnership of "A. A. Waterman & Company has the right under "the agreement with Arthur A. Waterman to use "that firm name, they have no right to use the name "'Waterman' without the initials. The use of the "name which they may have the right to employ "concededly causes confusion, and they have no "right to increase that confusion by employing any "name less definite.

"The defendant disclaims the use of the name "'Waterman' alone. If so, an injunction against "such use will do it no harm. But, as already "stated, we think there was sufficient evidence of "such use to warrant the first paragraph of the "injunction.

"The third paragraph of the injunction order is, "in our opinion, erroneous. It is clear that the "partnerships of which Arthur A. Waterman was "a member, had the right to use the name A. A. "Waterman & Co., in connection with their business "and to so mark their pens. *The decision of the "Supreme Court of the State of New York* (Septem-"ber 3d), *in which all parties acquiesced for many "years, was in accordance with principles now well "established by decisions of the Supreme Court of "the United States.*

"Similarly, said Waterman had the right to "transfer to his former partners in connection with

"the reorganization of the business, the right to "continue the use of his name. It is true that it "became their duty, as it had been the duty of the "previous co-partnerships, to do no act to increase "the confusion necessarily arising from the use of "a name similar to that of the complainant. *But "we find nothing in the record showing any such "acts* except those which we have seen to be cov- "ered by the first two paragraphs of the injunc- "tion.

"There is *insufficient basis* presented for the con- "tention that the agreement granting the right to "use the name 'A. A. Waterman & Co.' to the present "firm was a mere sham and fraudulent device, not "connected with the reorganization and sale of the "business."

The decree found at page 1118 restrained the use of the word "Waterman" alone, and the use of the word "Ideal."

The plaintiff printed and circulated broadcast a *part* of this decree, found at pages 1120 and 1121, omitting the part of the decree found at pages 1118 and 1119, and thereby gave the trade a very erroneous impression of the exact findings of the Court.

While this decree was offensive to the defendant, it was willing to carry out what it understood to be the agreement and make this decree the final decree in the action, and written statements to that effect were filed three times, but they were ignored by the plaintiff, which, however, wrote one letter stating that they would be willing to make Judge Hough's order the final decree. This was, of course, merely adding insult to injury (see fol. 3365).

After six months expended in the taking of testimony in various States, and in Canada, on the part of the plaintiff and twenty-four days in the City of New York by the defendant, the case was pre-

sented by Judge Hand, and after the presentation, permission was granted to introduce the Italian decree.

Judge Hand's Opinion (p. 1861).

The opinion is somewhat long. He says, in part: "The Circuit Court of Appeals has decided that "there should be no absolute injunction against the "name 'A. A. Waterman and Company,' on the "showing made. It is not, therefore, necessary to "consider the question whether, under any circum-"stances, the Court should altogether forbid a man "from using his surname in a given business, and "whether there may be cases where no accompany-"ing phrase can prevent the result that the busi-"ness of the first in the field will suffer by the "competition of the second. *Certainly the general "rule is that such damage as so arises the victim "must bear as an incident of competition.* Fur-"ther, the decision upon the preliminary injunction "determined that upon the proof there presented "the agreement of June 12, 1905, upon which the "defendant depends *was not a mere sham, but was "a reasonable part of the reorganization of the "business of Frazer and Geyer Company*, and it also "determined that the old corporation of Frazer and Geyer Company had Waterman's right to use his "name in the business. The testimony upon the final "hearing is *conceded* to be *substantially like* that "in the affidavits with two exceptions, first, the "decree of the Italian court in the suit of this "complainant against the Chapmans and Cabrini, "and, second, the testimony of the assignment to "Rhodes Lockwood of Waterman's business on "February 1, 1899."

He then takes up the Italian decree and lays it aside (p. 1863). He then takes up the Rhodes

Lockwood affair, which was some testimony that came in at the close of the plaintiff's case in relation to an alleged assignment by Waterman to Lockwood, who was really the Sterling Pen Company, which merely took over some of the old stock of Waterman and Gibson, already marked A. A. Waterman & Co., and sold it. The defendant had never before heard of this matter, and the testimony in relaton to it was wholly hearsay and immaterial at best. Judge Hand lays this incident aside also (p. 1866). The truth of the Lockwood affair is found in the three circulars found at pp. 578, 579, 580.

Judge Hand then shows his entire misconception of the evidence in the following paragraph, substantially every part of which is erroneous:

"In the case at bar, it does not seem to me to be "open to any doubt that the whole purchase of "Waterman's business and the preservation of the "firm name had for its only motive the expectation "that the Frazer and Geyer Company could by the "resulting confusion pass off its goods under the "cover of the complainant's reputation [no]. My "reasons for this are first Waterman's own very "frank statement that throughout his connection "with the enterprise the only serious inducement "he could offer was the use of his name [no]. In- "deed, no other reason is suggested which could "serve as any inducement to coalition with a man "in Waterman's position at that time, one who had "failed within two years [no], and since his as- "signment to meet his debts, had been doing a small "business in a town [Boston] two hundred and fifty "miles away, which came into no competition with "the Frazer and Geyer Company and brought noth- "ing to its business [80 per cent of all of the busi- "ness of the new firm; Mr. Waterman traveled from "ocean to ocean selling his pens]. Again, the ob-

"viously colorable character of all the contracts "with Waterman showed that they valued him "chiefly for the right they got to use his name. At "no time had he any substantial powers as a part- "ner [no], and after December 12, 1901, he had no "rights to any profits or anything more than a "salesman's salary or a salesman's commissions "[no]. The elaborate efforts to keep up the formal "appearance of a real firm with actual business con- "nections with the real enterprise show that the "parties thought that they could not avow what "was their real intention and the same efforts em- "phasize what that real intention was; especially "is this true when one contrasts the formal rela- "tions with the fact that neither firm ever did any- "thing actually but keep a spurious existence upon "its books [no; no such proof or suggestion by any- "body]. Surely, the chief inducement to combine "with Waterman was to get the use of his name "[he multiplied Frazer & Geyer Company's busi- "ness by five]. However, I do not think that this "is in the last degree relevant to the rights which "the Frazer & Geyer Company got by the transfer, "for the question is of the effect of the competition, "not its purpose or motive. Whatever part motive "may play and may be destined to play, in the law "of torts, I know of no instance in which the le- "gality of an act depends upon the actor's motives "where those motives include his hope of personal "gain. Motive has a just share in determining "whether a man is in fact pursuing his genuine "interests and whether he is therefore acting on "his 'rights,' but when each party is obviously "trying to increase his property, his estate, his 'uni- "'versitas,' the mutual limitations of activity be- "tween them do not depend upon the motive, so "far as I know, but upon the means they use to "effect their intentions and the results that ensue.

"Once it be conceded here that Waterman might, "in ignorance of the complainant's business, have "started a business under the name of 'A. A. Water- "'man & Company,' and learning the facts have "developed it as he could, I think his rights are not "different because he knew from the outset that a "part of his profits, if successful would be at the "complainant's expense, and through confusion "with the complainant's wares, as I have no doubt "he did think. If his only motive were to damage "the complainants the result might be quite dif- "ferent, so also if his only motive were to sell out "as a blackmailer. Moreover, if the defendant and "its predecessors could have bought innocently, "they could have bought with a deliberate purpose "of profiting at the complainant's expense. Such "consequences are involved in the right to use the "name and *sell the business with the name.*"

[This shows how strangely single Judges may misconceive evidence. Where Judge Hand got the idea that the only "inducement" for the combination between Waterman and Frazer and Geyer Company in 1901 was to get the use of Waterman's name, is a query. The Frazer & Geyer Company had been actually manufacturing all parts of pens for some years—they were not mere assemblers of parts, like the plaintiff. A. A. Waterman had been in business for some years under his own name. Under the new combination, the Frazer & Geyer Company continued to be the manufacturers and A. A. Waterman & Co. (Waterman, Frazer and Geyer) were the sole selling agents. Mr. Waterman brought 80 per cent of the business to the new combination. That is, Frazer & Geyer Company multiplied their output by 5. Mr. Waterman is a remarkable salesman, besides being an inventor, and of excellent judgment in relation to the details of manufacture. Where Judge Hand got the idea

that Waterman had failed, we do not know. There was nothing of the kind in the evidence. They had not made money, and had before that been backed by Lockwood (Sterling pen people), but they paid all their obligations by turning over their stock of goods and there is no suggestion that they were ever insolvent.

[We have heard New Yorkers speak of Philadelphia as one of New York's most attractive suburbs, but we never before have heard of Boston as "a *town* 250 miles away" (top p. 1867). The proof of the pudding is the eating, and the evidence is undisputed that the new combination made money, from 20 to 50 per cent per annum of the capital actually invested. They did this for several years, and that fact induced the Chapmans to keep putting in more money. It only ceased to make money when Mr. Geyer and Mr. Waterman were really eliminated from the financial end of the enterprise and Mr. Frazer given complete control through a foolish pooling arrangement. Mr. Frazer was a decided failure, and in order to get rid of him—owning almost no stock—it was necessary to make the reorganization of 1905, which resulted in the partnership agreement, Exhibit A-13 (p. 1668), which now forms the foundation of the defendant's right to the use of the trade name A. A. Waterman & Co.]

Judge Hand's misconception of the facts evidently led to his invention of a very objectionable suffix. Judge Hand then argues that the defendants ought to distinguish themselves from the plaintiffs more emphatically than by the use of their own name, and he directed the following:

A. A. WATERMAN & CO.
NOT CONNECTED WITH THE ORIGINAL "WATERMAN PEN."

At the top of page 1869, he cites authorities for this remarkable suffix, no one of which has a bearing on this case.

At the bottom of page 1869 he says that the public means by the "Waterman pen" the complainant's pen. He states: "The public means by the Water-"man pen the complainant's pen. Indeed, so the "defendant concedes [no] being punctilious to avoid "that name without its prefix."

This is not true. The only reason the defendant was so punctilious always to use the full name A. A. Waterman & Co. was because, as they claimed, nobody had the right to use the name Waterman without an appropriate prefix of initials.

Judge Hand has the honor of having discovered such a suffix as applied to trade names, and very much to our surprise, the Circuit Court of Appeals, notwithstanding their previous decision, on practically the same evidence, sustained Judge Hand's discovery, but modified it.

The plaintiff did not appeal from Judge Hand's decree.

Second Opinion of the Circuit Court of Appeals.

The Court states, per Curiam:

"In our opinion, the testimony upon the final "hearing was not substantially different from that "presented by the affidavits which were before us "in the former record. The most important ad-"ditions to that record consist of the Italian decree "and the testimony concerning the Lockwood trans-"actions, but we agree with the conclusions of the "District Judge that those items do not materially "change the situation.

"The case before us, then, is practically the case

"which came up before and we are not convinced "that our conclusions reached at that time were "erroneous, or that the final relief granted should "vary from the preliminary relief which we then "regarded as proper except in one particular."

Then the Court refers to Judge Hand's suffix: "We think that the suffix required in the decree "appealed from tends to characterize the defend- "ant's product as *inferior* to that of the complain- "ant and is unduly prejudicial to it. The defend- "ant should, however, distinguish its goods from "those of the complainant, and, in our opinion "should do so by employing after the name 'A. A. "'Waterman & Co.' or 'A. A. Waterman,' the words "'Not connected with the L. E. Waterman Co.' "This notice should be sufficient to put the public "upon inquiry. We think it all that the facts or "the case require, but it is the very least they do "require."

The plaintiff was not satisfied with the second decision of the Circuit Court of Appeals, and filed a printed brief on a motion for a re-hearing.

Plaintiff desired especially a change in the suffix, so that it should be "L. E. Waterman Company" and not "L. E. Waterman Co.," stating also: "The "defendant itself offered to use the full name Arthur A. Waterman & Co. instead of the initials only, if "the Court should so suggest."

The brief states: "In other words, the complain- "ant has always marked its pens with its trade "names and trade marks only, and not with its "corporate name. The decision of this Court now "authorizes the defendant to put complainant's "name on fountain pens (something never done "before), that is, put complainant's name on de- "fendant's pens without sufficiently distinguishing "words to differentiate defendant's pens from com- "plainant's pens. Such marking will only increase

"the existing widespread confusion and substitu-
"tion. * * * In this connection, the Court is
"respectfully asked to consider the situation, if the
"complainant should sell its business, good will,
"trade marks and trade names to a concern whose
"name was entirely different from 'L. E. Waterman
" 'Company,' the total inappropriateness and insuf-
"ficiency of the suffix ordered by this Court becomes
"strikingly apparent."

The complainant apparently objected to the defendant advertising the complainant's pen every time the suffix is used, and wished the suffix changed so as to advertise the plaintiff more effectively as the "original" Waterman. We have no doubt that the Court is wholly in error in adding the suffix at all. It has no right to make one man advertise another man's business.

We believe that the defendant has an absolute property right in the name "A. A. Waterman" which no court has a right to take away, directly or indirectly. Notwithstanding this absolute property right, the writer still thinks that "Arthur A. "Waterman" is more dignified and the defendant will probably use it whether the court requires it or not.

This brief on reargument suggests a transfer of the name of Waterman from the L. E. Waterman Company to some stranger. This is an admission of the correctness of the defendant's position. If the complainant can transfer its trade name, Mr. A. A. Waterman could also, and nobody suggests that by merely entering a field earlier than another, he could prevent a second man from using his own name in business.

The Court rendered the following opinion, on this *ex parte* application for a re-hearing:

"In addition to the modifications of the decree
"appealed from stated in the opinion, the order for

"the mandate may require the defendant to use the "name '*Arthur* A. Waterman & Co.' instead of 'A. "'A. Waterman & Co.'

"If, as stated in its petition, complainant feels "that the required suffix 'will only increase the "'existing widespread confusion and substitution,' "the order for the mandate will, at its option, con- "tain no provision for a suffix.

"The petition for a re-hearing is denied."

After the rendition of the second opinion by the Circuit Court of Appeals, there appeared the case of *Walter Baker & Co., Ltd.*, v. *Gray, et al.*, Circuit Court of Appeals, 8th Circuit, January 24, 1911, 192 Fed. Rep. 921, which is on all fours with the case at issue. It is an admirable brief, and we ask the Court kindly to read that opinion as the last word on this subject of which we have any knowledge. It sustains every position ever taken by the defendant in this litigation. The head-note is as follows:

"1. Trade marks and Trade names (Sec. 73) "UNFAIR COMPETITION—RIGHT TO USE "SURNAME.

"One has no exclusive right to use his surname in "doing business as against another of the same "name, but, to avoid confusion or deception in the "public mind, equity will enjoin use of a name "where another has previously appropriated it in "business, unless some addition or explanation ac- "companies the subsequent use, clearly distinguish- "ing the new business from the old.

"2. The right to use one's own name as descrip- "tive of his goods cannot be taken from him, under "the doctrine of unfair trade, merely because such "use would incidentally injure a predecessor in "business of the same name.

"3. A dealer who has conformed to the law gov-
"erning unfair competition in trade is not required
"to affirmatively advise an inquirer for his goods,
"designating them by his name, that a competitor
"of the same name is in business, or warn his in-
"quirer of danger of being deceived by patronizing
"him.

"4. A grocer is not guilty of unfair competition
"in delivering to customers 'William H. Baker's
" 'Chocolate' in response to an order for 'Baker's
" 'Chocolate,' though for many years the latter name
"exclusively signified the product of Walter Baker
"& Co., a pioneer manufacturer, where the labels
"of the rival packages are strikingly dissimilar."

"William H. Baker, Syracuse, Inc.," was held to be sufficiently different from Walter Baker & Co., even though the defendant was a corporation, not a firm, and the plaintiff had had an established business extending back into the 18th century.

Following the precedent of this latest Baker case, the plaintiff has ample protection in the defendant using, as it has *always* done, its firm name of "A. A. "Waterman & Co."

We think that we have presented above everything that the Court will need to understand and decide the issues presented.

In view of the gravity of the issues at stake, we will add hereto more extended statements, largely as they appeared in the brief at the Circuit Court of Appeals. If the United States Supreme Court wishes to examine into the matter further, they may read on, but the remaining matter is largely supplemental to what has preceded.

New York, March 31, 1914.

SUPPLEMENTAL BRIEF.

Bona Fides of the Present Firm of A. A. Waterman & Co.

The *bona fides* of the firm of A. A. Waterman & Co. has not been questioned by any court in America, but in Italy where Mr. F. D. Waterman swore positively that there was no such firm in existence as A. A. Waterman & Co. (folios 5151, 5153), that question has been seriously at issue, especially as a few garbled sentences from Mr. A. A. Waterman's testimony in this case have been used there, with effect.

The history of Mr. A. A. Waterman's connection with the pen business is as follows:

Before 1895, he was a salesman with the L. E. Waterman Company, being, however, in no way related to Mr. L. E. Waterman. He left their employ and started in to manufacture and sell pens for himself in connection with Mr. Gibson, under the corporate name of the A. A. Waterman Pen Company, although they were a firm. They "manufactured" pens just as the plaintiff does: they bought the rubber holders from one party and the pen points from others, and merely assembled them.

In 1898, L. E. Waterman Company sued the A. A. Waterman Pen Company, and obtained the decree of September 3, 1898, which prevented them from using the *corporate* name of A. A. Waterman Pen Company, but expressly permitted them to do business under the *firm* name of A. A. Waterman & Co.

In 1899, A. A. Waterman & Co. dissolved. Mr. Lockwood had been selling them pen holders, and he took over some of their stock in payment of the debt due. During a part of 1899, and during 1900,

Mr. Waterman manufactured and sold pens under the name of "A. A. Waterman & Co., Boston," and issued a circular (set forth at page 579), explaining the dissolution and the new arrangement. (See important circulars at pp. 578, 579, 580. They tell the true story of this little known period.)

Frazer & Geyer Company.

Frazer and Geyer first went into the manufacture of pens as a firm. They manufactured the holders and bought the pen points, but as early as 1898, they formed the Frazer & Geyer Company, and manufactured the whole pen. They and their succesors have manufactured the whole pen from that day until this.

They sold their complete pens to Mr. A. A. Waterman up to November, 1899. He then organized a new firm of A. A. Waterman & Co., which manufactured (assembled) pens, and had the Colonial Pen Company as their selling agent. This combination was not wholly satisfactory, and in January, 1901, Mr. A. A. Waterman formed still another firm of A. A. Waterman & Co., composed of himself, Mr. Frazer and Mr. Geyer, who were to be the selling agents, while the Frazer & Geyer Company did the manufacturing. The new combination was very successful until about 1903, when, under the unsuccessful management of Mr. Frazer, they began to lose money.

Mr. Waterman was a remarkable salesman and inventor. The new combination between him and Frazer and Geyer Company was very successful for several years. New capital was needed, and the Chapmans put in about $50,000 in 1901.

During 1901, they entered into four different contracts, the result of which was a combination that tied up Mr. Waterman for forty years. They

were unusually successful until 1903, when Mr. Frazer began to demonstrate that he was a poor manager, and they began to lose money. When the losses began, Mr. Waterman began to fret under the yoke of forty-year contracts with the new combination, and *at his request*, in February, 1905, new contracts were made, between Frazer, Geyer and Waterman on the one side and the Frazer & Geyer Company on the other, which looked forward to letting Mr. Waterman out of his forty-year contract. The substance of this contract was that the United States was divided into the Eastern and Western Districts, and that on July 1, 1906, Mr. Waterman should be permitted to take the Western District, leaving the Eastern District exclusively to his co-partners.

After this contract was entered into in February, 1905, the friction between the Chapmans and Mr. Frazer became acute, as hereinafter set forth. Thereupon the new contract of June 12, 1905 (wherein is found the assignment on which this defendant relies) was entered into. This agreement between Waterman and the Chapmans is not substantially different from the agreement of February, 1905, between Waterman, Frazer and Geyer.

The evidence is undisputed that in 1901 Mr. Waterman brought experience, brains and a list of customers into the new combination that was very valuable. He sold 80 or 90 per cent of the goods manufactured by Frazer & Geyer Company, and the dividends were from 20 to 50 per cent for two years. He traveled from ocean to ocean, and "made good" in every direction.

Under the reported cases, and especially the *Tussaud* case in London, which was the foundation of the present law permitting the assignment of a trade name, it probably makes no difference, whether the transaction was made for the express

purpose of obtaining the use of the name or not. This was exactly what Mme. Tussaud's nephew did. Young Tussaud was at first an *employe* of a company bearing that name. The court enjoined the use of the name. He thereupon entered into a partnership, with his own name in the partnership title, and the court refused to enjoin the use of the name.

However, lack of good faith does not enter into this controversy, for the present partners of A. A. Waterman & Co. (the Messrs. Chapman) have been the principal financial backers of the enterprise since its foundation in 1901. The history of the partnership is best indicated by the exhibits. Human memories are frail and easily warped, but writings do not forget.

The partnership of William G. Frazer & Co. (Frazer and Geyer) was started in the year 1897 (fol. 3739). In 1899, they incorporated under the laws of New York as the Frazer & Geyer Company; capital stock $20,000 (fol. 3739). On January 9, 1901 (Exhibit A-4, page 1635), the firm of A. A. Waterman & Co. (Waterman, Frazer and Geyer) was organized, and the Frazer & Geyer Company increased its capital stock to $60,000, the next month. In 1902 it was increased to $300,000, of which $135,000 was actually issued by 1903 or 1904 (page 1247).

At first, William G. Frazer & Co. made the holders and "assembled" pens, by buying the pen points. In May, 1898, they began to manufacture their own pen points, and from that day to this the enterprise has never in any instance sold any pens except those whereof *every* part was manufactured by themselves (fol. 3740).

The Frazer & Geyer Company began to sell pens to an A. A. Waterman & Co., in November, 1899. He was a remarkable salesman and inventor (fol.

4679), although a poor financier, and when the combination was made with him in 1901, their profits were very much increased. He sold about 80 per cent of their product (fol. 3744), and they had large profits, even to 50 per cent on common stock as indicated at folio 3746, besides 10 per cent on the preferred (fol. 3745).

Mr. Isaac E. Chapman bought stock in the Frazer & Geyer Company a few weeks after the partnership with Waterman was formed, and while the dividends were very high (fol. 3749). They soon had about 70 per cent of the stock (fol. 3753).

The first partnership agreement of January 9, 1901 (Exhibit A-4, p. 1635) states at folio 4906 that:

> "The said Arthur A. Waterman shall con-
> "tribute all his time, energy and experience
> "to the business of said firm and also all the
> "tools, dies, records, designs and other ar-
> "ticles and assets belonging to said Arthur
> "A. Waterman and *recently* in use in the
> "business of a *former* firm of A. A. Water-
> "man & Co., together with the use of all pat-
> "ents now owned by him for fountain pens."

Mr. Waterman was to receive 15 per cent of the profits; Mr. Frazer, 47½ per cent, and Mr. Geyer, 37½ per cent (fol. 4907), but before any division of profits, Mr. Waterman was to draw $2,000 per annum and a royalty of two cents on each pen, which salary and royalty were to be charged to expense (fol. 4908). This was a ten-year partnership. Mr. Waterman put in no capital; Frazer and Geyer put in $500 each (fol. 4906), but Frazer and Geyer obligated themselves to secure credit up to the extent of $25,000 (fol. 4912). The control was vested in Frazer and Geyer, except that Waterman had authority over styles and quality

of goods bearing the name "A. A. Waterman & Co." and over the list and net prices and terms to the trade (fol. 4911).

> "In the event of the death of any partner "*the remaining partners may continue the* "*business and use the firm name of A. A.* "*Waterman & Co.*, with the same status for "the estate of the deceased partner as he him- "self had in his lifetime, except that in case "of death of Arthur A. Waterman, his salary "is to cease, but his royalty is to continue "(fol. 4912)."

It will thus be seen that the continued use of the firm name of A. A. Waterman & Co. was provided for in 1901, in exactly the same way that it was in the partnership agreement, paragraph VIII of Exhibit A-13, dated June 12, 1905 (fol. 5006).

(Fol. 4913):

> "It is understood and agreed that A. A. "Waterman & Co. shall contract with the "Frazer & Geyer Company for the goods "used by said firm so far as said company "are able to furnish them. *Any interest in* "*patents applicable to the line of business* "*of said firm which any partner may have* "*or may acquire, shall be for the use and* "*benefit of the co-partnership. All new pat-* "*ents shall be secured and defended, if at* "*all, at the expense of the co-partnership* "*free of any allowance for royalty*" (fol. 4913).

From this paragraph in the earliest partnership agreement (1901), the relation of A. A. Waterman & Co. to the Frazer & Geyer Company was substantially the same as the present relationship be-

tween the Modern Pen Company and A. A. Waterman & Co., reversed: *i. e., then* A. A. Waterman & Co. were the selling agents and Frazer & Geyer Company the manufacturer; *now,* A. A. Waterman & Co. manufacture, and the Modern Pen Company are the selling agents. The same close relationship existed, however.

In other words, there is no substantial difference between the various contracts of 1901 and the various contracts of 1905. They vary in phraseology, but not in substance. The partnership of 1905 was not merely colorable.

A few weeks after this contract was entered into, Frazer and Geyer carried out their engagement to secure credit up to $25,000. They did secure funds to a far greater amount, for Mr. Chapman was secured and he advanced through himself and his relatives some $50,000 in loans and bought stock, so that they held a large majority control.

Exhibit A-5 (fol. 4915) is an endorsement on the co-partnership agreement of January 9, 1901, extending the co-partnership from 10 years to 40 years from January 9, 1901; directing that Mr. Waterman shall continue to travel and act as salesman; that all partners shall have equal authority in prices and terms of sale, and that the management shall be lodged in Mr. Frazer. This endorsement is dated December 12, 1901. (This cut Mr. Geyer out of the management.)

The Messrs. Chapman, having invested so enormously in this new business, and their investment appearing only as stockholders and creditors in the Frazer & Geyer Company, it was natural that they should want some control over A. A. Waterman & Co., in that the profits of the entire business might be absorbed by the profits of the selling agent, in which they had no technical interest. Therefore, on August 27, 1901, Exhibit A-6 (p.

1639) was executed, whereby Mr. Frazer and Mr. Geyer assigned all of their profits in A. A. Waterman & Co. (above 10% on their personal investments) to the Frazer & Geyer Company (fol. 4919).

This agreement of August 27th, 1901, only seven months after the initial partnership agreement, is signed by Isaac E. Chapman, as vice-president of the Fraser & Geyer Company (fol. 4921). This shows that as long ago as 1901 the present firm of A. A. Waterman & Co. (Isaac E. and William L. Chapman) were already the controlling spirits in this enterprise.

On December 12, the day that the partnership was extended from ten to forty years, Mr. Waterman executed a somewhat similar agreement (Exhibit A-7, page 1642) to that of August 27th. He assigned to the Frazer & Geyer Company his 15% of profits and his two cents per pen royalty, but, unlike the Frazer & Geyer assignment of August 27th, he was paid in addition to his salary $100 for every 1% of the annual net profits made by Frazer & Geyer Co. (folio 4928) and, inasmuch as their profits had been very great up to this time (page 1249), it looked like an excellent arrangement, and besides there were issued to him 50 shares of stock of the par value of $5,000 *in consideration of giving up his royalties* (fol. 4929). It was covenanted as follows:

> "And the said party of the second part, in "consideration of the premises, further cove- "nants and agrees not to engage in any other "business than that of the said firm of A. A. "Waterman & Co., and that covered by this "agreement during said term, *and he will "not, during said term, use or permit the use "of his name in connection with any other*

"*business*, firm, corporation or person what-
"soever, but during the whole of said term
"will use his influence, reputation, energy
"and skill solely for the benefit of said firm
"and said parties of the first part, *and that*
"*in case of his death the business of the said*
"*firm of A. A. Waterman & Co. may be con-*
"*tinued under the same firm name* upon com-
"plying with the statutes of the State of
"New York for continuing the use of a firm
"name! *and in case, for any reason whatso-*
"*ever, the said party of the second part shall*
"WITHDRAW *from said firm or from this*
"*agreement*, before the expiration of the
"term above limited, he further covenants
"and agrees that *he will not directly or in-*
"*directly engage in the manufacture or sale*
"*of fountain pens* during the term contem-
"plated by this agreement within the United
"States and will not use or permit the use
"of his name, influence or reputation, by any
"corporation, firm or individual whatsoever
"in said business during the same period of
"time" (fols. 4929-31) (Dec., 1901).

The fifty shares of stock was trusteed with Mr. Asa A. Spear for ten years to provide for the faithful performance, on Mr. Waterman's part, of this contract (fol. 4932). A reading of this entire agreement will show the relations of the parties at that time, and indicates that, in all essential particulars, this agreement is not different from the partnership agreement of June 12, 1905 (Exhibit A-13, p. 1638), in paragraph VIII of which (fol. 5006) Mr. Waterman formally assigned the use of the trade name of A. A. Waterman & Co. to his partners. In other words, the contract relations between these particular parties was not essentially different in 1901 and 1905.

On the same day, December 12, 1901, there was a contract (Exhibit A-8, p. 1645) between the Frazer & Geyer Company and A. A. Waterman & Co. It set forth the exact relations between the parties. Frazer & Geyer Company agreed to manufacture for A. A. Waterman & Co. (fol. 4936)

> "All goods in their line, consisting of gold "pens, fountain pens and the several parts "thereof, which said firm can sell, *and to "furnish the capital needed* to produce such "manufactured goods as rapidly as they can "be sold by said firm, and deliver the same "to said firm as they are ordered * * * "(fol. 4940). This agreement shall extend "over the whole term of said co-partnership "of A. A. Waterman & Co., to wit: Forty "years from January 9, 1901, *and should "said firm be dissolvel for any reason before "the end of said term and said business be "continued under* THE SAME FIRM NAME or "reorganized, *the partners now composing "the said firm of A. A. Waterman & Co., "who shall continue said business, shall con- "tinue this agreement or cause the same to "be continued until said full term of forty "years shall have run."*

The result of the *five* contracts executed in 1901, was to concentrate most of the profits of A. A. Waterman & Co. in the Frazer & Geyer Company, as a consideration for which Mr. Waterman received $5,000 in stock and a salary to be proportionate to the profits.

As a matter of fact, the Chapmans were just as much interested, and were just as much partners, in the *entire* enterprise in 1901, as they were in 1905, or are to-day in 1914 (fols. 3749-50).

On June 11, 1904, there was a modification of the partnership agreement (Exhibit A-9, p. 1648). Waterman, instead of getting a salary of $2,000 a year, got a commission, and a certain field was set aside for him exclusively. He was to get certain commissions on all goods sold in that field, whether sold by him or not (fol. 4943). Mr. Waterman was beginning to get restless and wanted to get out for himself.

By 1905, the very large profits of the business had changed to losses, which began in 1903 (fol. 3747). This was under the exclusive management of Mr. Frazer, who had shown himself incompetent. Through a pooling arrangement (fols. 4127-30) he had absolute control of everything, although he and his friends held but a small minority of the stock (fol. 3754).

At this time a new partnership agreement was entered into (February 11, 1905; Exhibit A-10, p. 1650). It was called a modification of the first partnership agreement of January 9, 1901, but it was in reality elaborate, new articles of co-partnership, and was substantially the same as the contract of June 12, 1905, with the Chapmans substituted for Frazer and Geyer.

A reading of Exhibit A-10 (p. 1650) will show that it is substantially the same as Exhibit A-13 (p. 1668), which latter agreement was drawn by the writer and largely copied from, and modeled after, Exhibit A-10 of February 11, 1905 (p. 1668). It provided for the division of the Western Hemisphere into two parts, one of which should be operated by Mr. Waterman; *for Mr. Waterman getting out of the firm on* JULY 1, 1906, and operating independently in the Western District (fol. 4950); for the mutual use of patents then existing or thereafter to be obtained; for prices and mutual advertisements and the method of stamping their

product "A. A. Waterman & Co.," "New York," or "Chicago" (fol. 4959); for the purchase by Waterman of show cases in the Western territory at 75 per cent of their cost (fol. 4961); it provided (fol. 4963) for his continued relations with Frazer & Geyer whether he did or did not terminate his relations with them on the first day of July, 1906 (fol. 4963), and also provided (fols. 4971-72) that

> "In case he shall or shall not begin busi-
> "ness on his own account by JULY 1, 1906, as
> "hereinbefore provided, he shall on that day
> "retire as an active partner in said present
> "firm of A. A. Waterman & Co., retaining no
> "connection with the said firm or its busi-
> "ness, *except he shall permit therein the*
> *"continued use of all his patents, trade-marks*
> *"and improvements and shall permit the re-*
> *"maining partners to continue the said busi-*
> *"ness under the said firm name of A. A.*
> *"Waterman & Co.*, upon their complying
> "with the statutory requirements to obtain
> "the right to use said firm name."

Mr. Waterman retained his right to determine the quality of all pens and their accessories (fol. 4973)

> "made and sold as the product of the *present*
> *"firm* of A. A. Waterman & Co. *or of any*
> *"firm that may be formed after July 1, 1906,*
> *"as the successors to the present firm*, which
> "goods bear the name or initials of said Wa-
> "terman in any form, and provided further
> "that the reservation to said Waterman of
> "this right and power as to the quality of all
> "said goods shall apply to and be binding
> "upon any concern or firm continued, formed

"or organized after July 1, 1906, which "goods bear the said Waterman's name as "hereinbefore provided, and this privilege "and power to pass on the quality of said "goods, both of the present firm of A. A. "Waterman & Co. *or of any succeeding firm* "as aforesaid *is an express condition and* "CONSIDERATION *for the use as hereinbefore "provided of the name of said Waterman in "any such firm, or on any such goods."*

The original arrangement of January 9, 1901, was re-established, giving Mr. Waterman 15 per cent of the profits and 2 cents per pen royalty (fol. 4972).

This agreement between Waterman, Frazer and Geyer, dated February 11, 1905, shows that the essential ideas that dominated the relationship between the corporation and the firm were the same in 1904, 1905, 1911 and 1901.

Exhibit A-11 (p. 1659) bears the same date, and is an agreement between Mr. Waterman and the Frazer & Geyer Company. It abrogates the agreement of December 12, 1901; it provides for delivering up the 50 trusteed shares to Mr. Waterman, terminating the trusteeship (fols. 4978-81) and re-establishes his 15 per cent of the profits and 2 cents royalty (fol. 4980). It provides elaborately for the prevention of Mr. Waterman competing with A. A. Waterman & Co.; it consents to the incorporation of a new company in the Western territory with a bond to protect the Frazer & Geyer Company against damage (fol. 4986) and constitutes in its paragraph marked "Thirdly" almost a general release (fol. 4987).

It again provides for the free perpetual use by A. A. Waterman & Co. of the patents, trade-marks, *trade-name,* etc. (fol. 4989), speaks of the possible

successors of A. A. Waterman & Co. (fol. 4990), etc., etc. In fact, it is an elaborate reiteration of the dominant purpose of permitting Mr. Waterman to get out of his obligation of working for forty years for the firm of A. A. Waterman & Co., as set forth in the contract, Exhibits A-4 and 5, and looks towards his retiring from the firm and setting up business in the Western territory, which was afterwards carried out on July 1, 1906. It was *his* desire to get out of his contracts of 1901 and set up business for himself in the Western district, while his partners were to have the perpetual use of the name of A. A. Waterman & Co. in the Eastern district.

We now come to the period of acute friction. The Frazer & Geyer Company was losing money very heavily. Mr. Chapman and the Chapman estate had chattel mortgages, aggregating $30,000. They and their friends owned a large majority of the stock (70 per cent, fol. 3753). The management of Mr. Frazer was in disrepute. The books were found to be inexact. The pooling agreement tied the hands of the people who had put in substantially all of the money, and conditions were unbearable.

It was then that a reorganization was suggested whereby the pooling agreement could be avoided, *and the management changed.* A meeting of the stockholders was called; a statement of the assets and liabilities was made (Exhibit A-41; page 1712); circulars were sent to the stockholders in an attempt to get the stockholders, or two-thirds of them, to agree to a reorganization, practically assessing themselves $15 per share (fol. 5139). This amount of money was imperatively necessary to keep going, as the Chapmans positively refused to put up more money. Frazer and Geyer and Waterman were willing to come in. They were

present at the meeting of the stockholders, and objected to nothing (fols. 5298, 5306). The temper of that meeting indicated plainly that a new management would be insisted upon, and that Mr. Frazer would lose his job (fol. 5309).

After this meeting, Waterman, Frazer and Geyer seem to have conspired together to defeat the reorganization, although Mr. Chapman had agreed to advance moneys to them in order to meet their assesments.

Everything was supposed to be moving smoothly, and it was thought that there was a unanimous agreement to the reorganization. Apparently, in conformity with what now appears to have been concerted action between Waterman, Frazer and Geyer, Mr. Weaver, the attorney for Waterman, sent to the writer the letter of May 10, 1905 (Exhitib A-62, page 1773), with its accompanying circular to stockholders of the same date (page 1774). This was a thunderbolt out of a clear sky. It demanded an answer by four o'clock the same day (fol. 5319), and threatened to put the business into the hands of a receiver. The circular boasted than over 80% of the business of Frazer & Geyer Company came from A. A. Waterman & Co. (fol. 5323); that with the proposed reorganization, A. A. Waterman would not co-operate; that the stock would not be worth 50 cents on the dollar (fol. 5325); and it closed with a request to the stockholders not to sign the "consent to the sale of the assets" (fol. 5326). In short, Waterman, Frazer & Geyer withdrew from the reorganization scheme. Mr. Weaver's letter and circular should be read in full, pages 1773-76.

On May 15, Mr. Frazer had a talk with Mr. Chapman wherein he, Frazer, openly threatened to put the company in the hands of a receiver (fol. 4238). This meeting on May 15, was an open

rupture between the Chapman interests, which had put in substantially all of the money, and Waterman, Frazer and Geyer, who had been operating the company at a loss.

On May 15, 1905, it became evident that a peaceable reorganization was impossible; and, acting upon the writer's advice, four different suits were begun against Frazer, Frazer & Geyer Company, and A. A. Waterman & Co. (fol. 4142). There could be no defense to these actions, and the three conspirators saw that they would be swamped with judgments.

Mr. Waterman immediately changed front, discarded his attorney, Mr. Weaver, and entered into the temporary agreement (Exhibit A-12, page 1666) of May 27, 1905. This temporary agreement tells the story as of that date, and looks forward to the partnership agreement of June 12, 1905 (Exhibit A-13, page 1668), which was to be a substantial copy of the Frazer, Geyer and Waterman agreement of February 11, 1905, which, in turn embodied the spirit of all former agreements with relation to the essential issues of this controversy, *i. e.*, THE ASSIGNMENT OF THE TRADE NAME TO THE NEW FIRM (fol. 5006), AND THE COVENANT OF WATERMAN NOT TO COMPETE IN BUSINESS. The new idea engrafted upon the old contracts by the partnership agreements of February and June, 1905, was that *suggested by Mr. Waterman himself;* that he should be permitted to withdraw from his old partnership obligations which covered forty years, and go into business for himself in the Western territory.

The temporary agreement (Exhibit A-12, page 1666) contains the following:

"II. The new co-partnership agreement

"shall be substantially the same as the pres-
"ent co-partnership agreement between A.
"A. Waterman, W. G. Frazer and H. W.
"Geyer, dated February 11, 1905, and the
"relations of the new firm to the new cor-
"poration shall be substantially the same as
"those of the old firm to the old corpora-
"tion."

An examination of all these contracts shows a continuity of thought and of business purpose, and indicates, beyond any controversey whatever, that the present firm of A. A. Waterman & Co., with the Modern Pen Company as sole selling agent, was but a continuation of the initial idea of 1901, with the additional provision of permitting Mr. Waterman to get out and establish business for himself. *It was not new;* it was not a mere trick or pretext for getting possession of the name.

The assets of the Frazer & Geyer Company were sold by the sheriff; were bid in for the benefit of the old stockholders, who thereupon reorganized as the Modern Pen Company, and every share of the old stock came into the new organization except four or six held by Mrs. Frazer and a friend (fol. 4146), and all of the old shares paid $20 per share as a so-called assessment instead of $15. This reorganization was not a freeze-out (fol. 4146).

After the defection of Mr. Waterman from the triumvirate, Frazer and Geyer continued hostile, and began an action for a receiver for A. A. Waterman & Co., as threatened in Mr. Weaver's letter (page 1773). Frazer and Geyer both made hostile affidavits, but within a few days Mr. Geyer found that Mr. Frazer was "out for" revenge; that his only purpose was to cause the Chapmans to lose all of the money that they had put into the enterprise. He, Frazer, had none to lose; all his stock

was hypothecated. Mr. Geyer was not a man of revengeful character, and, besides, he and his friends had twenty or thirty thousand dollars of money invested in the stock. He therefore formally withdrew from the suit for a receiver; he and his friends went into the reorganization, and he accepted a subordinate position under Mr. Martling, as manager.

The old firm of A. A. Waterman & Co. then went into liquidation under the direction of Waterman and Geyer, until Mr. Frazer succeeded in getting a receiver appointed, who filed his bond and almost immediately asked the Court to be relieved from his position as receiver, inasmuch as there was nothing to receive, and he had paid a premium on his bond without having any assets to meet that expense.

This was the end of this controversey. Mr. Frazer's stock having been hypothecated, was sold out and went into the reorganization. The Chapmans, Waterman and Geyer and their friends were all in the new fold and no stock was outside the breastworks excepting five or six shares as already indicated.

This long history, taken from the contracts, has but one purpose: to show that the firm of A. A. Waterman & Co., as constituted by the co-partnership agreement of June 12, 1905, was not a sudden affair, was not a mere pretext under which the Chapmans should get the use of the name Waterman. They had been interested in the use of that name since 1901, when they first provided the $25,000 credit called for by the A. A. Waterman & Co. co-partnership agreement of January 9, 1901 (Exhibit A-4, page 1635). The Chapmans had been the moneyed men from the beginning. The losses of the company were especially *their* losses. They, above all others, were interested in

a change of management. They had a right to be. It took from May 27, 1905, the date of the temporary agreement (Exhibit A-12), until June 12—16 days—to prepare the co-partnership agreement (Exhibit A-13). It was a period of daily conferences, day and evening, and notwithstanding the fact that it was taken largely from the co-partnership agreement of February 11, 1905, nevertheless its preparation was attended with great labor and very many consultations. The question of the right to use the firm name of A. A. Waterman & Co. did not arise; that had been settled in 1898. We now come to the Defendant's Exhibit A-13, which is the one upon which the defendant relies. This contract should be read in full. An analysis of it follows:

I.—Name, A. A. Waterman & Co.

II.—Object, the manufacture, purchase and sale of fountain pens, etc.

III.—Profits and losses shared equally.

IV.—Term of partnership 36 years. [The agreement of four years before was for 40 years.]

V.—Capital to be treated as loans.

VI.—Business management should be vested in Messrs. Chapman, who alone could make notes, checks, etc. [Formerly vested in Frazer & Geyer.]

VII.—The Modern Pen Company *to be* organized as selling agent. A. A. Waterman and the Chapmans are interested in it. [A. A. Waterman was stockholder, director and officer (fol. 4213).]

"VIII.—Arthur A. Waterman hereby "*grants to this said firm of A. A. Waterman* "*& Co. the right to use the name of A. A.* "*Waterman & Co.*, IN CONNECTION WITH THE "MANUFACTURE AND SALE of fountain and "other pens and articles *perpetually, and ex-* "*clusively,* except as hereinafter reserved to

"said Waterman to make use of said firm "name, and *hereby conveys* to said firm all "the GOOD WILL now existing and attaching "to the name of A. A. Waterman and A. A. "Waterman & Co.; *this grant shall not be "modified or diminished by said Waterman "ceasing to have an interest in this said firm "under the terms of this agreement, or by his "death or otherwise.*"

IX.—Continent of America divided into two parts, Eastern and Western [former contracts had contained similar provisions]:

"If said A. A. Waterman shall so desire, "it is hereby agreed that he may do busi- "ness on his own account, under a firm, "trade, or corporate name of A. A. Water- "man & Co., or other suitable name, either "alone or with others, in the manufacture "and, or, sale of fountain and other pens "*in the said Western territory,* provided he "shall begin such business before July 1, "1906 [same date (July 1, 1906) fixed in "earlier contracts with Frazer & Geyer], in "which event he shall have the exclusive "right to said Western territory, *and the "remaining members of this firm of A. A. "Waterman & Co. shall have the* EXCLUSIVE "*right to the Eastern territory, operating "under the name of A. A. Waterman & Co.*

"If said A. A. Waterman shall exercise "said option before July 1, 1906, and estab- "lish such business on his own account as "aforesaid, he shall thereupon cease to have "any interest in this firm of A. A. Water- "man & Co., which said firm shall belong ex- "clusively to Messrs. Isaac E. and William "L. Chapman, their heirs, executors, admin-

"istrators and assigns; and if said Water-
"man shall fail to exercise his said option
"before July 1, 1906, all his interest in this
"said firm of A. A. Waterman & Co. shall,
"in like manner, cease and determine in all
"respects the same as if he had exercised
"such option."

X.—In the event of Waterman doing business on his own account in the Western territory, the following covenants were to prevail:

A.—Provides for the joint payment for advertising in periodicals, etc., for three years under one arrangement and thereafter under another arrangement.

"B.—Each party hereto shall have the
"perpetual free use of all patents, trade-
"marks and trade names (within their re-
"spective territories) in which *either party*
"hereto, or the Modern Pen Company, now
"has, or may hereafter acquire any inter-
"est.

"C.—Any patents or improvements in
"patents heretofore taken out by said Wa-
"terman *or that he may hereafter acquire,*
"shall be used in common between the par-
"ties, upon the Messrs. Chapman paying one-
"half of the expenses thereof, *and should the*
"Messrs. Chapman or the Modern Pen Com-
"pany take out or acquire other similar
"patents, said Waterman shall have equal
"rights with them, upon paying one-half of
"the expenses therefor" (similar contracts with Frazer & Geyer preceded this one).

"D.—The parties hereto shall agree on a
"minimum price of goods to be sold in the
"Eastern and Western territories.

"E.—All goods manufactured in the "Eastern territory shall be marked 'A. A. "'Waterman & Co., New York,' and all those "manufactured in the Western territory "shall be marked 'A. A. Waterman & Co.' "(or some similar name), 'Chicago.'" [Similar provision in preceding contracts.]

F.—A. A. Waterman was to buy certain show cases.

G.—No party to sell in the territory of the other, and if goods are so sold, 20% of the net prices belong to the other party.

XI.—A long paragraph wherein Waterman covenants not to compete in business, Among the covenants is the following:

"And he will not use, or authorize and "*permit any other persons*, firm or corpora- "tion to use, the name of Waterman or A. A. "Waterman, in any way or manner in con- "nection with the manufacture, purchase or "sale of fountain pens, other than as con- "templated by this agreement; that is to say, "if this agreement is terminated, the said "Arthur A. Waterman hereby covenants "with said Isaac E. Chapman and William "L. Chapman, not to compete, either direct- "ly or indirectly, in the manufacture, pur- "chase or sale of fountain pens *or to use "his own name, or to permit his name to "be used in any such competing business, ex- "cept as herein provided.*" [See also similar contracts.]

XII.—If Waterman does not go into business for himself, he shall have the exclusive agency in the Western territory for 36 years under elaborate conditions indicated in the agreement.

XIII.—Waterman to pay his own traveling expenses, etc.

It will be noticed that this co-partnership agreement with the Chapmans contained nothing new; nearly every condition is to be found in the various contracts with Frazer & Geyer, scattered through the four preceding years.

In short, Exhibit A-13 is *an assignment* of the trade name "A. A. Waterman & Co." by Mr. Waterman to his partners by a written agreement in which Mr. Waterman has *continuing* interests for 36 years. The agreement has not yet terminated under its own express terms. *It was an assignment of a bona fide, going concern.*

Mr. Waterman elected to go into business for himself, and did this under the terms of the agreement on July 1, 1906. Thereupon the firm of A. A. Waterman & Co., in the Eastern division of North America, consisted of the Messrs. Chapman only, and they continue the manufacture of pens marked "A. A. Waterman & Co., New York," under the assignment of the good-will and trade name set forth in the partnership agreement.

Since July 1, 1906, A. A. Waterman & Co. (Eastern Division), under the business management and added capital of the Messrs. Chapman, have prospered; their self-filling pen (which is the best on the market) is known throughout the world, and hundreds of thousands of dollars have been spent in advertising it. Its sales in Europe are large. Its success does not depend upon advertising alone. Its pens are improved constantly. Its patents and designs are new. It makes every part of its pens itself, using the best materials that money and experience can buy, and the most skilful workmen. It is not a mere assembler of parts bought from others, like so many so-called manufacturers, including this plaintiff.

It will be remembered that, though this last co-partnership agreement was dated June 12, 1906, the Messrs. Chapman had put in substantially all the capital into the enterprise in 1901. The change was largely nominal, except that, under the new arrangement, the business management was taken from Mr. Frazer and given to Mr. Geyer, under whom it has prospered.

In short, since the date of the decree, September 3, 1898, until about December, 1909, the L. E. Waterman Company has acquiesced in the 1898 decree of the Court, when they attempted by underhand and dishonorable methods to deprive the defendants of their right to the good-will and trade name for which they have paid thousands of dollars, by obtaining a judgment against a third party, without the knowledge or consent of these defendants, and, as defendants maintain, by a fraud on the Court. (See Cleveland Decree.)

From the following quotation from Judge HAND'S opinion we most emphatically dissent:

> "In the case at bar it does not seem to me "to be open to any doubt that the whole "purchase of Waterman's business and the "preservation of the firm name had for its "*only motive* the expectation that the "Frazer and Geyer Company could, by the "resulting confusion, pass off its goods un-"der the cover of the complainant's reputa-"tion. My reasons for this are first Water-"man's own very frank statement that "throughout his connection with the enter-"prise the only serious inducement he could "offer was the use of his name. Indeed, no "other reason is suggested which could "serve as any inducement to coalition with "a man in Waterman's position at that time, "one who had failed within two years, and

"since his assignment to meet his debts, had "been doing a small business in a town two "hundred and fifty miles away, which came "into no competition with the Frazer and "Geyer Company and brought nothing to "its business. Again, the obviously color- "able character of all the contracts with "Waterman show that they valued him "chiefly for the right they got to use his "name. At no time had he any substantial "powers as a partner, and after December "twelfth, 1901, he had no rights to any "profits or anything more than a sales- "man's salary or a salesman's commissions. "The elaborate efforts to keep up the formal "appearance of a real firm with actual busi- "ness connections with the real enterprise "show that the parties thought that they "could not avow what was their real inten- "tion and the same efforts emphasize what "that real intention was; especially is this "true when one contrasts the formal rela- "tions with the fact that neither firm ever "did anything actually but keep a spurious "existence upon its books. Surely the chief "inducement to combine with Waterman "was to get the use of his name. However, "I do not think that this is in the least "degree relevant to the rights which the "Frazer & Geyer Company got by the trans- "fer, for the question is of the effect of the "competition, not its purpose or motive."

The above quotation has no foundation in fact. Judge HAND has entirely overlooked the undisputed evidence, a part of which follows:

Mr. Geyer testified:

(Fol. 4280) "RDQ. 1617. When A. A. Wa-"terman came into the original firm with "you and Mr. Frazer [1901] did he not "bring his line of customers with him ? A. "Yes.

"RDQ. 1618. And did he not produce sub-"stantially all the trade that A. A. Water-"man & Co. had? A. Yes, it was through "his ideas, as I understood it.

"RDQ. 1619. And all of the pens that they "sold were sold through him, were they not, "in the beginning? A. Right after he came "with us, yes.

"RDQ. 1620. In other words, he brought "the entire good will and all the customers "that he had before into this new firm in "1901? * * *

"A. Yes.

"RDQ. 1621. Had A. A. Waterman ever "failed in business before 1901? A. I never "heard of his having failed.

"RDQ. 1622. Or before July 1, 1906? A. "I never heard of his having failed. I al-"ways heard him take pride in the fact that "he never had. * * *

"RDQ. 1623. A. A. Waterman & Co. that "preceded your firm were manufacturers, "were they not? A. Yes.

"RDQ. 1624. And the Colonial Pen Com-"pany was their selling agent? A. * * * "Yes.

(Fol. 3739) "Q. 5. How long did you con-"tinue? Tell us the history of the Frazer "& Geyer Company? A. We incorporated "in the first place with a capital of $20,000 "—$6,000 common stock and $14,000 pre-"ferred. Then business kept growing so fast

"that we outgrew our capital and in Feb-
"ruary, 1901, we increased the capital stock
"to $60,000. [Mr. Waterman came in Jan.,
"1901.] Business kept growing so rapidly
"that in 1902 we again increased the capital
"stock to $300,000.

"Q. 6. How much of it was actually is-
"sued? A. The largest amount that was is-
"sued was about $135,000 early in 1904 or
"the latter part of 1903.

"Q. 7. Go on and tell all about the Frazer
"& Geyer Company? A. Our business was
"the manufacturing of fountain pen holders
"and gold pens, making a complete fountain
"pen. When I first went with Mr. Frazer we
"made nothing but the holders. We had our
"factory in Hinsdale Street, East New York.
"About six months after I went with him we
"put in a complete gold pen plant and from
"that time on we made the complete holder
"and gold pen. * * *

"Q. 13. About what per cent of the pro-
"duct of the Frazer & Geyer Company was
"sold by the A. A. Waterman & Co., do you
"know? A. I should say off-hand from 80 to
"90 per cent. * * *

(Fol. 3741) "Q. 8. What was the date
"when you first began making the complete
"gold pen? A. It was in May, **1898**. Along
"in August, 1899, the Frazer & Geyer Com-
"pany began selling gold pens to A. A. Wa-
"terman, of Boston, and we sold him up to
"the 6th of November, 1899. His address
"then was 38 Bromfield Street, Boston,
"Mass. From the 13th of August, 1899, to
"the 15th of October we made and sold gold
"pens for A. A. Waterman & Co. in Howard
"Street, West Somerville, Mass. * * *

(Fol. 3745) "Q. 15. When the stock of the "Frazer & Geyer Company was $60,000, were "they making money? A. Yes; they were.

"Q. 16. How much were they paying on "the stock? * * * A. We were paying 10 "per cent. The preferred called for 10 per "cent and on the common we were making "from 25 to 30 per cent is my recollection, "and paying 10. We were piling up quite a "substantial surplus.

"Q. 17. Before that, when it was $20,000, "how much had you made? * * * A. Our "profits at that time were larger in propor- "tion. I think we were realizing possibly 50 "to 60 per cent on the common stock, besides "paying 10 per cent on the preferred.

"Q. 18. When was it that you increased "your capital stock to $300,000? A. About "February, 1902.

"Q. 19. Did you move your factory at that "time? A. Yes; about that time.

"Q. 20. And changed your methods? A. "Frazer & Geyer Company had already "moved from East New York to 36 Gold "Street, about 1899, I think it was, and we "stayed at Gold Street two or three years, "when our business was so large we were "crowded out of there, as we could not get "any additional space and we then moved to "our present location at the corner of "Thames and Greenwich. There we took a "large floor.

"Q. 21. About 1902, when you extended "your capital stock to $300,000, of which "about $135,000 was eventually issued, did "you make money or lose money? A. Along "in 1903 we began to lose money. Our ex- "penses had increased and the cost of man- "ufacturing had increased. * * *

(Fol. 4148) "RDQ. 1179. After Mr. Mart-"ling was disposed of, you were made man-"ager? A. Yes; when he left in October, "1908, I think it was.

"RDQ. 1180. And since that time you have "been very prosperous? * * * A. Yes; "doing well.

"RDQ. 1181. Was Mr. A. A. Waterman a "stockholder and director in the Modern Pen "Company? A. Yes. * * *

"RDQ. 1184. You said that 50 per cent of "your product was end-joint pens, is that "so, A. About 50 per cent in number, not "in value.

"RDQ. 1185. And that 50 per cent in num-"ber comprises exclusively cheap pens, does "it not? A. They retail from $1 up to $3.50 "without the mountings.

"RDQ. 1186. While the middle-joint and "self-filler retail for how much? A. From "$2 to $6, the plain ones without any mount-"ing. * * *

(Fol. 4283) "RDQ. 1625. Is it not a fact "that A. A. Waterman dictated the policy of "the original firm of A. A. Waterman & Co.?

"* * * A. *I think he did* WHOLLY *"after he came with us.*

"RDQ. 1626. And he dictated the styles of "pens, and the method of manufacture and "the patents under which they should be "manufactured and everything of that char-"acter? A. Yes.

"RDQ. 1627. Mr. Waterman was an in-"ventor, was he not, of pens? A. Yes.

"RDQ. 1628. Had taken out several pat-"ents? A. Yes.

"RDQ. 1629. And those were brought into "the new firm? A. Yes.

"RDQ. 1630. And patents taken out since "in Mr. Stone's name and other people's "names were really directed by him? * * * "A. That is my understanding.

(Fol. 3875) "XQ. 302. Was the use of the "name A. A. Waterman & Co. discussed at "all at the time you formed this partnership "in 1901? A. I presume it was as Mr. Wa- "terman had been doing business, or the "firm of A. A. Waterman & Co., in Boston, "had been doing business; it was simply a "case of transferring it to New York. Our "object was, that we had been supplying the "firm of A. A. Waterman & Co. with what "we presumed was a small part of their "goods and we had a plant where we could "turn out a whole lot more goods than we "were making and we thought with the new "arrangement, or we *knew* with the new ar- "rangement we could supply them with all "the goods and that by our method of doing "business, which had shown that our busi- "ness was increasing rapidly all the time, "that we could also increase the business of "A. A. Waterman & Co.

(Fol. 3890) "XQ. 356. That is the reason "you took the name, was it not? A. The "reason we took the name was that the firm "of A. A. Waterman & Co. had been doing "business; they had more or less of an estab- "lished business and we had been making a "part of the goods for them and we thought "—*we not only thought, but we knew*, that "if we formed a partnership with Mr. Wa- "terman we would then have all the business "and then we could increase that business "by our own methods. * * *

(P. 1399, fol. 4196) "RXQ. 1309. Did A.

"A. Waterman & Co. take any action inde-
"pendent of the Frazer & Geyer Company?
"A. A. A. Waterman & Co. attended to the
"selling of the goods entirely, *practically*
"*running the business.* * * *

(Fol. 4197) "RXQ. 1312. And A. A. Wa-
"terman & Co. did not do any business, ex-
"cept with the goods that they got from the
"Frazer & Geyer Company? A. Yes; they
"bought thousands of dollars of stock out-
"side; they bought pearl goods and boxes
"and advertising matter and paid all their
"bills for advertising. * * *"

The motives of either A. A. Waterman & Co. or Frazer & Geyer Company may not be important, as Judge Hand argues. But he has wholly mistaken the condition existing in 1901, when A. A. Waterman joined forces with the Frazer & Geyer Company. It will be remembered that the decree of September 3, 1898, had permitted A. A. Waterman to do business under his own name. That decree was not questioned, and it is now thought to have been agreed to between them. Mr. Waterman was a man of long experience in the pen business, an inventor, and had a large clientele of his own. Waterman and Gibson had not failed; they dissolved because neither of them had much capital. After the dissolution, A. A. Waterman had done business in his own name—still without much capital. Nevertheless he had a large clientele from Maine to California. Frazer & Geyer Company were likewise people of small capital, but they had a factory of their own and were already doing what this plaintiff has never yet done: manufacturing their own pens from top to bottom. In the original partnership agreement they agreed to get in additional capital to the amount of $25,000.

Capital and business were what were needed. They already had the plant. The capital they got from the Chapmans (the present firm of A. A. Waterman & Co.); the business, patents, etc., they got from Mr. Waterman. The new combination was a great success for several years.

This new venture was very profitable. Mr. Waterman's customers took 80 per cent of the entire new product. That is, Frazer & Geyer's business was multiplied by 5. These facts are not controverted.

It will be remembered that Mr. A. A. Waterman was the complainant's, not the defendant's, witness, and there was practically no cross examination. His "perfectly frank statement" was the statement of a very hostile witness, whose testimony related almost exclusively to matters that were afterwards put into written contracts, which are in evidence. The facts must be taken from them.

Mr. Waterman has been hostile to the defendant since the separation on July 1, 1906.

As already shown, his first co-partnership agreement was dated January 9, 1901 (p. 1635). Mr. Waterman received 15 per cent of the profits and two cents per pen royalty. Their capital was only $1,000. After that, the Chapmans put in above $50,000 through the Frazer & Geyer Company. They, naturally, demanded a share of the profits of the whole enterprise. To do this Frazer and Geyer assigned their profits to the Frazer & Geyer Company (August 27, 1901, p. 1639). On December 12, 1901, Mr. Waterman made a somewhat similar assignment, receiving in consideration $5,000 in stock of the Frazer & Geyer Company and $100 for every 1 per cent of profits (besides his salary from A. A. Waterman & Co.). This is wholly different from Judge Hand's statement of the relations between Mr. Waterman and the company.

Mr. Waterman swears:

(Fol. 282) "Q. 23. Was there anything "said between you and Mr. Frazer and Mr. "Geyer as to the reason for making the part- "nership for such a long term? A. Well, "they regarded the connection with me as "being most advantageous, and *they wished "to increase their capital,* and so felt that a "long term would be much better as an asset "than anything uncertain, not bearing my "name.

"Q. 24. Did you have any interest in the "corporation of Frazer & Geyer Company? "A. No.

"Q. 25. To what did you look for your "profits? A. To A. A. Waterman & Com- "pany.

"Q. 26. Solely to the co-partnership? A. "Solely to the co-partnership.

"Q. 27. Now, what were you to receive un- "der that? A. I had a salary and a royalty "—a royalty so-called. So much per pen "that bore my name."

This was true in January, 1901—but not true later. (See contract of December 12, 1901, p. 1639.)

(Fol. 317) "Q. 120. The reasons or plans "for going into business [1905]? A. *The "reason was I wanted a separate business* "was because the New York business was "not managed to my liking. *I wanted to "organize a business in the West and take "hold of the field I have travelled over and "have it for my own.* They conceded that to "me *reluctantly* if I would do certain things. "One of these things was to form this part- "nership.

(Fol. 322) "Q. 133. That was said to you?
"A. That was the consideration proposed.
"*I offered as much.* I wanted to get certain
"points in order to get my Western oppor-
"tunity. *I was ready to concede most any-*
"thing to get it."

How Judge Hand got the following misconception we cannot understand:

> "The elaborate efforts to keep up the
> "formal appearance of a real firm with ac-
> "tual business connections with the real en-
> "terprise, show that the parties thought that
> "they could not avow what was their real
> "intention and the same efforts emphasize
> "what that real intention was; especially is
> "this true when one considers the formal re-
> "lations with the fact that neither firm ever
> "did anything actually but keep a spurious
> "existence upon its books."

The above quotation is based upon no evidence, and is a pure misapprehension. It is not true as to present relations between A. A. Waterman & Co. and the Modern Pen Company, and there is no suggestion, even, in the evidence of such a relationship in 1901 between A. A. Waterman & Co. and Frazer & Geyer Company. Separate books are kept and profits distributed.

We do not understand why Judge Hand confined his opinion to January, 1901, when A. A. Waterman and the Frazer & Geyer Company first combined—Waterman furnishing the customers from Maine to California, and Frazer & Geyer Company furnishing the plant, and promising to get the capital.

This defendant is the agent of the *new* firm of A. A. Waterman & Co. (the Messrs. Chapman who

have furnished nearly all of the capital), which paid their retiring partner abundantly (contract of June 12, 1905).

We cannot understand how Judge Hand, in reading the case and the briefs, could get the misconception that Mr. Waterman "had been doing a small "business in a town (Boston) 250 miles away, "which came into no competition with the Frazer "& Geyer Company and brought nothing to its "business."

Mr. Waterman traveled as a salesman, from ocean to ocean. He had been in business for himself for years, had a large clientele, country-wide, North, South, East and West, and whether the factory was in New York or Boston, was unimportant.

The Superiority of Defendant's Pens.

DEFENDANTS MANUFACTURE THEIR PENS; PLAINTIFF DOES NOT; IT MERELY ASSEMBLES THE PARTS PURCHASED FROM OTHERS.

THIS SUPERIORITY *IS* SHOWN BY BARE INSPECTION.

The defendant and its predecessors have for over twelve years manufactured each and every part of the complete pen, while this plaintiff has never manufactured its penholders at all, and has generally purchased its pen points, good, bad and indifferent, from various parties, merely assembling the parts in their own factory by the cheapest kind of labor. The plaintiff has advertised enormously, has many medals and diplomas from expositions, where they were probably the only exhibitor, not one of which was given for a pen manufactured completely by the plaintiff, and in only one instance (Paris) could the manager swear who had made

the pens that had received the medals. The defendant's manager testified:

(Fol. 4258) "RXQ. 1546. Have you ever "put your pens in competition with any of "the leading pens of the United States in "exhibitions? A. I have not.

"RXQ. 1547. Do you know whether most "of the leading concerns of the country do "enter their pens in these competitions? A. "No; I think the L. E. Waterman Company "are practically the only ones that do it to "any extent."

The Quality of Plaintiff's and Defendant's Pens.

"Q. What is the general complaint about "L. E. pens? A. The usual complaint, pens "leaking at the joint (fol. 3595). * * * "*I don't think there is an end joint made "that does not leak once in a while.* I think "probably the percentage is very largely in "our favor as compared with the Ideal "pens" (fol. 3596).

(Fol. 3611) "The specialty of the higher "grade goods of the Modern Pen Company "is the self-filler and middle joint? A. Yes.

"Q. And the L. E. Waterman people do "not make any middle-joint pen? A. Not "now, no, sir.

"Q. And they do not make a self-filler "like that of the Modern Pen Company? A. "No. * * *

"Q. And the specialty of the plaintiff is a "pen with a joint under the finger? A. "Yes.

"Q. Their high-grade pens are made that "way? A. Yes."

The defendant's specialty is its "self-filler" (A. A. Waterman patent) in which the ink is contained in a rubber sack attached to a button on the end of the holder—when the pen is empty, by turning the button, the sack is twisted and a vacuum created. Putting the gold pen point into an ink well and letting go of the button, the ink is drawn up into the vacuum. The filling is substantially instantaneous. There is no joint to get worn and leak.

The plaintiff's specialty is the old fashioned, unpatented, pen which has to be unscrewed and filled with a filler.

The principal reason for the law relative to unfair competition is found in the fact that one party generally attempts to deceive *the people* by passing off inferior goods under the cloak of a name which is a guarantee of superior quality; and, generally, the person charged with unfair competition has been guilty of using some name or devise in imitation of another. Neither of these elements enters into this case. There is no suggestion that the Modern Pen Company has ever imitated in any way the product or literature of the plaintiff. The only offense charged is the bare fact that it uses the name of "A. A. Waterman & Co." in plain print.

The decree of 1898, which is now believed to have been on consent, sets out at great length the superior quality of the plaintiff's goods and the inferior quality of the A. A. Waterman Pen Company goods. Inasmuch as, at that time, both parties got all parts of their pens from any dealer that would sell them (fol. 4762), and merely assembled the parts, a proceeding that a $9 a week girl could accomplish (fols. 4357, 4758), the decree of 1898 sounds like "the pot calling the kettle black." *Neither of them made any pens at all.* The plaintiff does not yet; merely assembles the parts.

For some years before the combination between A. A. Waterman and the Frazer & Geyer Company (January 9, 1901), the Frazer & Geyer Company had been actually manufacturing *every* part of the pens that they sold—the holders, feeds and pen points (fol. 4485). Mr. Frazer gave the matter his undivided personal attention. When Mr. Waterman came into the enterprise, he gave his advice as to styles, patents, etc., and sold the product. If Mr. A. A. Waterman and Mr. Frazer had been as good business men and financiers as they were technical manufacturers and salesmen, they would have been a great success. There never was a moment from January 9, 1901, until the present, when the manufacturing end of A. A. Waterman & Co. was not conducted satisfactorily, and each year their pens were improved. They have as a motto: "Each pen must be better than its elder brother."

Within a short time after 1901, defendant's "Self Filler" was invented by Mr. Waterman, and no one has attempted to infringe this patent. No one makes a pen anything like it. No one, even the most careless buyer, would confuse a "Modern" self-filler with an "Ideal" end-joint. We have no hesitancy in saying that the self-filler is the best pen ever manufactured, and has never been equalled. A mere inspection of its mechanism shows its superior workmanship and design. It cannot leak (fol. 4487). There is no joint. The rubber tube, if kept filled with ink, will last for eight or ten years, probably longer, and can be renewed for a trifle. The new, improved and enlarged knob or screw at the end has obviated all former objections that they would sometimes be turned too hard and break off. Such an accident is nowadays almost unknown. They can be filled almost instantaneously, and it is an utter impossibility for them to leak and besmear the fingers

(fols. 3643, 4307, 4512, 3613, 3805, 3840, 4168, 4650, 4307-9, 4374-7, 4386-9, 4516-19, 4456).

Defendant's "Middle Joint" pen is vastly superior to the end or "under the fingers" joint. It was made before the self-filler, and was designed as an improvement upon the old style, end joint pen. The middle joint is very long and is not leakable. We have never heard of a middle-joint pen leaking (fols. 3848, 3611-13).

All gold pen points used by the defendant are manufactured by themselves. One of the greatest weaknesses in pen manufacture is the tempering of the gold. The defendant has recently procured a patent on a machine which gives the pen a certain fixed number of impacts every second, at a fixed pressure of so many tons, thereby making the tempering absolutely perfect.

Hitherto, all tempering has been done by hand, and no two pens were alike.

We notice that since the taking of testimony in this case, the plaintiff has been advertising its pen points as hand-made hammered pens, ignoring the fact that from the first day pens were ever made, until the present, all manufacturers have made pens in that way, excepting the defendant, during the last few years after its new process was patented.

Up to within a very short period, the patent mark on the plaintiff's pens was "1884"—long since expired. Very recently it has put on some more recent patent marks, relating to the feed, but they, like the plaintiff, are mere bluff. They have the commonest sort of feed; and the only scientific feed is that now used in A. A. Waterman & Co. pens, patents for which are now pending. It is the best feed known (fols. 4310, 4297).

All of the highest grade pens made by A. A. Waterman & Co. are either self-fillers or middle-joint

pens. All of the defendant's *cheap* pens are end joints made exactly like the plaintiff's best. They make a few of this character to retail as high as $3.50. The Lincoln pens and all of the cheap pens that retail up to $2 are end-joint pens. Only high-grade pens bear the name "A. A. Waterman & Co.;" the other pens which have cheap pen points tipped with manufactured iridum, bear some other name.

About one-half of the defendant's product (in number, not in value) is composed of cheap "un-"der the finger," end-joint pens, which are manufactured just as the plaintiff's are, and no claim is made for their superiority; but any pen that bears the name "A. A. Waterman & Co." is guaranteed as of the highest quality in its class. *But no end-point pen is guaranteed not to leak* (fol. 4328).

It goes without saying that even steel, if cut into a screw, if screwed and unscrewed frequently, will leak ink; and hard rubber, being comparatively soft, will necessarily, in the course of time, become worn and necessarily leak. This is the trouble with all L. E. Waterman Co. pens, when they are well made; but as a matter of fact, the penholders manufactured by the Messrs. Day, of Seymour, Conn., turned out in great quantities, are so poorly fitted that they are apt to leak from the very beginning. The Days make all sorts of goods, including ocean cables (fol. 3851).

We have no hesitancy whatever in saying that there is no pen on the market—of equal price—that is poorer than the L. E. Waterman Company pen (fols. 4696, 4706, 4708, 4760-62, 4649).

The evidence is undisputed that the plaintiff has not, during these many years, made its own pens.

From 1883 to the present time, the L. E. Waterman Company has been one stupendous "bluff."

They produce medals and pictures of medals of their exhibits in expositions throughout the world and claim perfection—other makers do not exhibit as a rule. They advertise profusely and declare themselves the "only genuine" and the "standard" pen of the world. The evidence shows that in no single instance, except one, could the manager of the plaintiff say who made a pen point that had won a medal. *They have never made their own holders.* For some years they have obtained their rubber goods from H. P. & E. Day Co. with whom the plaintiff has no connection whatever, except to purchase a part of their product and, apparently, to owe them a great deal of money (fols. 1912-13). The pen points on which these medals were obtained were manufactured by anybody and everybody. Not one single one of these medal pens was manufactured in whole, or, probably, in part, even by the plaintiff. They simply took other people's work; had $9-a-week girls to put them together, and then sent them to expositions as their own manufacturer and got medals, because they had no competitors.

The plaintiff's model and chief pen is the old "under-the-fingers" joint pen, and there has been no substantial change in any part of its highest priced pens for the last 15, 20 or 30 years. They claim a difference in the feed, but it is a fictitious claim. They are now trying to put some self fillers on the market, but they are not a success. They have a bar on the side.

Up to about *three years* ago, the factory, in Montreal, did nothing but assemble parts. Now they claim to manufacture everything. Up to a few years ago, the New York company—this plaintiff—were mere assemblers. They made *nothing* themselves. They claim that within the last five or six years, they have made *some* of their *pen points*, but

none of their rubber goods; but even to-day they admittedly buy their pen points even from several dealers.

The plaintiff made much of the fact that it did the chasing in its own factory. Only a part of their product is chased. Chasing is a machine decoration on the plain holder. It makes a plain holder look wavy. Half a dozen holders are put into a chasing machine and the machine does the work in 30 seconds. A girl at $9 a week will attend to several of these chasing machines. It is the simplest thing about the pen, and is done by unskilled labor (fols. 4509, 4740, 4758).

This brings us to the point of "workmanship." The defendant has a union shop (fols. 4691, 4708, 4712, 4575), pays the highest wages known to the trade, and has the most experienced workmen (fols. 4745, 4743). None better can be procured at any price, in any country. Its machinery is of the latest design, and some of it is exclusive.

The plaintiff has a non-union shop, had a strike while the testimony was being taken, and pays the lowest prices possible. No man, except the foreman, gets more than $20 a week (fols. 4576, 4694, 4695).

The most important part of the pen point is the iridium. The defendant buys the best iridium procurable, and then rejects 40 to 60 per cent of it for its first-class pens (fols. 4493, 3833). A man of long experience and high salary selects this iridium from the iridium of commerce, and applies it to the pen. The defendant's cheap 25-cent pen points, marked "14 kt." have manufactured or soft iridium, nothing else; nothing else is claimed. It is put on $1 pens only. This is what they gave the plaintiff on its order for 1,500.

The plaintiff claims that it has no pens with soft iridium, but a number were produced at the hearings (Ex. A-69, fol. 5333).

The superiority of the defendant's goods was sworn to by experts, not connected with the defendant, besides its own experts, notably the three ladies who had been many years in charge of pen stores, or as demonstrators, repairing all pens and selling all pens, including those of plaintiff and defendant. They had no hesitancy in saying that the defendant's self-filling pen was the finest pen ever made (fols. 4373-76, 4309).

The only so-called outside expert called by the plaintiff was a poor old man named Lancaster, who assembled pens marked with his own name. He was "down and out." The plaintiff would not sell him goods at all; the defendant only c. o. d. Mr. Watson called on him in Baltimore. He came to New York; Mr. Watson called on him several times at his hotel, and finally subpœnaed him just as he was leaving for Baltimore, giving him $1.85 and making him a *loan* of $10—generous Mr. Watson. Of course, in such circumstances, Mr. Lancaster said that the plaintiff's pen was the finest in the world, but he also said that the defendant's pen was next best, and, on cross examination, he admitted that nobody could make a pen such as he wanted, except the defendant. The fact is that the old man has joined the "down-and-out club," and ten dollars looked so big to him that he was willing to swear even against his own manufacturer.

Mr. Lancaster's characterization of the defendant's pens as next best to the plaintiff's reminds one of that famous incident in history when the Greek generals, at Marathon, were called upon to give first and second choice as to who was the greatest general. Each voted for himself first choice, and for Miltiades, second choice.

To sum this matter up: the defendant manufactures every part of every pen that leaves their establishment. This fact antedates 1901 (fol. 4485).

Their designs are new, made under living, exclusive patents, and their workmanship is of the highest style known to the art. Their product, pen for pen (Exhibit A-39, p. 1711), is cheaper than the plaintiff's, and far superior. Their low-grade, "end joint" pens are better than the plaintiff's best, and far cheaper. They make no boast, however, concerning their end joint pens except that they are the best end joint pens that can be manufactured. The end joint holders are structurally faulty, and in time the rubber screw *will* wear and the pen may leak; and any leakage in defendant's pens, referred to in the testimony, referred to those cheap pens of that fabrication, which is no improvement upon the style manufactured 20 years ago by many manufacturers; and by the plaintiff to-day.

MODERN SCIENCE AND THE MOST SKILLFUL WORKMANSHIP CANNOT PRODUCE A BETTER PEN THAN THE A. A. WATERMAN & CO. "MODERN" SELF-FILLER.

Confusion arising from similarity of names. Simulation.

We do not think that the corporate name of "The "The L. E. Waterman Company" is so nearly like the firm name of "A. A. Waterman & Co." that any intelligent man should be confused and mistake the one for the other, but even if confusion does arise, it is quite as hurtful to the plaintiffs as to defendant.

One thing is certain: no intelligent man would ever confuse the A. A. Waterman & Co. self-filling pen with the old-fashioned "joint under the fingers" pen manufactured by the plaintiff under patents long since expired.

Slight confusion is admitted; was admitted in

court before the beginning of this action. It is, however, only the confusion which arises from the bare fact that two firms, each legitimately using the name "Waterman," uses their trade name in a legitimate and fair way (fol. 4116). Concerning such confusion there is no remedy. The writer has no remedy against any other man named Bacon practicing law under his own name, nor against the Rev. A. S. Bacon, who preaches under the writer's exact name.

The defendant has never intentionally added to that confusion, but, on the contrary, has used every effort possible to make the public know that their superior goods must not be confounded with the inferior "assembled goods" of the plaintiff—assembled from everywhere.

All of these issues were threshed out on the motion for a preliminary injunction. As the defendant has never used the word "Waterman" alone, it had no serious objection to that part of the preliminary injunction that restrained the use of that word alone, and the defendant was perfectly willing, and so announced to the plaintiff to make the temporary injunction as modified by the Circuit Court of Appeals the permanent decree of this court. This offer was first made in a letter—unanswered—written before the appeal book was prepared for the Circuit Court of Appeals; it was later made at the opening of the plaintiff's testimony (fols. 1601-02), at the opening of the defendant's case, and at the close of the testimony (fol. 1602). The defendant received no reply, except the insulting letter printed at page 1122 (although it was not a part of the record), wherein the plaintiff very flippantly offers to make the *first* order of Judge Hough—that dated Aug. 29, 1910 (fol. 3331), not the one dated Dec 10, 1910 (fol. 3352)—the decree of this court, the costs to be divided. This was merely adding insult to injury.

It is the L. E. Waterman Company who aggravate, exaggerate and create very much of such confusion by the untruthful statement that "there is no such concern in New York City" as A. A. Waterman & Co. as shown by their own letter, Exhibit A-36, folio 5125, and their complaint in the Italian suit (fols. 5151, 5153).

An examination of some 142 pages, 956 to 1107, of the printed case, giving alleged irregular directions on letters does not show confusion, but ignorance; and why this record was cumbered with such a lot of immaterial matter, not only in this exhibit, but in the testimony, we do not comprehend, because the law on this point is very emphatic.

In view of all these facts, and especially in view of the offers made by the defendant and the unbusinesslike, unprofessional methods pursued by the plaintiff, this action should be dismissed on the merits with costs.

Simulation.

There is no question of simulation. A. A. Waterman & Co. have never used similar colors to the plaintiff. Defendant's distinguishing color is primrose, while plaintiff's color is blue. No letterhead, advertisement or advertising device has ever been even remotely similar to the plaintiff's. There is no complaint along this line. The only complaint is that confusion arises from the bare fact that A. A. Waterman used his own name, given him at birth. There is no evidence, and no claim, of confusion arising from any other fact. The only grievance arises from the fact that A. A. Waterman's father was named Waterman.

> (Fol. 4116) "XQ. 1094. That confusion "came from the fact that the name and "marking of the goods were so similar, did

"it not? A. The marking is not similar. "There is no similarity to the marking at "all. The only similarity is that they both "have the name Waterman.

(Fol. 4148) "RDQ. 1182. *Has there ever "been a time when the trade name of A. A. "Waterman & Co. was printed in any way "like the name L. E. Waterman Company, "so as to simulate it even remotely?* A. *No.*

"RDQ. 1183. *There never has been any "claim of that character, has there?* A. *I "never heard of any such claim.*

(Fol. 4167) "RDQ. 1224. Have you ever "knowingly sold either directly or indirect- "ly, through any salesman, any A. A. "Waterman & Co. goods simply as Water- "man? A. No, sir.

"RDQ. 1225. Have you in each instance "given explicit instructions to salesmen as "to how your goods should be sold and, if "so, state the tenor of such instructions? "A. The instructions have been for them "to sell them as the goods of A. A. Water- "man & Co., that we are making our self- "fillers and middle-joint pens, pens of a dif- "ferent class and so much superior to the "Waterman Ideal pens, that we do not want "them confounded at all; and our end-joint "line is practically the same as the Ideal, as "far as quality is concerned, but the price is "about one-half the price of the Ideal.

"RDQ. 1226. Then the middle-joint and "the self-filler sell for about the same as the "Ideal? A. Yes.

"RDQ. 1227. And the end-joints, which "are just as good as the Ideal, sell for about "one-half? A. Yes."

It will thus be seen that the merits of this case are wholly different from those cases where the infringing party has *recently* started in business, has used some color or device similar to the trade mark, trade name or trade device of an old established concern, and puts on the market an *inferior* article.

On the contrary, this defendant has always strictly avoided using the name "Waterman" alone, and any imitation of the plaintiff's advertisements; and has impressed upon everybody the fact that its pens are new, up-to-date pens, made under existing patents, in every way superior to the "assembled" pens of the plaintiff.

There is no claim that the defendant has ever imitated the plaintiff's designs.

There are several interesting French cases cited in Brown on Trade-marks. The principle of all of them is thus expressed in one:

> "Every person has a right to use his pat-
> "ronymic in commerce as in anything else,
> "subject, however, to being distinguished as
> "much as possible from any other in the
> "same trade."

This author also remarks:

> "Cases in which *corporations* have been
> "the parties sought to be restrained *stand*
> "*on a different footing* from natural per-
> "sons, for the persons forming a new cor-
> "poration designated like another corpora-
> "tion already formed in the same business
> "are chargeable with assuming a name that
> "does not belong to them. In one of these
> "cases the element of fraud or falsehood en-
> "tered (*Batchellors* v. *Batchellor Manufac-*
> "*turing Co.* not reported in Vermont), and

"in the other the element of estoppel by "contract (*Holmes* v. *Holmes, etc., Manu-"facturing Co.,* 37 Conn. 278, 9 Am. Rep. "324), but in neither of these cases was "anything said or adjudged in conflict with "the general doctrine in the cases of indi-"viduals which we have cited.

"The editor of the American Reports "(Vol. 12, p. 414) says: 'It seems to us that "confusion has sometimes arisen from a "failure to distinguish between infringe-"ments upon a trade-mark and mere compe-"tition in trade. *In our view, such cases as "the* FABER *and* MENEELY *cases are not "trade-mark cases in any sense, but simply "cases of alleged unfair competition in "trade.* In the case of imitation of a trade-"mark, the proprietor will be protected "whether the imitation be fraudulent or in-"nocent. The damage to him is the same "in either event. But in the case of alleged "unfair competition in trade, THE FRAUD-"ULENT INTENT *must be conclusively shown.* "IT IS NOT ENOUGH THAT THE PUBLIC ARE "DECEIVED OR LIABLE TO BE DECEIVED; *the "court must be satisfied* THAT THE DECEP-"TION IS CONTRIVED AND INTENDED *before it "will punish a man for causing it.*

"'*We think we are warranted in deriving "this conclusion from these cases: A man "has a right to the free and UNRESTRICT-"ED use of his name in trade or manufac-"ture, notwithstanding another of the same "name may have previously set up the same "business in the same locality, and acquired "a celebrity for his goods, unless the former "in connection with his own name uses some* "MARK OR DEVICE *which has become the*

"*property of the latter, or is otherwise* "*guilty of* AFFIRMATIVE ACTS *designed to* "*deceive the public and induce them to be-*"*lieve that the goods of the former are the* "*goods of the latter, and in such cases* THE "USE OF SUCH MARK OR DEVICE *or the prac-*"*tice of such acts* WILL BE RESTRAINED, BUT "NOT THE USE OF THE NAME.'

"The family name of a manufacturer can-"not be made a trade-mark, so as to exclude "other manufacturers of the same name "from its use in the manufacture and sale "of similar articles, *unless unfair means are* "*adopted to mislead purchasers into the be-*"*lief that the article is of the other manu-*"*facture. Marshall* v. *Pinkham,* 52 Wisc. "572; 38 Am. Rep. 756.

The Suffix.

THE SUFFIX OR QUALIFYING PHRASE, "NOT CONNECTED WITH THE ORIG-"INAL 'WATERMAN' PEN," or "NOT CON-"NECTED WITH THE L. E. WATERMAN "CO."

The JUDGE HAND opinion states that "the pub-"lic * * * looks no further than the name," and also states that the "suffix which I shall suggest "would be interpreted, at least by *a buyer experi-*"*enced in the business,* as a voluntary disclaimer "of an association disastrous to the manufacturer "and deceitful to the public."

This is not a question for the *dealers.* They know full well the superiority of the defendant's pens. It is a question for the general public, and the form of Judge Hand's qualifying phrase con-

veyed to them the idea that the defendant's product was an inferior, and not a superior, pen. But to require to be appended to the trade name at all times, in letters equally as large as the trade name, any suffix at all, is to require this defendant, which, with its predecessors, has been manufacturing A. A. Waterman & Co. pens for fifteen years under the sanction of a decree of the Supreme Court of the State of New York and under their own patents, to proclaim to the world that its goods are in some way tainted.

Besides, every time defendant uses its own legitimate trade name, it must advertise the plaintiff with a long suffix.

Again, what is an "original Waterman pen"? The Ideal end-joint pen is not covered by any patent and never has been. Plaintiff might as well have put on the market an ordinary grindstone and call it "the original Waterman grindstone."

On the contrary, defendant's self-filler and middle-joint pens are covered by live patents. They are, at least, the original A. A. Waterman "self-fillers" and "middle-joints," while the "original Waterman pen" isn't original at all.

The suffix "not connected with the original 'Waterman' pen" would convey to the ordinary inexperienced purchaser the idea that plaintiff manufactured a patented pen that defendant was trying to imitate. Nobody imitates an inferior article.

The opinion relies upon the following precedents stating.

> "There is plenty of authority for an in-
> "junction in this form. *Singer Mfg. Co.* v.
> "*June Mfg. Co.*, 163 U. S. 169, 200, 204;
> "*Herring, etc., Safe Co.* v. *Halls Safe Co.*,
> "208 U. S. 554; *American Waltham Watch*
> "*Co.* v. *U. S. Watch Co.*, 173 Mass. 85; *Wal-*

"*ter Baker & Co.* v. *Sanders*, 80 Fed. R. 869;
"*Dr. A. Reed Cushion Shoe Co.* v. *Frew*, 162
"Fed. R. 887."

In the *Singer* case, the court held that the word "Singer" became public property at the expiration of the Singer patents. However, the defendant *imitated* the Singer trade-mark; *did not put its own name on the machines or in advertisements*, but marked the machines "Improved Singer" in large letters and "J. M. Co." or "J. Mfg. Co." less prominently. They used nothing to indicate that the defendant made the machines. There can be no doubt that the defendant intended to deceive the public. The mere fact of suppressing their own name and designating themselves as the "J. M. Co." was sufficient to prove that fact. Nevertheless the court held:

> "*Second.*—Also perpetually enjoining the "defendant from marking upon sewing ma-"chines or upon any plate or device con-"nected therewith or attached thereto the "words 'singer' or words or letters equiva-"lent thereto without clearly and unmistak-"ably specifying in connection therewith "that such machines are *the product of the "defendant or their manufacture and*, "THEREFORE, not the product of the Singer "Manufacturing Company."

It is clearly deducible from this case that if the June Manufacturing Company had used their full name so as to let the public know that it was they, and not the Singer Manufacturing Company, that manufactured these machines, no injunction would have issued.

A. A. Waterman & Co. never sold a pen without "A. A. Waterman & Co." plainly marked upon, ex-

cept some very cheap pens marked "Lincoln," &c. A. A. Waterman & Co. have always used their full title; have called their goods "Modern," not "Ideal," and have never in any way simulated the plaintiff's goods or advertisements. The Singer case is in no wise a precedent favorable to Judge HAND's contention.

In *Herring-Hall-Marvin Safe Co.* v. *Hall Safe Co.*, 208 U. S. 554, the plaintiff obtained all grantable rights to use the name Hall (p. 557), although the trade name had not been mentioned in the deed. The court held that the defendant could use the name Hall, "provided an explanation is attached" (p. 559) and

> (p. 559) "*We are not disposed to make a "decree against the Halls personally.* That "against the *company* should be more speci- "fic. It should forbid the use of the name "Hall, either alone or in combination, *in "corporate name,* on safes, or in advertise- "ments, unless accompanied by information "that the defendant is not the original Halls "Safe & Lock Co., or its successor, or, as the "case may be, that the article is not the "product of the last-named company or its "successors."

This Hall case might be an analogy if the controversy was between the present firm of A. A. Waterman & Co. and Mr. A. A. Waterman who had attempted to use his own name in the eastern division of the United States in violence of the contract of June 12, 1905.

One would naturally think that the defendant in the Hall case should have been enjoined absolutely. The right to use the name "Hall" had

been granted to plaintiff. The case is certainly not a precedent favorable to this plaintiff.

The decree of September 3, 1898, while prohibiting the use of the *corporate* name, expressly permitted the use of a firm name of A. A. Waterman & Co. or *Arthur* A. Waterman & Co. The defendant has the right to use both forms under the partnership agreement of June 12, 1905. A. A. Waterman & Co. was selected in the beginning probably because the corporate name had been the "A. A. Waterman Pen Company." Mr. Waterman always used the initials only.

The court must not overlook the distinction often made between *corporations* and *individuals or firms*. The law seems in many cases to be different as to each. The reason, apparently, is that a corporation can be given any name that may be selected by the incorporators, while an individual or the members of a firm are obliged to use the name given them by their parents.

In *American Waltham Watch Co.* v. *U. S. Watch Co.*, 173 Mass. 85, Judge HOLMES agreed with the defendant that it should not be discredited in advanced by requiring it to use a suffix that would injure it in the market, and he simply enjoined the use of the word "Waltham watch." Judge HOLMES' opinion would sustain this defendant's contention that the words "not connected with the original "Waterman pen" discredits the defendant's wares. The Waltham watch case is not a precedent favorable to the plaintiff. Besides, the U. S. Watch Co. was not using its own name, but emphasized the fact that its factory was in Waltham for the purpose, apparently, of obtaining the benefit of the reputation of a firm that called its wares "Waltham Watches."

In *Walter Baker & Co.* v. *Sanders*, 80 Fed. Rep. 889, it was expressly held:

"The defendant may indicate therein in "appropriate language that the chocolate "is made or prepared or sold for or by W. "H. Baker, of Winchester, Va."

In this case the defendant imitated or simulated the plaintiff's labels.

Right here, we call attention to the fact that in the City of New York here are three Fabers in the lead-pencil business, viz.:

Eberhard Faber, 200 Fifth Avenue,
Johann Faber, 61 Duane Street,
A. W. Faber, Germania Bank Building,

and among undertakers, there are

Rev. Stephen Merritt, 223 Eighth Avenue,
Stephen Merritt Burial & Cremation Co., 8th Avenue & 19th Street,
Stephen Merritt Embalming Institution of New York, 241 West 23d Street.

As to the Rogers in the silver plated ware business, they are numerous. There are seven in the City of New York alone; we take the following list from the "Jeweler's Circular-Weekly Buyers' Directory," published at 11 John Street, New York City:

J. Rogers Silver Plate Co., 4788 Pearl Street,
Rogers Silver Plate Co., 470 Broadway,
Simeon L. & Geo. H. Rogers Co., 350 Broadway,
Wm. Rogers Mfg. Co., 9 Maiden Lane,
Wm. A. Rogers, Ltd., 12 Warren Street,
Rogers & Bro., 9 Maiden Lane,
Rogers Bros., 1847, Meriden, Ct.
Rogers & Hamilton Co., 9 Maiden Lane,

Rogers, Smith & Co., Meriden, Ct.
Wm. A. Rogers, Niagara Falls,
W. A. Rogers, Northampton, Mass.
Biggins-Rogers Co., Wallingford, Ct.

There are, apparently, 12 different concerns.

A hasty examination of the Telephone Business Directory shows literally hundreds of people doing business in this city, where others of the same surname are in the same line.

We are not aware that the courts have added a suffix to any of these names.

The other two cases cited by Judge HAND do not apply to these issues:

Florence Mfg. Co. v. *J. C. Dowd & Co.*, 178 Fed. 73, merely held that a trade name "Keep Clean" was violated by the use of the trade name" Sta-Clean," and *National Biscuit Co.* v. *Baker*, 95 Fed. Rep. 135, related to the violation of the trade name "Uneeda" by the word "Iwanta."

We venture to say that no case can be found in the books where any man in a straightforward, legitimate way, manufacturing a product under the name given him at birth and to which he was entitled, was ever restrained from its use because some one else had a father of the same name, unless, by simulating the wares of the other, he in some way added to the necessary confusion that arises from the mere similarity of the family names.

Judge HAND seems to have relied for his precedent upon *Dr. A. Reed Cushion Shoe Co., Ltd.*, v. *Frew, et al.*, 162 Fed. Rep. 887, but an analysis of that case shows that it is not a precedent for such radical action as here taken, in the case of an individual who has committed no offense other than to manufacture goods under his own name, legally given to him by his father.

Dr. Adam Reed, in 1895, 1896 and 1900, took out patents on so-called "Cushion shoes." The manufacture of these shoes began while the applications for the patents were pending, and the shoes were advertised by licensees who sold them as "Dr. A. Reed's Cushion Shoes." The licenses went into liquidation; the patentee sold to a bank, which in turn sold to Goodyear & Co., which company sold to the complainant, which licensed a Chicago company to manufacture men's shoes, and a Buffalo company to manufacture women's shoes, upon a royalty. These shoes were high grade and expensive. Large sums were spent by the licensees in advertising and stores were opened for their exclusive sale. A large trade was built up. All this was done by remote assignees of the early patents with the assent of Dr. Reed.

After selling his first three patents, Dr. Reed obtained in 1900, 1901 and 1904, three other patents for improvements, and in 1905 he organized the E. Z. Shoe Company, and conveyed to it those three new patents, and the right to use his name. It seems that he did not specifically grant to the complainant's *remote grantor* the right to use his name, but he stood by for years while they advertised "Dr. A. Reed's Cushion Shoes." This new company gave licenses to others who manufactured an inferior shoe at a lower price, which was advertised with the words "Dr. A. Reed patentee."

> "This use of the name 'Dr. A. Reed' is "what the complainant complains of in the "present case. It is not contended that the "defendants in any way imitate the prod- "ucts, devices, packages, or advertisements "of the complainants or its licensees. The "whole contention is in respect of the "name."

The Circuit Court enjoined absolutely the use of the name "Dr. A. Reed." The defendant appealed.

> "Now, Dr. Reed did acquiesce in the use "of the name 'Dr. A. Reed Cushion Shoes' "by the complainant and its licensees. This "name had been used with his knowledge "and approval to describe the shoes manu- "factured under the earlier patents long be- "fore their assignment to the complainant's "predecessor in title. The same name was "employed by the complainant's licensees, "and large sums of money were spent to "advertise it. Dr. Reed knew of such use, "and made no objection. The name became "in a sense identified with the shoes manu- "factured under the earlier patents. Its use "by others would give them the results of "the labors and expenditures of the com- "plainant and its licensees. Against this "the complainant is entitled to protection."

The opinion then says:

> "It is undoubtedly true that the motive "actuating Dr. Reed and his associates in "forming the defendant corporation was the "desire to avail themselves of the reputation "attaching to the name of Dr. Reed in con- "nection with cushion shoes; *but this motive "was not necessarily illegitimate so long as "the defendants did not palm off their shoes "as those of the complainant or its licensees.*
> "As said by Mr. Chief Justice FULLER in "*Howe Scale Co.* v. *Wyckoff, Seaman & "Benedict*, supra:
>
> " 'Doubtless Remington and Sholes, in "using the name 'Remington-Sholes,' desired "to avail themselves of the general family

"reputation attached to the two names; but "that does not in itself justify the assump- "tion that their purpose was to confuse their "machines with the complainant's or that "the use of the name was in itself calcu- "lated to deceive. Remington and Sholes "were interested in the old company, and "Remington continued as general manager "of the new company. Neither of them was "paid for the use of his name, and neither of them had parted with the right to that "use. *Having the right to that use,* COURTS "WILL NOT INTERFERE *where the only com- "parison, if any, results from a similarity "of the names, and not from the manner of "the use.* The essence of the wrong in un- "fair competition consists in the sale of the "goods of one manufacturer or vendor for "those of another, and, *if defendant so con- ducts its business as not to palm off its "goods as those of the complainant, the ac- "tion fails.'* " (If 198 U. S. 136 is good law, "the L. E. Waterman Co. must fail in this action.)

The court held that the owners of the original patents were entitled to protection in the use of their trade name, "Dr. A. Reed's Cushion Shoes," and this was certainly just, and we are not prepared to say that, in good morals, Dr. Reed should not have been enjoined from the use of his name at all, in connection with the new patents; but this Circuit Court of Appeals has held in that case that Dr. Reed, *even in those circumstances of doubtful morality,* was still entitled to the use of his name, even though he had sold the patents and acquiesced in their exploitation as "Dr. A. Reed's Cushion Shoes." Nevertheless, the new company was per-

mitted to use his name upon designating the patents under which the new shoes were made, and stating that they were not made under the first patents.

The analysis of this opinion will show how different it is from the circumstances in the Waterman case. If A. A. Waterman had merely transferred his patents for fountain pens and had merely acquiesced in the use of the firm name of A. A. Waterman & Co., to which he had never assigned the good will of the business or the use of the name, and had afterwards organized a similar company owning new patents, the conditions would be substantially the same as in the Reed case, but, here, we have a case where Mr. Waterman has assigned the use of his name for a valuable consideration, still retains the right to use the patents in the western part of this country, and still retains relations with the original firm in matters of advertising, etc. (See contract of June 12, 1905.) *It is not by Mr. A. A. Waterman that the complaint is made, it is by a stranger.* The conditions are not at all similar and the analogy falls.

A. A. Waterman & Co. have all the rights of A. A. Waterman by formal assignment; the plaintiff in the Reed case did not.

An analysis of all the cases cited by Judge Hand fails to reveal any precedent for his offensive suffix.

Probably the latest trade name case is *World's Dispensary Medical Association* v. *Robert J. Pierce*, 203 N. Y. 419. This case is valuable as the latest expression of the State Court on this phase of the subject, and as showing the penalty imposed in a case of unfair competition of the most outrageous character, where the defendant made no defense. The writer happened to be present at the Court of Appeals during the argument of this case and obtained from the plaintiff a copy of his brief.

Dr. Ray V. Pierce was a practicing physician who invented certain formulas known as "Dr. Pierce's Golden Medical Discovery," &c. (p. 421). He assigned all his rights to the plaintiff of which he was the president and active manager. The plaintiff is a corporation organized under the manufacturing act, not only for the "manufacturing, compounding and vending of medicines," but to operate a hospital and, practically, to do a physician's and surgeon's work.

The defendant was not a physician, but prepared certain *immoral* remedies which he called "Dr. Pierce's Tansey," &c. He *imitated* the plaintiff's name, boxes, &c., and put in no defense, but relied exclusively upon the fact that the plaintiff, as a corporation, could not legally practice medicine, and therefore could not come into equity for relief.

A majority of the Court of Appeals refused to consider this point (page 423), leaving it undecided, holding that the plaintiff had at least a right to manufacture and sell proprietory remedies, and that that was separate from the practice of medicine. The defendant was an outrageous sinner. He was not a doctor at all, yet prefixed "Dr. Pierce" to his immoral preparations. No stronger possible case can be produced for an extreme punishment. He admitted his wrong-doing and simply said:

> "The plaintiff practices medicine as a cor-
> "poration, therefore, I have a right to palm
> "off on the people illegal goods under Dr.
> "Pierce's name."

The Special Term and Appellate Division had enjoined the defendant absolutely, but the Court of Appeals said (p. 424):

> "Appellant's contention that the judg-

"ment is too broad and drastic is well "founded. Its restraint of the defendant "from the use in any way of the designa- "tions 'Dr. Pierce' or 'Dr. Pierce's' is legal "and just, because he is not a licensed phy- "sician nor entitled to practice under the "law of the State. (Public Health Law, "§§161, 174.) *The defendant has, however, "the right to use his own name in his own "business. It is a general principle of law "that one's name is his property, and he has "the same right to its use and enjoyment as "he has to that of any other species of prop- "erty.* (*Chas. S. Higgins Co.* v. *Higgins "Soap Co.*, 144 N. Y. 462; *Brown Chemical "Co.* v. *Meyer*, 139 U. S. 540.) It is, how- "ever, also a general principle of law that "no man has the right to sell his products "or goods as those of another. He may not, "through unfairness, artifice, misrepresenta- "tion or fraud, injure the business of an- "other or induce the public to believe his "product is the product of that other. The "law protects the honest dealer in the busi- "ness which fairly is his, and the public "from deception in trade. In this case, as "in others which have been before the "courts, these principles must, because of "the identity in the surname of the defend- "ant and the trade name used by the plain- "tiff, be reconciled and amalgamated. * * *

"The defendant has the right to use his "name. The plaintiff has the right to have "the defendant use it in such a way as will "not injure his business or mislead the pub- "lic. When there is such a conflict of rights, "it is the duty of the court so to regulate "the use of his name by the defendant that,

"due protection to the plaintiff being af-
"forded, there will be as little injury to him
"as possible. Defendant should so use his
"name in connection with his remedies that
"he will obviate deception or with an ex-
"planation which will inform or be a notice
"to the public that those remedies are not
"those of plaintiff. (*Herring-Hall-Marvin*
"*Safe Co.* v. *Hall's Safe Company*, 208 U. S.
"554; *Devlin* v. *Devlin*, 69 N. Y. 212;
"*Meneely* v. *Meneely*, 62 N. Y. 426.)

"We have already stated that the defend-
"ant cannot use his name with the prefix
"'Dr.' *We have concluded that due and*
"*adequate protection* will be afforded to the
"plaintiff and the public if the defendant is
"enjoined additionally from using the words
"'Pierce' or 'Pierce's' in advertising, de-
"scribing, designating, labeling or selling
"his proprietary remedies unless said word
"be immediately preceded on the same line
"therewith by *defendant's first or proper*
"*Christian name and his middle name or the*
"*initial letter thereof* in letters identical in
"size, color, style of type and conspicuous-
"ness with those of said word, so that said
"word shall not appear for any of the pur-
"poses aforesaid, except when thus con-
"joined with the words '*Robert J.*' *or* '*Rob-*
"*ert' followed by the middle name of the de-*
"*fendant.*"

IT WILL THUS BE SEEN THAT THE LATEST PRONOUNCEMENT OF THE NEW YORK COURTS ON THIS SUBJECT IN AN EXTREME CASE DID NOTHING EXCEPT TO REQUIRE THE DEFENDANT TO USE HIS OWN FULL NAME.

Can this Court say that the law, as laid down in the Remington and Sholes case, is not the law of the land, enunciated in a score of cases? *i. e.*:

> "Having the right to that use, *courts will "not interfere* where the only comparison, "if any, results from a similarity of the "names, and not from the manner of the "use. The essence of the wrong in unfair "competition consists in the sale of the "goods of one manufacturer or vendor for "those of another, and if defendant so con- "ducts its business as not to palm off its "goods as those of the complainant, the ac- "tion falls."

Is it not true that A. A. Waterman & Co. come strictly under this law as laid down by our highest court? Has not A. A. Waterman at all times since his christening "had the right to that use?" Has Judge HAND or any judge, or even the plaintiff, ever claimed that defendant ever "palmed off its goods as those of the complainant?" Has anyone ever said that defendant has ever sold its goods as those of the plaintiff? Is there any pretense that the admitted confusion—very slight—results from any cause save "from a similarity of the "names, and not from the manner of the use?"

This is a government of law, not of caprice. Did Chief Justice FULLER proclaim the law? If he did, we demand, in the name of civilized government, that the law be obeyed by the courts and that this defendant be protected in its rights under the law.

The law gives A. A. Waterman the right to trade under his own name. He has never abused that legal right. He has never simulated the plaintiff's marks or symbols or advertisements or colors. His only offense is in using legitimately the name borne by himself and his fathers. This Court has

no more right to tag him as spurious with the suffix "not connected with the L. E. Waterman Co." than it has to require him to do business as A. A. Jones.

No court has ever gone so far as Judge HAND, and the Circuit Court of Appeals. This decree violates the law and the rights of property (trade name) guaranteed by the Constitution.

Mr. A. A. Waterman's only offense consists in manufacturing pens lawfully and marking them with his own legal, full name.

A. A. Waterman has as much right to call his pens "A. A. Waterman pens" as his parents had to call their baby "A. A. Waterman." Each is an indestructible right. No law can require Mr. A. A. Waterman to change his name because some man was born with that name before he was, and no law can put a suffix or prefix or qualifying phrase on a man's name just because he started in business one day after another, when he uses his full, lawful name in that business. Under the rule laid down by Judge HAND, if John Smith should start a tailor shop on the Bowery on January 1st, and James Smith on February 1st, James Smith might be required to tag all his clothes "not the original Smith on the Bowery."

A. A. Waterman was born and legally using the name his parents legally gave him before the plaintiff was named and incorporated, and he can no more be deprived of his name than of his clothes, when he uses them legitimately. John Jones might buy the same style of suit from Brokaw Bros. that James Jones did, and thus confuse some careless people as to their identity, but that fact would not require James to tag himself, "not "the original and genuine John." If Judge HAND's rule is to prevail, why should not the writer require a competing lawyer named Bacon to adopt

a suffix, "not connected with the original 'Bacon' "lawyer?"

The exact law is elaborately collated in the notes to

17 C. C. A. 519;
27 C. A. A. 357.

As was said in *Wm. Rogers Mfg. Co.* v. *Simpson*, 54 Conn. 427:

> "If the first appropriator of his name as "a mark adopt the name simply without any "accompanying word or symbol, by way of "prefix or suffix, another manufacturer of "similar goods, having the same name, may "lawfully impress it upon his goods if * * * "he accompanies it by such distinguish- "ing devices, by way of prefix or suffix, *as "that a consumer who will take note of the "whole will not be misled, and if customers "who will take note of nothing but the same "are misled, and there is subsequent loss to "either, it must be borne as the result of the* "ACT OF TAKING A NAME AS A TRADE-MARK."

THE SUFFIX IS OFFENSIVE AND INARTISTIC.

The dog is supposed to wag the tail (suffix), but in this instance the tail is larger and more conspicuous than the dog. An advertisement on a fence would look like this:

A. A. WATERMAN & CO.
NOT CONNECTED WITH THE L. E. WATERMAN COMPANY.

The name has 13 letters and its suffix 36.

On letter heads, if the name is two inches long,

the suffix must be nearly six. On penholders, the same. Of course, it would be difficult so to mark pen points. They were marked "A. A. Waterman & Co." but there would be scant room to advertise the plaintiff also, by putting the suffix on the defendant's gold pen points.

IDEAL.

The defendant has never questioned the plaintiff's rights to this trade-mark.

The small order from Mr. Saadi of penholders marked "Royal Ideal Pens" was an inadvertence. Less than a gross were sold by Mr. Saadi. Judge HAND refused to give plaintiff any damages. The profits were the merest trifle, and Saadi owes $235 that he has neglected to pay for four years.

Plaintiff admittedly, deliberately infringed one of defendant's patents because it was bargaining to buy out the defendant, but defendant called attention to the infringement in a letter and it was stopped.

Plaintiff was not so polite, but amended its complaint so as to include this insignificant infringement.

Assignability of Trade Names. This is Elementary.

The Circuit Court of Appeals has already decided this point in *this* case (p. 1114).

Plaintiff's right to the trade name of "A. A. Waterman & Co." is derived from the following formal assignment contained in Exhibit A-13, folio p. 1682.

> "VIII. *Arthur A. Waterman hereby "grants* to this said firm of A. A. Waterman "& Co. *the right to use the name of A. A.*

"*Waterman and said firm name of A. A.*
"*Waterman & Co.* in connection with the
"manufacture and sale of fountain and other
"pens and articles *perpetually and exclu-*
"*sively*, except as hereinafter reserved to
"said Waterman to make use of said firm
"name, *and hereby conveys to said firm* all
"the *good will* now existing and attaching
"to the name of A. A. Waterman and A. A.
"Waterman & Co.; *this grant shall not be*
"*modified or diminished* by said Waterman
"ceasing to have an interest in this said
"firm under the terms of this agreement, or
by his death or otherwise."

The agreement also prevents Waterman from using his own name in competition with defendants.

"In *Kidd* v. *Johnson*, 100 U. S. 617, S.
"N. Pike adopted as a trade-mark for his
"whiskey the words 'S. N. Pike's Magnolia
"'Whiskey, Cincinnati, Ohio,' inclosed in a
"circle. He took several partners into the
"business, but retained his individual
"ownership of the plant and trade-mark.
"The firm, Pike being a member, removed
"the business to New York, and Pike *sold*
"*the Cincinnati plant and trade-marks* to
"Mills, Johnson & Co., who entered upon
"the business with that plant, and used the
"same label and trade-mark before used by
"S. N. Pike, and the various firms with
"which he was associated. Pike, dying, his
"surviving partners undertook to use the
"trade-mark above described. The Court
"held that *the purchasers from S. N. Pike*
"*had the* EXCLUSIVE *right to use the trade-*
"*mark*, and enjoined the defendant's use.

"In *Burton* v. *Stratton*, 12 Fed. Rep. "696, two brothers, Stratton, originated a "yeast, and adopted as a trade-mark the "figures of two heads (portraits of one of "them with a twin brother) in an oval set- "ting, with the words, 'Twin Brothers Im- "proved Dry Hop Yeast.' The brothers, the "proprietors, *sold* the business and the "trade-mark to Burton, who carried on the "same business and used the same trade- "marks. Subsequently one of the Strattons "began making yeast, and used the words "or name 'Twin Brothers' Dry Hop Yeast.' "The use of this trade-mark by Stratton "was enjoined, BROWN, *J.*, said that the "cases were numerous in which it had been "held that a *party may lawfully sell*, not "only a trade-mark indicative of origin in "himself, but *even the right to use his own* "*name*, in connection with a particular busi- "ness.

"In *Pepper* v. *Labrot*, 8 Fed. Rep. 29, the "right to use the words 'Old Oscar Pepper,' "was held to pass by an assignment of the "plant and business even as against Pepper "himself, the former proprietor, who had "set up a separate establishment in another "county.

"In *Skinner* v. *Oakes*, 10 Mo. App. 45, "Oakes had originated a business of mak- "ing and selling a candy called 'Oakes' "Candy.' He took a partner, Probasco, and "the firm carried on the same business. *He* "*afterward sold to Probasco* all his interest "in the property, business and trade-marks. "*Probasco's title passed to Skinner.* It was "held that Oakes should be restrained from "using the name 'Oakes' Candy' in a new

"candy business set up by him.

"In *Hoxie* v. *Chaney*, 143 Mass. 592, A. "N., Hoxie had originated and carried on "a business of making and selling soap, and "used for label and trade-mark the phrases "'A. N. Hoxie's Mineral Soap' and 'A. N. "'Hoxie's Pumice Soap.' He took Pegram "into partnership, and afterward *sold to "him* all the plant, business and *good will.* "Pelgram then formed a partnership with "Chaney. It was held that Hoxie, having "sold and been paid for the names and "marks applied to the soap, could not use "them in a new soap business.

"In *Churton* v. *Douglass*, John's Eng. Ch. "174, the complainant and respondent had "carried on a manufacturing business under "the firm name of 'John Douglas & Co.' "Douglas *sold* to Churton *all his interest* in "the plant, business and *good will*, and "afterward formed a new partnership with "another person in the same kind of busi- "ness under the same firm name, 'John "Douglas & Co.' The new firm was re- "strained from using that name."

In *Kennedy* v. *Dr. David Kennedy Corporation*, 32 Misc. 480, 60 N. Y. Supp. 225, the assignment in writing is set forth at page 226, and is much less emphatic than that contained in Exhibit A-13.

Many of the cases litigated the point whether or not an assignment for the benefit of creditors will carry with it the right to use the trade name, but in no instance has that right been denied, when the use was conveyed by a written instrument.

In *Glenn and Hall Manufacturing Co.* v. *Hall*, 61 N. Y. 226, the Court says at page 232:

> "It seems plain that if a banking house "had acquired a name, such as that of Bar- "ing Brothers, *though there were no "partner of the name of Baring,* it would on "general principles of law, and independent "of a statute preventing the use of fictitious "names, have a property in such name, with- "out reference to the particular place where "the business was carried on. Though the "name might be inseparable from the busi- "ness, it would be separable from the prem- "ises; so that the business might, for ex- "ample, be carried on on the opposite side "of the street." (Many citations.)

But why multiply citation? The rule is elementary; and these plaintiffs have the same right to the use of the firm name of A. A. Waterman & Co. as though Mr. Waterman were still personally interested in the profits of the Eastern business and dominating everything as he formerly did (fols. 4199, 4283).

Indeed, under the terms of the co-partnership agreement (Exhibit A-13) he still has an interest, though not a partner's interest.

In *Devlin* v. *Devlin*, 69 N. Y. 213, there is also an elaborate note in the same edition, book 14, page 617 [taken from the Law Journal of December 13, 1890]. From this note we take the following quotation from *Tussaud* v. *Tussaud*, L. R. 44, Chanc. Div. 678. This case refers to an opposition establishment to the world-wide famous Mme. Tussaud's Wax Works in London:

> "It followed, in Mr. Justice Stirling's "opinion, from the decisions in the two "cases of *Burgess* v. *Burgess*, *ubi sup.*, and "*Turton* v. *Turton*, *ubi sup.*, that the de- "fendant Louis Tussaud was at perfect lib-

"erty to open on his own account, and to "carry on in his own name an exhibition "of wax works. *Further, he might take "partners into his business and carry it on "under the name of Louis Tussaud & Co.* "The learned judge, without act ally de- "ciding the point, *also gave it as his opinion "that the defendant* HAVING COMMENCED "BUSINESS ON HIS OWN ACCOUNT, might sell "*it with the benefit of the good will to third "parties, who might continue to carry it on "under the same name, and transfer the "business and good will to a joint-stock "company registered under the same name "as had previously been used in connection "with the business.* But his lordship con- "ceived it to be clear that defendant could "not confer on another person the right to "use the name of 'Tussaud' in connection with a business which the defendant had "*never* carried on, and in which the defend- "ant had no interest whatever; and the "learned judge came to the conclusion that "the defendant could not confer that right "on a company in relation to which he "would stand simply in the position of a "*paid servant.*

"The above expression of opinion by his "lordship bore fruit in a further attempt by "the defendant to make use of his name in "connection with a wax works' exhibition, "he having entered into a partnership to "carry on such an undertaking under the "name of 'Louis Tussaud's Exhibition.' The "plaintiff company again attempted to re- "strain him from so doing, but on this oc- "casion without success, Mr. Justice Stirl- "ing holding that what they sought was

"practically a monopoly of the name of "Tussaud in connection with wax works, "to which they were not by law entitled."

"Sometimes the question raised is, "whether on the sale of a business carried "on under a particular name *the purchaser "has a right to use that name.* Thus, in "*Thynne* v. *Shove*, 59 L. J. Rep. Chanc. 509, "the plaintiff had sold to the defendant his "business premises and the good will of the "business carried on by him there. *The "deed by which the sale was effected con- "tained no express assignment of the right "to use the plaintiff's name.* Mr. Justice "Stirling held (distinguishing *Levy* v. "*Walker*, 10 Chanc. Div. 436) that the *de- "fendant had, by virtue of the assignment "of the* GOOD WILL, *the right to use the plain- "tiff's name* in the business, so as to show "that the business was the one formerly "carried on by him, and not so as to expose "him to any liability by holding him out as "the owner of the business, or as one of "the persons with whom contracts were to "be made.

"Summing up briefly the results of the "various decisions, the following proposi- "tion may, we think, be taken as a correct "statement of the law relating to personal "trade names as it as present stands. A "trader who adopts as his business name "that which is an accurate statement of an "existing state of facts—*e. g.*, his own name "if trading alone, or his own in combina- "tion with those of his partners, or a com- "prehensive description of them—cannot, in "the absence of fraud, be restrained from "so doing." [Law Journal, Dec. 13, 1890.]

The above quotations are taken from the note to 69 N. Y. 213, in Cook's 5-volume edition of Court of Appeals, Book 14, page 617.

The assignability of a trade name by a written assignment is no longer a subject of controversy.

The defendant can maintain with very little grace that a trade mark or trade name is not assignable, for Lewis E. Waterman, the originator of the trade mark "Ideal" is dead, and the principal patents have expired, and the L. E. Waterman Company gets all the interest that it has from an assignment. If L. E. Waterman could assign to the L. E. Waterman Company why could not A. A. Waterman assign his trade name to A. A. Waterman & Co.?

It is scarcely with good grace that the L. E. Waterman Company claim that the present A A. Waterman & Co. is not a privy of the original A. A. Waterman & Co. because of the fact of several prior companies of that name, for an examination of *Waterman* v. *Shipman*, 130 N. Y. 301, indicates that the original Mr. L. E. Waterman, in his assignments to his wife, and his bankruptcy difficulties, resulting in a receivership, had a much more checkered career than A. A. Waterman.

Consideration.

The consideration of the bill of sale (Exhibit A-13) cannot be attacked by an outsider. Besides, it was more than adequate. Mr. Waterman never made that objection. The Chapmans had, 4 years before, put up substantially all the capital ($50,000) and they were the only parties having a large financial interest in the business which at that time (June 12, 1905) had been a failure. It was the Chapmans' money and the Chapman's

brains that have given the business its present success, which seems to be the cause of arousing the plaintiff, at this late day, to its present frantic effort to put them out of business.

The Use by Defendant of the Word "Waterman" Alone."

The Wolfson Advertisement.

We admit now, and have always assumed, and at all times before the beginning of this controversy, have acted upon the following assumptions:

1.—The family name "Waterman" cannot be made the subject of a trade-mark or a trade name;

2.—The defendant had no right to use the name Waterman alone;

3.—The plaintiff had no right to call its pens the "only genuine Waterman pens";

4.—Each party should so designate its products as not to lead the public to believe that they were the products of the other, *i. e.*, use the initials L. E. or A. A.

The defendant maintains that it has never, in any single instance, authorized or ratified the use of any advertisement or statement which did not carefully distinguish the plaintiff's goods from the defendant's goods. Judge Hough, in his opin- adverse to the defendant, says:

> *"I find no proof of use by defendant of "the exact trade mark 'Waterman's.'"*

The Circuit Court of Appeals, in their opinion, says at folio 3346:

> "The evidence also tended to show *some* "use of the word 'Waterman' in connection "with the sale of the goods of the firm of "A. A. Waterman & Co. without the dis- "tinguishing initials."

Judge Coxe does not mention this phase of the question at all.

Both courts had practically the same record before them. Nobody has pointed out, and we defy any man to point out, anything in that record which sustains the Circuit Court of Appeals. There was absolutely no suggestion that the defendant had ever used or authorized the use of the word "Waterman" alone, and the injunction as modified should not, therefore, have restrained the defendant from the use of that word alone, even though it was a matter of no particular moment, for the defendant should not be restrained from doing what it has never done or threatened to do.

The plaintiff alleges very boldly that the defendant ratified the Wolfsohn advertisement found at page 337, because the defendant ultimately allowed **one-half of the advertisement, $3, on the Wolfsohn** account, but an examination of the correspondence shows that this was *not* a ratification, but a repudiation, and it exemplified perfectly the defendant's attitude throughout, on the subject of the use of "Waterman" alone, which subject is, as we understand it, the only important problem unsolved in this litigation. (See Plaintiff's Exhibit 12, pp. 338, 340 of the record.)

On December 14, 1909, Wolfsohn Bros. wrote A. A. Waterman & Co. that they had put an advertisement in two of the preceding Saturday's papers, and stated:

> "We *presume* that it will be agreeable to

"have us charge you with one-half of the "cost of this advertisement."

The advertisement was admittedly without the knowledge or consent of the defendant.

The defendant immediately replied on December 16th (fol. 1014):

"We cannot see that this ad. covers our "pens at all. In advertising our line we "have to be very particular to advertise it "as A. A. Waterman & Co.'s pens, while "your ad. would lead the general public to "infer that it was the Waterman's Ideal "pen. We do not make a practice of paying "for advertising of this kind, and you do not "give us any idea as to what you figure the "proportion of cost for the ad. would be. "If you will let us know what the cost is, "we will *then* let you know if we will pay a "portion of it, *providing* you wish to adver- "tise our line under its proper style."

This letter is an express *repudiation and not a ratification* of this advertisement, and shows the defendant's method of treating this subject.

Wolfsohn Bros. replied next day (fol. 1016):

"We *did not intend* this advertisement to "be misleading nor do we think it is. We "merely advertised Waterman's pens, which "we think your pens are entitled to be called. "However, if you prefer that we should ad- "vertise your goods as the A. A. Waterman "pen we shall be glad to do so."

This shows the utter ignorance of the law by Wolfsohn Bros. The defendant replied the next day:

"Your letter of the 17th inst. received, and "we will be very much pleased to stand half "the cost of the ad. as per your former re- "quest.

"For your own sakes, as well as ours, it "will be necessary for you to advertise the "goods as A. A. Waterman & Co.'s, so that "you may have no trouble with the L. E. "Waterman Co."

The incident closed with Wolfsohn Bros.' letter of December 20th (fol. 1020):

"We note your further remarks regarding "the similarity of the names, and the proper "manner in which to advertise your goods, "*and in the future we will do so.*"

In other words, the defendant expressly repudiated the Wolfsohn advertisement, and finally admitted the trifling credit for advertisement on the express condition that the offence should not be committed again. If this is a ratification, we do not understand what ratification is.

There was a somewhat similar advertisement in New Brunswick by some man of whom the defendant had no knowledge whatever, except that it had sold him a few pens.

There are also two or three similar advertisements. None of these were proved by any competent evidence, and there is no pretence even that the defendant had anything to do with them. A decree on the trial of the issues is not determined by clippings from newspapers that are admitted into the record without any proof whatever. But even if they had been proved competently, they could not have been connected with the defendant which does not even know the parties.

Two Toronto advertisements were introduced in

evidence. The only evidence is that the defendant knew nothing about them. Besides, an examination of the advertisements (pp. 848, *et seq.*) shows that they were perfectly proper. "A. A. Waterman & "Co." was the most prominent display in the advertisement.

No officer of the plaintiff claimed on the stand, and no witness ever said that any officer connected with the defendant had ever directly or indirectly used or authorized the use of the word "Waterman" without the initials "A. A."

Mr. Raymond spent many months in scouring the country from Grand Rapids, Mich., to New Orleans, from New York to Denver, trying to entrap people into selling him an A. A. Waterman & Co. pen and tricking them into giving a receipt for a "Waterman pen." Mr. Watson also went about to some extent.

These are peculiarly L. E. Waterman Co. methods. Mr. Raymond was not able to swear to any fact that indicated that any of these people were acting with the knowledge or authority of the defendant. He simply said that he *believed* the defendant *must* know something about it.

Mr. Raymond never dared to take the testimony of any of these people whom he said had given him a receipt. Mr. Raymond's evidence of other people's statements to him are not, of course, competent evidence.

The defendant has been carried, by its representatives, all over the country, to Seattle, Wash., to different points in Ohio, Indiana, Michigan, Canada, New York, Pennsylvania, Maryland, District of Columbia, and Massachusetts, in taking testimony, substantially all of which is incompetent and irrelevant. In several instances, notice was given to take testimony in certain towns where Mr. Raymond had sworn that they had sold him

an A. A. Waterman & Co. pen as "Waterman" goods, but he did not dare to take the testimony of those persons concerning whom he himself testified, and in no single instance did any man whose testimony *was* taken, swear that the defendant's salesman did not tell him that he represented A. A. Waterman & Co. And Mr. Bartlett, the salesman referred to, swears very positively that he always gave his card (Exhibit, p. 1619), always stated that he represented the Modern Pen Company, sole selling agent for A. A. Waterman & Co.—These were his express instructions, and he carried them out.

There was one case in Allegan, Mich., where a cigar man swore that some unnamed man entered the store, asked if they wanted to buy Waterman pens, was told "no," and left within a minute. This is, of course, not evidence, and is denied by Mr. Bartlett, who is the only agent who was in the vicinity at the time.

Mr. Bartlett, by the way, was a new man who was in defendant's employ only a short time, and whose principal business was selling farm wagons (fol. 3550); he sold fountain pens as a side line. The correspondence between him and the defendant shows how very particularly he was instructed in this matter, and his word must be taken as true, inasmuch as he is not contradicted by any witness. A witness who says he doesn't remember what was said to him when an unnamed salesman came to his store gives no contradicting evidence.

We readily read between the lines that Mr. Raymond had a serious time in his travels and occasionally came near being roughly handled. His methods invited it. A critical examination of Mr. Raymond's testimony, almost every word of which is incompetent, being his statement of unverified statements made by third parties, shows that

neither anything that he says, nor statements of any witness produced by him, gives a scintilla of evidence that this defendant ever, either directly or indirectly, knowingly used or permitted the use of the word "Waterman" disconnected from the initials "A. A."

If any dealer misrepresented a pen, it was not, of course, the fault of the defendant. It was not the salesman's duty, although it was his custom, to tell the dealer to be careful to sell the goods as A. A. Waterman & Co. pens. If the dealer knew what goods he was selling, that was sufficient. It is not to be presumed that he would sell them as the goods of the plaintiff, or of the Sterling, or Parker Companies. Mr. Bartlett expressed it just right at folio 3510: "I always told them never to "buy and sell our pens on the reputation of the L. "E. Waterman Company pens; *if they did they will "starve to death.*"

We ask the Court to examine this record with special care to find, if possible, one scintilla of competent evidence that would have been admitted at a trial before a Judge, that shows that since June 12, 1905, there has ever been one single instance of an advertisement or a sale where this defendant ever authorized or directed or ratified the use of the word "Waterman" alone.

Inasmuch as it is the settled law of the land that a family name, Waterman, cannot be utilized as a trade name, or a trade mark, we understand it to be the law that every person who uses that name rightfully should use with it some designating mark. It is the height of presumption for the plaintiff to go about the country and say that they are selling "THE genuine Waterman pen." One of the defendant's salesmen made a correct analysis when he said, "There is no such thing as THE "genuine Waterman pen." There is such a thing

as A genuine Waterman pen, and that applies to the product of either plaintiff or defendant.

We have searched this record diligently and can find no case where defendant's employes ever called their pens "Waterman" alone. Even Mr. Raymond, who, with his wife, made a wide tour of the country, bulldozing dealers, telling them that there was no such firm as A. A. Waterman & Co. (fol.), and trying to trick them into selling him an A. A. Waterman & Co. pen and giving a receipt—as would easily be done, with an abbreviated title—even he admits that he has never found that any such sale was ever with the knowledge or consent of the defendant.

The defendant's salesmen were produced and swore to their instructions, and to their universal habit of representing themselves as with A. A. Waterman & Co. We have no hesitancy in saying that any incident to the contrary has been shown by incompetent evidence—the unverified statement of some third party as arising from the fact that some one of plaintiff's representatives had placed some false information with the dealer.

The mere fact that the L. E. Waterman Company circulated throughout the United States and Canada their Cleveland decree, fraudulently obtained and so designated later by the Court, and the further fact that they printed and circulated a garbled extract of the injunction in this case, as modified by the Circuit Court of Appeals, leaving out all that part of the order which indicated that the defendant had a right to use the name A. A. Waterman & Co.; together with the uncontradicted evidence of their having written letters and sworn to a complaint in Italy to the effect that there was no such firm as A. A. Waterman & Co., indicate the contemptible and corrupt business methods of the plaintiff that should not be protected by the Court.

After the Circuit Court of Appeals had modified Judge Hough's order, the plaintiff published a deceiving "extract" therefrom. (See circular at p. 1617, which omits from the order the two first pages found at pp. 1118 and 1119.)

There is no proof, and Judge HAND does not hold, that defendant ever sold its pens as "Waterman" pens. The opinion states:

> "The public means by the 'Waterman' "pen the complainant's pen; indeed, so the "defendant concedes, *being punctilious to "avoid that name without its prefix.*"

The Court has no right to enjoin defendant from doing what it has never done.

The court will disregard differentials—like the one gross Saadi penholders.

The court will disregard ciphers—like the defendant's use of "Waterman" alone.

Enjoining the use of "Ideal" and "Waterman" was therefore an error, although it did not hurt the defendant, because it never used either intentionally.

The defendant is entitled to use its own name, unsuffixed, and the suffix should be reversed.

Plaintiff could have had all it was entitled to —the preliminary injunction made permanent— under defendant's three written offers. The trial and the great labor and expense of this padded record should have been avoided. Judge Hough suggested that the issues would all be determined by the first appeal. Defendant would have consented to abide by the first modification of Judge Hough's interlocutory order, although it was error, just to avoid litigation. Now, the complaint should be dismissed, and the plaintiff should be made to pay all the costs.

Unfair Competition.

A critical examination of this complaint will show that it is really drawn in "unfair competi-"tion" rather than for violation of trade mark. The writer did not think that it stated a cause of action at all; but Judge Lacombe held otherwise on demurrer, without opinion.

We do not yet see where there is any allegation of fact to indicate a cause of action for "unfair "competition." While a few sentences of the bill of complaint might squint in that direction, it will be found that they are merely conclusions of law, and that, stripped of all its verbiage, there is nothing complained of in the bill except the bare fact that the Modern Pen Company sells pens manufactured by A. A. Waterman & Co. and stamped with that name, which firm to-day contains no member by the name of Waterman.

The complaint will be searched in vain for any allegation of fact that the defendant has, at any time, used the trade name "A. A. Waterman & Co." except in a straightforward, legitimate way.

There is no allegation of fact that shows that they have ever stamped or printed their trade name so as to resemble any particular method employed by the complainant in stamping or printing its own name or alleged trade marks.

Moreover, nothing contained in any affidavit on the various motions has indicated any complaint on the part of the L. E. Waterman Company except the bare fact that this defendant or A. A. Waterman & Co. have used the word "Waterman" in combination with the initials "A. A."

If defendant has the right to use its trade name, there can be no unfair competition without the use of some "mark or device" or some imitation or affirmative act that not only deceives the public,

but is *intended* to deceive the public and to "in-"duce them to believe that the goods of the one are "the goods of the other."

Plaintiff's Trade Marks (Trade Names).

The plaintiff relies on three trade marks, viz., "Waterman's" (not "Waterman") and "Waterman's Ideal Fountain Pen, N. Y.," and "Ideal." *These trade marks were all* REGISTERED *of recent date, long subsequent to the decree of September* 3, 1898 (pp. 1821-40). They were used much earlier by L. E. Waterman and by him ASSIGNED to the defendant in 1887.

Of course a trade mark gives no new rights. It is merely *prima facie* evidence of what already existed. If the L. E. Waterman Company had any rights to these trade marks when they were registered, the registry gave them no additional right. It is merely a matter of proof, not of fact. Although Watson & Raymond in their first letter to the Standard Drug Company (Exhibit A-17, p. 1682) complained of the use of "Globe Special" as a violation of their trade mark, "the representation of a globe" (fol. 5045), and from reading that letter one would think that that was the only offense committed by the Standard Drug Company, nevertheless, that trade mark drops out of the controversy after that letter and never appears again.

> "Nobody questions the right to the word "'Ideal' or to the words 'Waterman's Ideal "'Fountain Pens.' The word 'Ideal' and "nothing else is the valid part of their trade "mark." (Quoted from this defendant's brief of Appellate Division before the beginning of this action.)

When it comes to the WORD "Waterman" or "Waterman's" with its different spellings and connections, there can be no doubt that the L. E. Waterman Company is not entitled to that trade mark or trade name, as such.

The principal case on this point is *Meneely* v. *Meneely*, 62 N. Y. 428, the opinion of which is a most excellent brief, and the elaborate notes at the close of this case, in the 5-volume edition of Brown & Cook (book 13) is everything to be desired by way of a brief, and this opinion and the said notes are respectfully referred to as final on this subject. The gist of the opinion is found in the head note:

> "Every man has the absolute right to use "his own name in his own business, even "though he may thereby interfere with and "injure the business of another bearing the "same name; *provided he does not resort to "any artifice to mislead the public or pro- "duce the impression that the establish- "ments are identical.*"

We quote from the opinion in 62 N. Y., at page 432:

> "*Where the only confusion created is that "which results from the similarity of the "names the* COURTS WILL NOT INTERFERE. *A "person cannot make a trade mark of his own "name, and thus obtain a monopoly of it "which will debar all other persons of the "same name from using their own names in "their own business.*"

In 62 N. Y. 428, the celebrated bell foundry in Troy was known as the Meneely Bell Foundry, and its bells were famous. They were generally

known as "Meneely bells" and that became "a "designation or trade mark of great celebrity and "value to the plaintiffs." After many years, the defendant entered into a partnership and began the manufacture of bells in Troy, stamping them "Meneely & Kimberly, Troy, N. Y."

> "The referee found that the defendants, "by the use of the name of 'Meneely,' *ex-* "*pected and intended* to derive a profit and "advantage by reason of the good reputa- "tion and celebrity in bell founding given "to that name throughout the country by "the said Andrew Meneely and the plain- "tiffs. That the use of the name 'Meneely' "by the defendants, as hereinbefore set "forth, is calculated to, and does, mislead "persons who are not personally acquaint- "ed with the plaintiffs and defendants, nor "with the respective locations of Troy and "West Troy, and the difference between "those places, into the belief that the de- "fendants are the proprietors of the "'Meneely bell foundry' carried on by t[illegible] "plaintiffs; and such use of the name of "Meneely by the defendants is injurious to "the plaintiffs' business of bell founding. "Judgment for injunction against using the "name 'Meneely' in the bell business."

Nevertheless, the General Term and the Court of Appeals reversed, stating:

> "In the present case the injunction con- "sists wholly of a prohibition of the use of "the name 'Meneely' in any way. *It is in* "*conflict with all the cases upon the sub-* "*ject.* If the evidence showed any attempt "by the defendants, by means of catalogues

> "or by any other contrivance, to induce the "belief that the firm of Meneely & Kim- "berly was the successor of Andrew "Meneely, or the managers of the plaintiff's "bell foundry, those acts might have been "restrained; but no such injunction was "granted or asked for. The use of the name "'Meneely' in any way, was all that was "enjoined, and that was the very thing "which should not have been enjoined."

A note of more than two pages in said volume 13 amplifies the cases referred to in the opinion, and collects the cases from the earliest, *Sykes* v. *Sukes, 3 B. & Cr.*, 541 A. D. 1841, down to the present, leaving no question whatsoever as to the law. This defendant said in his brief in the State Court before the beginning of this action:

> "No one will question the right of the "L. E. Waterman Company to the exclusive "use of the word 'Ideal,' as that is their "trade mark and has been sustained by the "Court of Appeals in *Waterman* v. *Ship- "man*, 130 N. Y. 301, but the word 'Ideal' "is the only word that they have an ex- "clusive right to. They have not the exclu- "sive right to the word 'fountain,' nor 'pen,' "nor 'Waterman.' The Court says at page "312:
>
> "*'Upon the facts found the plaintiffs "'were entitled to an injunction restraining "'the defendant from using the word Ideal "'as applied to fountain pens,'* and that "was the only word to which the L. E. Wa- "terman Co. was entitled under 130 N. Y. "301" (quotation from App. Div. brief, ar- gued May 6th, 1910).

No case can be found where the exclusive use of "Waterman" or "Waterman's" has been confirmed to the L. E. Waterman Co., and the fact that defendant has recently obtained a trade mark for the word "Waterman's" does not give them any greater rights than they had before.

Immaterial, Irrelevant and Incompetent.

We venture to say that 90% of all of the plaintiff's evidence is either irrelevant or incompetent. If this case had been tried before a judge, with power to rule out improper evidence, it would doubtless have been tried in two days.

No more striking example of evidence, both irrelevant and incompetent, can be found than in the testimony of Richard H. Waldo (page 286 *et seq.*). He was the *New York* manager of "Good Housekeeping," a magazine of the large circulation of 250,000 copies. He obtained *copies* of certain letters, received by the Puzzle Editor in *Springfield*, and copies of these copies were submitted in evidence, and take up 34 pages of the record (pp. 296-329 inclusive). This evidence is really humorous, not to say ridiculous. The magazine publishes each month a picture puzzle (p. 295-b) wherein a part of the advertisements of six advertisers in the current issue are set forth. To find these and solve the puzzle is, of course, the simplest thing possible. It requires no ingenuity whatever. A part of the plaintiff's advertisement (found at page 295-a) is found on the boy's cap in the picture, and is part of the bottom of the plaintiff's advertisements on the opposite page, being parts of the words "best dealers" and "Company." A prize of $5, with certain other prizes (fol. 873) valued at $2 each, apparently

ten in number, were offered for the best letters relating to these advertisers. The request to say something nice about the articles advertised is found at folio 885. By thus offering prizes for nice things said about the advertisers they got laudatory letters.

With 250,000 subscribers to Good Housekeeping, there were probably a million readers, and among that million of readers 205 made reply, of whom there were 189 females, 7 males, and 9 of doubtful sex, owing to the signature being initials. The letters indicate that they are very largely from school girls, whose recommendations are, of course, valuable. One, found at 899, contains the following:

> "It is the best made pen and the firm the "most reliable. *Each year a new pen of* "*newer style* is given in return for an old "pen—and nearly half cost for allowance is "made for old pen if not broken—now what "other firm would be as generous?"

Overlooking the falsity of these statements, we would ask what other pen would need a renewal each year? Besides, this eulogist would have to go back 30 years to find any substantially new style.

The following imitation of Browning (with apologies) indicates the inspiration of these letters (fol. 939):

> "I am using the Waterman pen,
> "It's the best on the market, and then,
> "It's just the right size,
> "*And will help me get the prize*,
> "Or at least to be one of the ten."

This defendant does not have to offer a prize in order to get letters of commendation. A few very recent ones were selected and put in the rec-

ord, not because it was competent evidence, but because the plaintiff had put in so much similar incompetent evidence. These are found at pages .....

A few recent letters of denunciation of the plaintiff's pens were also included at pages ..... These letters were taken from certain alphabetical letter files, and if the whole alphabet were searched and we had gone through the files of an earlier period, we could have produced as enormous a record as has the plaintiff.

In all of the writer's experience, he has never known a matter of this character where so little wheat was concealed in so much chaff; where a few undisputed, relevant facts were smothered in hundreds of pages of matter that is not only irrelevant, but incompetent—conclusions of law, hearsay and advertisements, statements and acts of third parties, without any attempt to connect them with the defendant.

There is bound to be some confusion when two firms legitimately do business under their own names. This relates to lawyers as well as manufacturers. As a matter of fact, the confusion is slight—scarcely noticeable. The fact that during the months since the Appellate Division brief was served, plaintiff has not been able to find one single instance where this defendant has ever "sought to induce the public to believe that its "product was the product of the plaintiff" (*Westcott Chuck Co.* v. *Oneida Chuck Co.*, N. Y. Court of Appeals, New York Law Journal, October 8, 1910) emphasizes the fact that the defendant has never, in any one single instance, during the years of the present management at least, done any act to increase this confusion, or to induce the public to think that its superior goods were the same as the inferior goods manufactured by plaintiff.

Indeed the spirit shown in the correspondence with the Standard Drug Company and in relation to the Wolfson advertisement shows how careful the defendant has been at all times to have the public differentiate between the two firms.

There is not one scintilla of competent evidence that there is any confusion other than that arising from the mere fact that the plaintiff is the L. E. Waterman Company and that the defendant is A. A. Waterman & Co.; and such confusion is slight, and there is no remedy therefor, as each has a right to his own name.

"Oceans" of testimony is submitted, of salesmen and managers of local stores—none of them experts in the manufacture of pens—to show that certain people have confused the two concerns, and that certain pens manufactured by the defendant had a broken cap or were otherwise defective; also that certain dealers had advertised the defendant's wares as "Waterman's pens." Nowhere will any evidence be found to connect defendant with any such advertisement, and defendant is not responsible for the wilful or ignorant acts of strangers.

From page 956 to page 1107—142 pages—are taken up with addresses which are deemed to be erroneous. What this is supposed to prove we do not know. Eight of these are exactly right, and directed to the "L. E. Waterman Co., 173 Broad-"way, New York City," or "New York."

Nearly 100 of these addresses vary only in the addition of "pen," as "L. E. Waterman *Pen* Com-"pany," or "L. E. Waterman *Fountain Pen* Com-"pany," or in some initial, "L. E. Waterman," "L. "A. Waterman Co.," "J. E. Waterman & Co." "L. "E. Waterman & Co.," etc., etc., and in one instance, "L. E. Wyman & Co." In these 142 pages of names there are only two addresses that may be said to be confused. These are where "A. A. Waterman & "Co." are addressed at 173 Broadway.

What purpose this mass of addresses was intended to serve we cannot conceive. They show carelessness, not confusion.

Plaintiff's Methods of Business.

All the testimony and the correspondence will indicate that the defendant does business as gentlemen, and according to the strictest rules of business propriety. In fact, Mr. Geyer's remarkable success as a manager is owing very largely, we think, to his motto: "The customer can do no wrong," and his attempt to satisfy his every whim in the most polite way.

On the contrary, the business methods of the plaintiff are everything to be condemned. For instance, at page 1709 the plaintiff wrote to Mr. Hammell a letter wherein it says that "there is no such concern in New York City" (as A. A. Waterman & Co.). When the plaintiff wrote that letter, the writer of it knew that it was absolutely false (See also fol. 4438).

On page 1717, Exhibit A-44, is a translation of the complaint in an action against the defendant's representative in Italy. It contains in two places (fols. 5151 and 5153) the bare-faced falsehood that there is no such firm as A. A. Waterman & Co. Mr. F. D. Waterman knew that was a deliberate falsehood when he swore to it, and, on the strength of this brazen perjury, plaintiff has obtained certain preliminary advantage in that litigation. This copy (Italian complaint) appeared in the injunction proceedings and has never been denied.

The evidence is scattered all through the plaintiff's and defendant's case, showing that the plaintiff refuses to repair pens of other makes than its own, and, on that account, one of the defendant's experts (Miss Ayer, folios 4422, 4429). swore

that although the defendant's pens were superior to all others, and she sold them to her personal friends and customers in Boston, if a customer was about to travel abroad, she sold him an L. E. Waterman Co. pen because he could then get it repaired, because the L. E. Watermen pens were more generally sold on the Continent, and they were very nasty about repairing any pens other than their own. One expert indicated very plainly (fol. 4422) that she had known of the L. E. Waterman Company people deliberately injuring a rival's pen when presented for repair.

See fols. 4311-12, 4316-17, 4422, 4430, 4422, 4429-30, 4360.)

Plaintiff's attempted purchase of the Defendant's trade name "A. A. Waterman & Co."

It will be remembered that in 1898 the plaintiff obtained a decree against Arthur A. Waterman and Edward L. Gibson, co-partners, restraining them from doing business as "The A. A. Waterman "Pen *Company*," but expressly permitting them to do business as "A. A. Waterman & Co."

From 1898, for ten years, up to March, 1908, that decree was acquiesced in. It is now believed to have been a "consent" decree. Each side was satisfied, and there was no appeal. It bound, and still binds, all the parties. Neither side possessed anything distinctive except the name. Each bought his parts "from everywhere" and assembled them. Neither name represented the same product two months in succession.

By 1908 conditions had changed. The partnership of A. A. Waterman & Co., composed of Waterman, Frazer and Geyer, lost money—the Chapmans' money—from July, 1901, to June, 1905—and

this plaintiff made no complaint. Mr. Frazer was the manager and was a complete failure. Arthur A. Waterman, as traveling salesman, sold most of the goods. No wonder he wanted to get out of his earlier contracts and go into business for himself in the Western District. The common stock (the only voting stock) of the Frazer & Geyer Company was pooled so that it could not be voted except by the joint action of Frazer and Mr. Chapman, and Mr. Frazer had therefore the complete control of the company, and could not be ousted. His stock holdings were small, but his control was absolute; they could not get rid of him. He called for more money. The Chapmans owned a large majority of the stock of the Frazer & Geyer Company, and had advanced $30,000 on chattel mortgage, and were not willing to put more money into a sinking ship with Mr. Frazer at the helm.

The reorganization of 1905 occurred, and Mr. Martling was made manager. He was not a marked success. Mr. Geyer, who had always been looked upon as a mere bookkeeper, and who had never had Mr. Chapman's confidence, was put in as temporary manager until somebody else could be found. He proved to be marvelously successful, and under his regime the defendant has made money, and has not only extended its business, but every detail of manufacture has been attended to with such skill, and such new patents obtained and conveniences introduced, that the defendant to-day has the best equipped factory to be found and produces a pen of the best pattern and of the very finest quality that has ever been put on the market in any country by any concern.

About three years after the organization of the defendant, negotiations were entered into by Mr. Watson on behalf of this plaintiff *and on behalf of no one else*, for the purchase of all the assets,

patents, trade names, etc., owned or controlled by the defendant (fols. 4776-77, 4783, 4786). These negotiations continued from 1907 to 1909. They were broken off for a time, and the thread of the negotiations was several times taken up. The letters relating to this will be found in Defendant's Exhibits A-45-54 (pp. 1723-34), and in the testimony of Mr. Watson, Mr. Geyer, Mr. Spear and Mr. Williams. The amount of the purchase price was several times agreed upon. It was changed on account of the defendant having obtained new machinery later in the negotiations. The only apparent difference between the parties was the time within which the defendant was to dispose of the pen points on hand bearing the imprint "A. A. "Waterman & Co." The real reason why the matter fell through is indicated by the fact that the plaintiff endeavored to get the defendant to take, not cash, but notes, certificates of Aiken-Lambert Company and stock of A. A. Weeks-Hoskins Co., a concern that went into bankruptcy almost immediately thereafter. It is evident that the plaintiff did not have "real" money to complete the purchase (fol. 2245).

This attempted purchase of the trade name of "A. A. Waterman & Co." is relevant to this issue only to show that the plaintiff recognized the defendant's right to that name after Arthur A. Waterman had ceased to be a member of the firm, and during several years attempted to buy it. Like the decree of 1898, these negotiations are an estoppel. Besides, Mr. Watson's two draft agreements allege, affirmatively, that A. A. Waterman & Co. have a right to their name.

Mr. Watson tried to avoid the effect of these negotiations by saying that he did not represent the L. E. Waterman Company, but represented either the Aiken-Lambert Company or the Cana-

dian corporation of L. E. Waterman Company, Limited. After much quibbling we have learned from Mr. Ferris and from Mr. Kastner, manager of the Canadian company, that the L. E. Waterman Company owns nearly all of the other companies. The officers, directors and stockholders are substantially the same. There are no different officers and directors excepting dummies, so that it makes no particular difference for whom Mr. Watson was conducting these negotiations. Mr. Ferris swears that they did not want any machinery for the Canadian company. Mr. Watson says that it was the Canadian company for which the negotiations for machinery were had.

At best, F. D. Waterman, a nephew of the original Waterman and the only Waterman who has any substantial influence in the corporation to-day, was openly conducting these negotiations, and no one on the part of the defendant or their attorneys, had any suspicion that they were negotiating with anybody but the L. E. Waterman Company. (See testimony of Mr. Spear and Mr. Williams.)

In December, 1907, Mr. Watson prepared a draft proposed agreement. A few months later, Mr. Chapman wrote for a copy, and received another draft. These two agreements are substantially alike. Each is dated "December , 1907," but "the parties of the second" part are different: in one, Exhibit A-58 (p. 1724) the parties of the first part are "The Modern Pen Company, a corporation "under the laws of West Virginia, Frazer & Geyer "Company, a corporation under the laws of the "State of New York, *and A. A. Waterman & Co., a "co-partnership, composed of Isaac E. Chapman "and William L. Chapman,*" and the party of the second part is the "Aiken-Lambert Company, a "corporation duly organized and now existing un-

"der the laws of the State of New York." In the other contract (Exhibit A-59, p. 1727), the party of the second part is "The Modern Pen Company, "a corporation incorporated and organized under "the laws of the *State of New York,*" a dummy corporation that actually had not yet been incorporated, but was to have been incorporated by the plaintiff in order to take over the defendant's plant, good will, patents, trade names, etc. It was to be one more *alias* under which plaintiff was to do business.

The principal features of these draft contracts are that they were prepared by Mr. Watson, the attorney for the L. E. Waterman Co., and the following clauses are positive admissions that the defendant was entitled to the trade name of "A. A. "Waterman & Co."; that the plaintiff admitted it, and wanted to buy it.

We take the following extracts from Exhibit A-58 (p. 1724) which was to convey

> "Also the name and good will of the said "Modern Pen Company, of said Frazer & "Geyer Company and of the *firm name and "good will* of said A. A. Waterman & Co., "and all trade marks and *trade names* of the "parties of the first part, or either or any of "them, together with *the exclusive right to "use* the said corporate names, *said firm "name* said trade marks and *said trade "names*, or either or all of them to the full "extent as the said parties of the first part, "or either or any of them, could or might use "the same had this grant, sale and assign- "ment not been made * * *.
>
> "*And the parties of the first part hereby "covenant and agree* with the said party of "the second part *to warrant and defend* the

"said described property, trade marks and "*trade names* hereby sold unto the said party "of the second part, its successors and as- "signs, against all and every person, firm, "corporation or association whatsoever."

In Exhibit A-59 (p. 1727), Mr. Watson proposed to convey to his dummy corporation, to be called the Modern Pen Company (of New York), the following:

"Also the name and good will of the said "Modern Pen Company, of Frazer & Geyer "Company, and of the *firm name* and good "will *of said A. A. Waterman & Co.* and all "trade marks and *trade names* of the parties "of the first part, or either or any of them, "together with the *exclusive right* to use the "said corporate names, *said firm name*, said "trade marks and *said trade names*, or either "or all of them, to the full extent as the said "parties of the first part, or either or any "of them could or might use the same had "this grant, sale and assignment not been "made * * *.

"To have and to hold the same unto the "said party of the second part, its successors "and assigns forever, and *the parties of the "first part hereby covenant and agree* to and "with the said party of the second part THAT "THEY ARE THE OWNERS OF THE ABOVE DE- "SCRIBED property, trade marks and TRADE "NAMES and have good right to sell the same "and that they and each of them will war- "rant and defend the same free and clear of "all claims, liens or encumbrances of every "kind whatsoever, unto the said party of the "second part, its successors and assigns, and

"against all and every person, firm, corpora-
"tion or association whatsoever. * * *

"And the said parties of the first part
"covenant and warrant that no licenses or
"shop rights to operate or manufacture un-
"der said patents or any of them, have been
"given or granted by the parties of the first
"part, or either of them, to any person,
"persons, firm, corporation or association
"whatsoever except as contained in a certain
"contract made with one Arthur A. Water-
"man and dated , a
"copy of which contract is attached hereto,
"referred to and made a part hereof."

(This shows plaintiff's knowledge of the defendant's various agreements with A. A. Waterman, who was then hostile to defendants, because he had established himself in the Western territory without taking over and paying for (as required by Exhibit A-13) the show cases (worth several thousand dollars) scattered over his territory.)

The draft contracts are admissions against interest of the highest character.

Laches and Acquiescence.

Laches have a powerful moral and legal influence in equity litigation of this character, and the plaintiff has been guilty of *laches* of the worst kind.

Defendant maintains that the decree of September 3, 1898 (fol. 4829), being final in its character, not appealed from, and acquiesced in, became the law as to the plaintiff and A. A. Waterman, and his privies. That decree was for the benefit of A. A. Waterman, individually, as well as for the firm of A. A. Waterman & Co., as then constituted. It

created a legal status. It is not disputed that from that day to this, A. A. Waterman had been continually doing business, stamping his pens A. A. Waterman or A. A. Waterman & Co. After July 1, 1906, he continued so to do in the Western Division of North America. Mr. A. A. Waterman's assignee is as much his privy, and takes over his legal status, as did the L. E. Waterman Company become the privy of L. E. Waterman and take over his rights to trade names by his assignment to the plaintiff.

Plaintiff and defendant are each a privy by assignment, and whatever rights A. A. Waterman had under the decree of September 3, 1898, this defendant now has.

When the Messrs. Chapman put their money into the enterprise in 1901, they did it on the faith of the decree of September 3, 1898, in that for three years the plaintiff had not then complained.

Between 1901 and June 12, 1905, while the enterprise was losing nearly all of the capital put into it, plaintiff remained quiet and made no sign of disapproval.

When, in 1905, Mr. Frazer became bankrupt, the business was reorganized under a new management, and more capital put into it by the Messrs. Chapman, Mr. Frazer became the enemy of the new management and the friend of the L. E. Waterman Company, which knew of everything that was happening and even produced copies of the partnership agreements. Still they remained acquiescent. A year later, Mr. A. A. Waterman elected to take the Western Division of the American Continent and started into business for himself.

The present management continued from July 1, 1906, to November, 1909, without interference from the plaintiff, and during this time has spent hundreds of thousands of dollars in advertising;

have extended their trade throughout the world, and have become prosperous by reason of the fact of the marked superiority of their goods, every part of which is manufactured by itself out of the best material procurable, by the most skilful workmen that high wages can procure.

Still the plaintiff remained quiet.

During the years 1906, 1907 and 1908, plaintiff tried to buy out the trade name of A. A. Waterman & Co. and offered $10,000 for the trade name alone. Mr. Watson was the principal representative of the plaintiff. The correspondence speaks for itself. Mr. Watson submitted two separate draft agreements whereby the business was to be bought through dummy corporations to be organized, one of which was to bear the name of Modern Pen Company to be organized under the laws of New York—the defendant, Modern Pen Co. is organized under the laws of West Virginia. Those draft agreements expressly alleged the ownership of the trade name of A. A. Waterman & Co. in the present firm (Exhibit A-45—A-54).

It was found that L. E. Waterman Company was infringing one of the defendant's patents, and when this was called to their attention, they excused themselves on the express ground that they expected to control the patent and that therefore had begun the manufacture of pens under it (Exhibit A-50).

In short, during twelve years, the plaintiff not only recognized the defendant's rights by acquiescence, but in writing, and by affirmative acts.

We use the word "defendant" in a general sense to mean not only the Modern Pen Company, but A. A. Waterman & Co. and their privies.

All through these twelve years the defendant's business has been built up under the trade name of A. A. Waterman & Co., which name has become

more and more valuable as the years rolled by and the plaintiff continued to acquiesce in the decree of September 3, 1898.

The Cleveland and Saadi Litigation.

The most flagrant violation of business proprieties, if not legal ethics, is found in the litigation in Cleveland. The plaintiff had acquiesced in the decree of 1898. During three years (1907, '08, '09) it had sought to purchase the assets and good will of the defendant together with the *trade name* "A. "A. Waterman & Co.," but these negotiations had fallen through, evidently because the plaintiff had nothing with which to pay except the notes of a corporation that went into bankruptcy very shortly.

The Standard Drug Company, of Cleveland, was a total stranger to the defendant. It seems to have had two stores where fountain pens were sold. In one of them there was some evidence that a clerk had sold a "Parker" pen and called it an "Ideal." For this reason, they evidently had a technical cause of action against the Standard Drug Company.

In another of their stores a Mr. S. Teller rented a show case. He was nothing but a tenant. He sold all sorts of pens—those of plaintiff and defendant and other makes. There was some advertisement in the window wherein plaintiff claimed that "Waterman" pens were offered for sale without any distinguishing initials. This is denied (fol. 5061). Inasmuch as Mr. Teller sold goods of both plaintiff and defendant, and as he is comparatively an ignorant man as indicated by his letters, he undoubtedly thought that his advertisements were all right, no matter what they were.

The correspondence (Defendant's Exhibits A-17

to A-30, pp. 1681-1706) tells the whole story. First Watson & Raymond (Exhibit A-17, p. 1682, November 11) wrote a letter to the Standard Drug Company stating that they were beginning suit and speaking of no infringement excepting that "representation of a globe on fountain pens is a "duly registered trade mark of the L. E. Water-"man Company, and we find that you are adver-"tising fountain pens under the name of 'Globe "'special.' We have advised our clients that *this* "constitutes *unfair competition* in trade, and we "notify you to forthwith discontinue the use of "same."

This is the last that we hear of the "Globe spe-"cial." Mr. Teller immediately wrote to the defendant, telling of the suit; considerable correspondence followed, and the defendant wrote the Standard Drug Company a characteristic letter on November 18, 1909 (which see, p. 1684), wherein they told them that if they had been guilty of any of the offenses indicated in the complaint "You, "of course, have been doing what you have no right "to do, and there is nothing that we can do to "help you in this matter.

"If, however, you have been selling the goods "made by us and *distinctly stating or advertising* "*that they are pens made by A. A. Waterman &* "*Co.*, we will do the right thing in protecting you "and ourselves against unjust interference.

"Please give us the necessary information in re-"gard to the manner in which the goods have been "advertised and sold, and we will then take the "matter up further with you."

The correspondence dropped suddenly on November 23, until, on December 1, the attorney for the Standard Drug Company wrote a letter (Exhibit A-33, p. 1689) which sets forth the signs in the Standard Drug Company window, all of which

were perfectly proper. The letter concludes: "The "Drug Company feels that it is not the party to "be sued even if any one should be, and *don't like* "*to assume the* BURDEN of defending unless proper- "ly indemnified."

The defendant wrote the attorney on December 2, giving the information required, and there the matter dropped again, until December 15th, when Mr. Teller wrote Mr. Geyer that a judgment had been entered restraining the use of the name "A. "A. Waterman & Co.," and he demanded that all of defendant's pens should be taken back.

The complaint in that action is Exhibit A-28, page 1694; it *contains no reference whatever to* A. A. Waterman & Co.; is absolutely innocuous on its face, and A. A. Waterman & Co. would not have been permitted to intervene and defend if they had desired to do so, because the complaint has no reference whatever to them.

The final decree was entered by *consent* (fol. 5111), without the filing of an answer or an affidavit of any sort, and was evidently collusive between the Standard Drug Company and the L. E. Waterman Company. The injunction was very much broader than the relief prayed for in the complaint, and was strictly illegal and unprofessional. It enjoined the Standard Drug Company from selling goods marked "A. A. Waterman & "Co."

Of course, this "consent" decree bound nobody but the plaintiff and the Standard Drug Company, the defendant who had consented to it, *but*

This plaintiff caused this decree to be printed, with a big red seal, and attached to it a notice (Exhibit A-30, p. 1706) following:

To all whom it may concern:

Notice is hereby given, that *infringement* of our trade marks and trade names is *enjoined by the*

United States Circuit Court AS APPEARS *from the injunction, a copy of which is hereby served upon you.* All persons found indulging in unfair trade practices in violation of the terms of the injunction will be vigorously proceeded against.

L. E. WATERMAN CO.,
173 Broadway,
New York City.

WATSON & RAYMOND, *Attorneys,*
10 Wall Street,
New York City.

This printed decree and notice were scattered broadcast throughout the United States and Canada (see Ex. A-35, fol. 5123), and utilized by the plaintiff's salesmen who bulldozed innocent laymen in every instance possible, who, on reading the notice and the decree would, naturally, infer that this was a solemn judgment of a court that was binding upon everybody.

It requires reference to no printed statute, nor to any moral code, to teach any man of conscience that this was a contemptible, illegal and immoral proceeding, stabbing an adversary in the back.

It is very probable that the only collusion between the Standard Drug Company and the plaintiff was the fact that they were relieved from costs and the irritation of litigation. They cared nothing for the Modern Pen Company, which was a stranger to them, and they cared less for Mr. Teller, who was a mere tenant of whom, as subsequent events have shown, they were anxious to get rid.

However, later, and after the closing of the testimony in this case, the plaintiff proceeded against the Standard Drug Company for contempt, alleging that Mr. Teller was the agent, not the tenant, of the Standard Drug Company, and that he had

continued to sell goods marked "A. A. Waterman "& Co." The motion came up before Judge Killets, who rendered an opinion on May 6, 1911, wherein he refers to the order of the United States Circuit Court of Appeals in this litigation, reversing the order of Judge Hough, stating:

> "So that by reason of the review it has "been adjudicated that the complainant is "not entitled to the injunction as expressed "in the third paragraph. No review was "had of this *consent* order in this Circuit. "* * * The facts do not connect the "Standard Drug Company with the transac-"tions, unless it may be said that they are "responsible for the acts of Sol. Teller, their "tenant. In fact, there is at most here noth-"ing more than a technical contempt, or a "technical violation of an order *which it is "quite plain the Court would not now grant "under the same circumstances and which "we are very clear the Court granting it, "would not have granted*, HAD IT BEEN CON-"TESTED.
>
> "The application for a rule to show cause "is dismissed at the cost of the complain-"ant."

The plaintiff's motion to reargue was denied.

The plaintiff, emboldened by its success in its victory in obtaining the original Cleveland decree, immediately brought another similar action against John Saadi, of Washington, who had been advertising "The Royal Ideal Pen," and who also sold A. A. Waterman & Co. pens. The complaint in that action contained no reference whatever to A. A. Waterman or A. A. Waterman & Co. and, like the Cleveland complaint, was harmless on its face. This complaint, as was the Cleveland com-

plaint, was submitted to the writer, who advised the defendant that there was nothing in either complaint that referred to them, and that they could not defend or intervene, stating to them that no decree could be broader than the bill of complaint, and that there was nothing in the prayer for relief that would injure them.

In taking testimony in the Saadi case, it appeared that he had several stores and was doing business as "The Royal Ideal Pen Company, "Brooklyn, N. Y. Sales office, No. 602 9th Street, "N. W., Washington, D. C. Reg. in U. S. Patent "Office, No. 14975." (Defendant's Exhibit C, p. 1612.)

This Exhibit C was brought by Mr. Saadi to Mr. Geyer with the request that he should make some penholders for him of cheap quality that should bear the imprint "The Royal Ideal Pen," stating that he had a registered trade mark for that name. (This seems to have been error, as the registrations were for labels, not trade marks.)

Mr. Geyer, not being a lawyer and giving the matter no particular thought, made up a number of penholders bearing this imprint. The exact number, their cost and the profit of $21.60 are indicated in Exhibit A-16, p. 1680.

As a matter of fact, no more than *one gross* were ever sold (fol. 361), because as soon as Mr. Saadi was attacked, he sent back the pens marked "A. A. Waterman & Co." and himself removed the imprint on the penholders. Nothing but the holders were imprinted "The Royal Ideal Pen" (fols. 352-3, 356). Most of the completed pens, being very cheap, had the gold pen point marked "14 kt." only; a very few were of high enough grade to have the pen point marked "A. A. Waterman & Co."

As soon as suit was brought against Mr. Saadi,

and the matter came up in court, and the Judge expressed an oral opinion that the name "Royal Ideal Pen" was an infringement of the plaintiff's trade mark "Ideal," Mr. Saadi immediately discontinued the sale of any goods bearing that name or the name "A. A. Waterman & Co.," and has never sold either since. The few pen points bearing the name "A. A. Waterman & Co." were exchanged for those bearing the words "14 kt.," and the penholders had the name burned out, and were restamped with some other name. The entire infringement of the word "Ideal" was inadvertent, was not known to any person who was then an officer of the defendant, and no man regrets it more than the defendants themselves. The injury to the plaintiff has been substantially nothing. Only 144 of these were sold (fol. 361). The profits on the *full* bill were only $21.60, but this was a profit not only on the manufacture of the penholders, but on the pen point as well, and upon *all* of the goods, even those on which the imprint "The Royal Ideal pen" had been removed so that the actual profits on pens that were ever sold to the public was merely nominal.

This demand of a pound of flesh is in marked contrast with defendant's treatment of plaintiff when it deliberately infringed several of defendant's patents (see correspondence, pp. 1719-22).

The evidence taken in the Saadi case showed the plaintiff that this small order of "Royal Ideal pens" had been manufactured by the defendant, and they thereupon amended their complaint, made a new motion for a preliminary injunction before Judge Hough, after having been defeated in a similar motion by Judge Coxe.

The Circuit Court of Appeals had handed down its opinion just before the final decree was to be entered in the Saadi case. New York communi-

cated with the Washington attorneys, who asked Judge Stafford to delay signing the decree until they could get a copy of the opinion. This was done, and Judge Stafford struck out of the final decree the paragraph relating to A. A. Waterman & Co. (fol. 394), but he seems to have neglected to strike out other offensive parts of the decree (fol. 398), and the anomaly is presented of a United States Circuit Court Judge striking out a paragraph of his decree which prevented the use of "A. A. Waterman & Co.," but leaving it in other parts of the decree, so that Mr. Saadi is still enjoined from selling pens bearing this trade name of "A. A. Waterman & Co.," even though a Circuit Court of Appeals had decided otherwise. We know of no explanation for such an anomalous decree.

If the profits of this inadvertent violation of the trade mark "Ideal" are to be determined by actual results, they are far less than nothing, for Mr. Saadi has taken advantage of this fact to ignore all dunning letters, and he still owes $235.15, which more than covers all of the product marked "The Royal Iedal Pen." (See exhibits, p. 1781.)

Plaintiff's Infringement of Defendants Patents.

The unbusinesslike, not to say unprofessional, methods of this plaintiff, as indicated above, are in marked contrast to the methods of this defendant, as exemplified in the correspondence relating to the plaintiff's infringement of the defendant's patents. These are Exhibits A-50 to A-57, pages 1719-22. Mr. Bacon's letter to the complainant, April 20, 1908 (A-50, p. 1719) contains the following:

"I have been directed by my client, the

"Modern Pen Company, to bring an action "against you for an infringement of their "patents Nos. 523,234 and 551,895, in the "manufacture of what you call a 'safety "'fountain pen' as advertised in the 'Cos-"'mopolitan.'

"*I presume that you have not yet manu-"factured many of these infringing pens "and I call your attention to the matter of "infringement, presuming that it was* IN-"ADVERTENT, *and that you will discontinue "such manufacture.*"

The plaintiff replied on April 30:

"We beg to say that we had no idea of "infringing anybody's rights, and if our at-"torney advises us that we are infringing "we will immediately discontinue the same" (fol. 5157).

On May 19, Mr. Bacon wrote to the plaintiff:

"Since the receipt of your letter promis-"ing to examine into the matter and advise "me further, I notice that your advertise-"ments have continued, and my client ad-"vises me further that you are infringing "their patent No. 719,529 on 'sleeve' type "of Self-filler.

"They also advise me that you are appar-"ently infringing their patent 700,909."

On May 21, the plaintiff answered (Exhibit A-56, p. 1720):

"We beg to say * * * *relying on the "fact that our Company would become a "licensee under the patents transferred by "the sale referred to*, this Company began

"the manufacture of a safety fountain pen "which is the one of which we assume you "complain. These negotiations of sale were "still pending at the time we received your "letter of April 29, 1908. * * * As soon "as we learned that these negotiations of "sale had been broken off, we forthwith en- "tirely discontinued the manufacture and "sale of the safety fountain pen as then con- "structed and of which we assume you com- "plain. Of the safety fountain pens of "which we assume you complain only a few "have been sold, probably less than a dozen. "* * * We are taking the course above "indicated merely to avoid litigation and "the trouble and expense incident thereto, "as we feel we can devote our time to better "advantage in attending to the immediate "business of this Company than in liti- "gation." (A feeling since apparently changed.)

"We are now using for our safety foun- "tain pen a construction or structure which "our predecessors in business used more "than TWENTY YEARS AGO *and which has "been commonly and continuously used for "pencils and fountain pens since* 1852, *and "of which we assume you claim no monop- "oly."* (This, like their principal "under "the finger-joint" pen, is slightly out of date; defendant's pens are 1911, not 1852.)

This correspondence relating, not to an *inadvertent* infringement, but a *deliberate* infringement based on a presumed sale of patents and trade name not yet consummated, and which was not consummated because, apparently, the plaintiff had not the money to pay the price, shows the

politeness and consideration extended by the defendant, and is in marked contrast with the ungentlemanly and unprofessional proceedings of the plaintiff in relation to the defendant's infringement in the Saadi matter, which was purely inadvertent and inconsequential.

Plaintiff knew well that in the first brief at Appellate Division, First Department (before this suit was begun), A. A. Waterman & Co. had expressly admitted and alleged the plaintiff's right to the trade mark "Ideal" (130 N. Y. 301, 312) (fols. 4794-99), although they disclaim the plaintiff's right to the trade mark of the family name "Waterman" and that claim was also ignored in 130 N. Y. 301. Of course, defendant has always recognized plaintiff's exclusive right to the name "L. E. Waterman."

No one regrets more than the defendant the unintentional, inadvertent marking of a few penholders (one gross) (fol. 361) "Royal Ideal Pen." The marking was discontinued at once, when attention was called to it, and the defendant offered to pay far more than the damage arising from the sale of a few of these pens, which were sold at about fifty cents apiece for the entire pen (p. 1680).

Plaintiff's Exhibit 9.

Plaintiff tries to distort Exhibit 9 (p. 841) into an abandonment by defendant of the name "A. A. "Waterman & Co." This notice does not say what plaintiff claims it does, and it is explained:

The notice says, "We will drop the name 'A. A. "'Waterman & Co.' *from the Modern line.*" When Mr. Martling was manager he conceived the idea of confining the name "A. A. Waterman & Co." to other makes than the "Modern," but it was found

that the dealers requested the old marking. At the same time that a few thousand of Exhibit 9 were issued, 50,000 of Exhibit A-43 (p. 1716) were issued; that is, in every catalogue in which Exhibit 9 was sent out, there was also sent out Exhibit A-43. There was no intent to abandon the defendant's name and the circular does not say so. There is no question whatever that from 1898 to 1910, pens have been manufactured and sold every working day, imprinted "A. A. Waterman & Co."

The Lockwood Issue.

See Judge Hand's opinion (pp. 1861-1863).

Late in the proceedings the plaintiff produced a witness, Stevens, who swore to an incident in Mr. A. A. Waterman's business career, immediately after the dissolution of Waterman's partnership with Gibson in 1899, and before Waterman combined with Frazer & Geyer Company, which were then manufacturing pens.

This testimony has no significance, except that it was not known at the time affidavits were presented to Judge Hough on the motion for a preliminary injunction. It has no probative force and would amount to nothing if it had. The facts relative to those few months and weeks, in 1897, are irrelevant.

The testimony of Stevens as to the alleged assignment to Rhodes Lockwood, was very hazy. Lockwood is dead. The alleged written assignment had been destroyed and the cross examination of his secretary, who pretended to remember something about this assignment, revealed the fact conclusively that he had no positive recollection of what the so-called assignments were.

This "new" Lockwood issue is as follows:

Rhodes Lockwood, like E. H. & P. Day Co., in

Connecticut, manufactured rubber holders for the so-called "manufacturers" of pens. At first he did business under the trade name of "Davidson Ruf-"ber Company" (fol. 2395); later, under the trade name of the Sterling Fountain Pen Company (fol. 2397), and the Sterling pen continues to be manufactured to this day.

Waterman and Gibson had but small capital. Mr. Lockwood furnished them with the holders for pens. They bought pen points from different persons and assembled the parts, *i. e.*, they were "manufac-"turers" in the same sense that the L. E. Waterman Company is a manufacturer of its pens to-day.

To secure Mr. Lockwood for his advances, A. A. Waterman & Co. (Waterman and Gibson) assigned to him their monthly accounts, and when they finally dissolved in February, 1899, Lockwood took over the stock on hand and sold it as it was then marked, "A. A. Waterman & Co." Mr. Gibson went with him as an employe, and he then began the manufacture of the Sterling pen. He never manufactured any new material marked A. A. Waterman & Co.

Mr. Waterman immediately proceeded to manufacture his own pens and marked them "A. A. Wa-"terman, maker, Boston." That is all there is to the very hazy testimony given by Mr. Stephens long after Mr. Lockwood's death and long after all papers in connection with the matter had been destroyed.

A. A. Waterman & Co. never assigned any trade name or anything else to Mr. Lockwood except certain accounts and, finally, the remaining stock on hand, to pay their indebtedness. To show this we present the following extracts from Stevens' testimony:

(Fol. 2429) "XQ. 253. Before that Wa-

"terman & Co. did the selling? A. There are "two parts to manufacturing fountain pens. "Mr. Lockwood manufactured the hard rub- "ber holders complete and Mr. Waterman "bought the gold pens and fitted the holders, "so that really both of them were doing man- "ufacturing business. * * *

(Fol. 2431) "XQ. 261. Then, while you "are not prepared to swear that there was "ever any assignment of the trade name of "A. A. Waterman or A. A. Waterman & Co., "you are prepared to swear that on and "after February, 1, 1899, Mr. Waterman con- "tinued to use his own name in the manu- "facture and sale of fountain pens, while "Mr. Lockwood did not? A. Mr. Lockwood "continued to use that name for five or six "years.

"XQ. 262. Only in disposing of the old "stock? A. That is all.

(Fol. 2410) "XQ. 166. The circular [of "A. A. Waterman, 1899] further states: "'Mr. Gibson had a position with the Ster- "'ling Fountain Pen Company, then starting "'in business, having acquired certain "rights from the business of A. A. Water- "'man & Co., while I continued as sole "'maker of fountain pens bearing my name "'and guarantee;' was that true? A. Yes.

"XQ. 167. Then Mr. Gibson went with "the Sterling people? A. Yes.

"XQ. 168. With Mr. Lockwood? A. Yes.

"XQ. 169. And Mr. Waterman continued "by himself? A. Yes.

"XQ. 170. And had no relations after that "with Mr. Lockwood at all? A. He bought "some goods.

"XQ. 171. That is all? A. That is all.

"XQ. 172. And Mr. A. A. Waterman con-
"tinued as sole maker of fountain pens bear-
"ing his name and guarantee? A. Yes.

"XQ. 173. Then the statements in this
"circular are true? A. So far as I know.

"XQ. 174. Then after February 1, 1899,
"Mr. Lockwood never had anything to do
"with Mr. A. A. Waterman, except to sell
"him some goods? A. That is all, and those
"pens were not marked A. A. Waterman &
"Co.

"XQ. 175. How were they marked? A.
"A. A. Waterman, maker.

(Fol. 2427) "XQ. 241. Are you willing to
"swear that that assignment was not merely
"for security for advances by Mr. Lockwood?
"A. No, sir.

"XQ. 242. It may have been for security
"only? A. It was to protect Mr. Lock-
"wood. * * *

(Fol. 2428) "XQ. 246. You are not pre-
"pared to swear that that so-called assign-
"ment was not in the nature of a security to
"secure advances? A. No, sir."

Frazer & Geyer never knew anything about Mr. Waterman's connection with Rhodes Lockwood before this very vague testimony of Mr. Stephens'.

The undisputed facts remain, that from the moment of the dissolution of A. A. Waterman & Co. (Waterman and Gibson), A. A. Waterman continued to manufacture and sell pens marked "A. "A. Waterman & Co., Boston," while Rhodes Lockwood did nothing but sell off the stock on hand, already marked with the name "Waterman." After a few months, A. A. Waterman formed a new copartnership, and during all these years has openly manufactured, advertised and sold pens under the

trade name of "A. A. Waterman & Co., New York," while Rhodes Lockwood, up to the time of his death, manufactured pens under the name of Sterling.

The fact is that the original firm of A. A. Waterman & Co. bought their pen holders of one party (Lockwood) and their pen points of others, just as this plaintiff does to this day, and merely assembled the parts. Rhodes Lockwood furnished the firm with part of its goods, and, perhaps, some cash, and when the firm dissolved, Rhodes Lockwood took over the stock on hand in payment of his debt. That is all there is to it. The whole story is told in the three circulars found at pages 578, 579 and 580.

THE ITALIAN DECREE.

Brief for Defendant on Supplemental proofs, not Presented until the Day of the Hearing before Judge Hand.

The defendant contends that the decree is not admissible in evidence.

[1.]

(a) because not properly proved;

(b) because it in no way binds the alleged intervener, A. A. Waterman & Co., and there is no sufficient proof of any such intervention;

(c) that it is absolutely incompetent, and of no effect against this defendant, who was neither a defendant nor an intervener in the Italian action.

(d) that it is not pleaded as *res adjudicata*, and not competent as an estoppel.

(e) the so-called decree determines no question of fact, merely interprets an American contract according to Italian law, without the aid of evidence, and refuses the aid of decisions of American courts in such interpretation.

(f) "*Want of Finality.*—A foreign judg-"ment is not available as a cause of action "or defense unless final and conclusive in "the place where rendered."

23 Cyc., 1611.

(g) "*Pleading and Exhibiting Foreign "Judgment.*—A plea of a foreign judgment "should contain enough to show the compe-"tence of the foreign court, and should set "forth that the judgment was duly given or "made, that it was on the merits and *con-"clusive* between the parties where rendered, "and that it remains in full force and un-"paid. Parol evidence is admissible to show "what matters were submitted to and passed "upon by the Court, but the construction "and effect of the judgment itself is a mat-"ter of law for the Court. The judgment "should be authenticated by the seal of the "Court, if any, the certificate of the officer "in whose custody the record remains, the "attestation of the principal judge of the "Court to the official character of the per-"son certifying and the whole fortified by "the certificate of the executive department "of the country and the impress of its great "seal."

23 Cyc. 1611.

[2.]

If the Italian record is admissible in evidence in any theory, neither it nor the conlusions pur-

porting to be contained therein, are binding against this defendant as to any of the issues in this action.

(a) because equity decrees are not binding as common law decrees are;

(b) because the interpretation of an American contract made in New York, between American citizens, and constituting purely a question of law, heretofore decided and determined, as to the law, by the United States Circuit Court of Appeals, is solely a question of American law as to which contrary interpretations by foreign courts have neither conclusive, controlling nor persuasive effect upon our courts;

(c) because the decision of any other court, in an action begun after the beginning of this action, and made after the taking of proofs herein, is not entitled to any recognition in this action, either by rules of comity or otherwise. The rules of comity, according to our United States Supreme Court, require that the Court first having jurisdiction of a cause is the one Court to decide the issues thereof, and the rules of comity precluded the Italian courts from deciding these issues while this action was pending;

(d) because the plaintiff, having *first* elected *this* forum, for the determination of these issues, and the parties having taken their whole proofs therein, before the Italian decree was granted, the plaintiff was estopped from seeking to have another day in a foreign court, and is estopped from urging its own wrongful act and the judgment of a foreign court in an action *subsequently commenced*, as a bar to this action or as an estoppel.

Plaintiff cannot put upon this Court the burden

of determining these issues, and then bar this Court from deciding those very issues by his wrongful act in subsequently beginning another action in a foreign jurisdiction.

(e) The Italian decree is interlocutory only, in that it leaves open certain questions as to which testimony is to be taken before a judge designated in Exhibit 144 (see pages). Only final decrees of foreign courts are recognized by us. Italy fails, according to the Italian opinion (decree) and the testimony of Mr. Accetta to give our interlocutory decrees recognition. Under the rule of reciprocity as enunciated in *Hilton* v. *Guyot*, 159 U. S. 113, we do not give their interlocutory decrees recognition.

(f) The decree is not a bar as *res adjudicata*, because not pleaded. It is not an estoppel because it is an equity decree, not a judgment for some fixed sum of money determined after a litigation as to facts. It does not purport to determine a controverted fact, merely to interpret an American contract between Americans, according to Italian law, without the aid of American law, or of any evidence, written or oral, to explain the contract or the prior relations of the parties.

(g) There is no judgment roll—no pleadings to determine the issues.

(h) The decree shows on its face that it is not final; that it repudiates the American law as laid down by our own Circuit Court of Appeals; that no issue of fact was determined, merely a contract interpreted.

(i) This defendant did not intervene in Italy and is not bound by a decree wherein it was not represented.

POINT I.

The Italian decree is not properly authenticated and is not admissible in evidence.

The law as to this has been settled since 1804, when Chief Justice Marshall, in *Church* v. *Hubbart*, 2 Cranch 187, at page 238, laid down the following rules which have never since been questioned. He says:

> "Foreign judgments are authenticated:
>
> "1. By an exemplification under the "great seal;
>
> "2. By a copy proved to be a true copy;
>
> "3. By the certificate of an officer au- "thorized by law, which certificate must it- "self be properly authenticated.
>
> "These are the usual, and appear to be "the most proper, if not the only, modes of "verifying foreign judgments. If they be "all beyond the reach of the party, other "testimony inferior in its nature might be "received. But it does not appear that "there was any insuperable impediment to "the use of either of these modes, and the "Court cannot presume such impediment to "have existed. Nor is the certificate which "has been obtained an admissible substi- "tute for either of them.
>
> "If it be true that the decrees of the "colonies are transmitted to the seat of gov- "ernment, and registered in the department "of state, a certificate of that fact under "the great seal, with a copy of the decree "authenticated in the same manner, would "be sufficient *prima facie* evidence of the "verity of what was so certified; but the

"certificate offered to the Court is under the "private seal of the person giving it, which "cannot be known to this Court, and of con- "sequence can authenticate nothing. The "paper, therefore, purporting to be a seques- "tration of the Aurora and her cargo in "Para ought not to have been laid before "the jury.

"Admitting the originals in the Portu- "guese language to have been authenticated "properly, yet there was error in admitting "the translation to have been read on the "certificate of the consul. Interpreters are "always sworn, and the translation of a con- "sul not on oath can have no greater valid- "ity than that of any other respectable man.

"If the Court erred in admitting as tes- "timony papers which ought not to have "been received, the judgment is, of course, "to be reversed and a new trial awarded."

For the foregoing reasons, Exhibits 143 and 144 —the latter necessarily dropping with the former —are incompetent and should not be received in evidence by the Court.

The copy, Exhibit 143, was not proved to be a true copy by a witness who personally compared it with the original record in the proper custody. That is the method of proving a copy to be a true copy (see 1 Paine U. S. 594).

Exhibit 143 is not (1) an exemplified copy (2) nor a sworn copy (compared with the original on file in Milan) (3) nor a copy certified and duly authenticated.

Even a duly authenticated copy judgment, standing alone, is not sufficient. The judgment roll must be produced.

"While a copy of the judgment alone of "a foreign tribunal may be sufficient to es- "tablish the fact that such a judgment has "been rendered, the entire record must be "produced when it is sought to establish "anything more than this."

Am. & Eng. Enc. of Law, Vol. 13, p. 1040.

POINT II.

Comity: — The law laid down in *Hilton* v. *Guyot*, 159 U. S., 113.

All of the cases cited by Judge Gray in *Hilton* v. *Guyot*, 159 U. S. 113, refer to actions on judgments for fixed sums of money. We do not think that any of them relates to a defense based on such judgment, or to any equitable cause of action —it seems that in every case cited, the action was either in debt based on the judgment, or on a foreign judgment based on a debt. As Judge Gray points out, the underlying reason for the alleged rule of comity, is the desire of the courts, in the interest of public policy, to terminate disputes, and their desire to hold that a man having once had a day in court, is precluded from again litigating the same issues of fact.

That reason cannot properly apply in this case. Here the litigation between American citizens relating to a contract made in the United States for a business conducted in the United States, and to be interpreted according to the law of the United States, was started before the Italian litigation and was started by plaintiff. It was therefore in the United States that the proofs of the parties should be made. It is not in accordance with our public policy to permit our own courts to be ousted of the decision of such issues by recognizing the right of

one of the litigants thereto, to begin a subsequent action in a foreign court looking to the same relief, and then to state that the decision of the foreign court is binding on us. It seems like a contempt of court to attempt to oust it of jurisdiction in a case, where it first acquires control, by such methods. Surely one who has himself started our legal machinery in motion, may not stop the machine by reason of a decree subsequently obtained in a foreign court by himself in his own favor, in an action begun after the American suit. The plaintiff was getting its full hearing on the merits in America, and having invited that litigation, cannot defeat the results thereof by choosing another day in Italy. See Point III.

> "p. DECREE IN EQUITY.—The rule as to "the conclusiveness of foreign judgments ex- "tends to decrees in equity, and in every "case in which an action of debt could be "maintained upon a foreign judgment at law "*for the sum of money awarded* by such "judgment, a like action can be maintained "upon a decree in equity, *which is for an "ascertained and specific amount*, and noth- "ing more, and the record of the proceedings "in the one case must be ranked with and "responded to as of the same dignity and "binding obligation with the record in the "other. BUT SUCH AN ACTION CANNOT BE "MAINTAINED ON A DECREE OF A COURT OF "EQUITY FOR THE PERFORMANCE OF ACTS "OTHER THAN THE PAYMENT OF MONEY."
>
> Am. & Eng. Enc. of Law, Vol. 13, p. 1008.

At the bottom of page 202 and top of 203, Judge Gray, in *Hilton* v. *Guyot*, states that in view of all the authorities and the trend of judicial opinion, here and in England, we

> "are satisfied that where there has been op-
> "portunity for a full and fair trial abroad
> "before a Court of competent jurisdiction
> "* * * and under a system of jurispru-
> "dence likely to secure an impartial admin-
> "istration of judgment between the citizens
> "of its own country and those of other coun-
> "tries, and there is nothing to show either
> "prejudice in the court or in the system of
> "laws under which it was sitting, or fraud
> "in procuring the judgment, or any other
> "special reason, why the comity of this na-
> "tion should not allow it full effect, the
> "*merits of the case* should not, in an action
> "*brought in this country upon the judgment*,
> "*be tried afresh* as on a new trial or an ap-
> "peal, upon the mere assertion of the party
> "that the judgment was erroneous in law or
> "in fact."

That is really the gist of that long opinion. The Court is careful to note that the merits should not be tried afresh in an action based on the judgment, but this action was begun and tried, substantially, before any judgment was rendered in Italy. The cause is not being tried afresh. Surely this should be one of the special reasons noted in the opinion why the comity of this nation should not allow the Italian decree full force and effect.

We grant full force and effect in an action brought on a foreign judgment, denying the parties the right to relitigate the *facts*, but we are not bound to recognize, and should not recognize, in point of principle, any binding force in a decree rendered in a foreign court in an action instituted after the American action was started and where the issues have been litigated in America, and merely await consideration and determination, and

which does not determine any fact, merely interprets an American contract between Americans.

At page 196 of the opinion in *Hilton* v. *Guyot* (bottom), we find that the English courts hold that foreign judgments should not be questioned either because the foreign courts had mistaken *its* own law, or come to an erroneous conclusion upon the facts. At page 197:

> "It was formerly understood in England "that a foreign judgment was not conclusive "if it appeared upon its face to be founded "upon a mistake or disregard of *English* "law, and *Simpson* v. *Fogo* is cited where "England refused to recognize the Louisiana "judgment because the Louisiana court had "declined to recognize the title of the mort- "gage of an English ship under the English "law" (see pages 197-198).

The Italian court did not extend comity, but repudiated the law as laid down by Judge Noyes.

Judge Noyes, in his opinion in this action, reversing Judge Hough as to the preliminary injunction (see plaintiff's record, pages 1116, 1117) stated that it was

> "clear that the partnership to which A. A. "Waterman was a member had the right to "use the name of A. Waterman & Co. in "connection with their business and to *so* "mark their pen. The decision of the Su- "preme Court of the State of New York *in* "*which all parties acquiesced for many* "*years* was in accordance with principles "now well established by decisions of the "Supreme Court of the United States (*i. e.*, "it was expressly held that to mark the pens "'A. A. Waterman & Co.' was sufficient).

> "Similarly, said Waterman had the right "to transfer to his former partners in con- "nection with the reorganization and sale of "the business, the right to continue to use "his name."

The law as laid down by the Circuit Court is the law of this case. The Italian courts have no right to go beyond that case and to hold that the agreement of June 12, 1905, was illegal under the Italian law when it had to do solely with American citizens and an American business. No question has been raised by A. A. Waterman as to that contract. Yet the Italian court states that because such an interpretation is "settled by "precise rules of *our* (Italian) positive law" they cannot give recognition to the decrees of the Circuit Court and Circuit Court of Appeals (page 26, supplemental record).

It must have been for that reason and not because the Circuit Court judgment was not acknowledged that it was given no judicial standing in Italy. The Italian court further states that Judge Noyes came to his conclusion on the "supposition" that the firm of A. A. Waterman & Co. had the right to use this firm name under the terms of a contract with Waterman, and then states that this very question, left undecided by our courts, was the one for Italy to determine, and to see whether A. A. Waterman actually, seriously, and effectively, became a partner of said business so as to give him the right to assume his own name in the firm name.

The reading of the remainder of the so-called opinion (decree) indicates conclusively that the Italian courts gave absolutely no faith, credit or standing to the opinion of Judge Noyes, and assumed to determine, as a matter not to be affected

by the opinion of Judge Noyes, the construction of the contract of June 12, 1905, and the intent of the parties as evidenced by said contract. We must respectfully insist that the interpretation of an unambiguous written contract made in the City of New York, relating to a business here conducted, the parties to which were all American citizens, creates wholly a question of American law, the decision of a foreign court on which has neither conclusive, *prima facie* nor persuasive effect. It would be ridiculous to assume that the straight ordinary contract for services at will, made in New York in proper circumstances, could, by reason of a decree rendered in China, or Italy, be conclusively held in New York to be a partnership contract lasting for a certain number of years, or to be a chattel mortgage, or a will.

While the parties may have only one opportunity to litigate facts, the American courts do not conclude those parties in a case like this, from having determined here according to our law, the pure question of law arising out of an unambiguous written American contract, as to which no question of fraud, in its procural, is made.

It is simply farcial to argue that an Italian court can state that an agreement providing that profits and losses should be shared equally, does not constitute a partnership agreement.

There is no question whatever that in America a man can enter into a partnership and, within a month, can sell his name, if he so desires. He can thus prevent himself from ever using his own name again (see the Taussaud case). He can sell his name to strangers (see numerous cases). If he cannot use his own name, sold to another for a valuable consideration, certainly a stranger has no right to complain—what business is it to this plaintiff, whether Mr. A. A. Waterman is still in the firm of that name or not?

This plaintiff allowed Mr. A. A. Waterman to go on for ten years and when a large business has been built up, steps in and complains because a stranger has sold his trade name to his continuing partners. The laches are gross and inexcusable. If the plaintiff wished to avoid the confusion necessarily attendant upon the use of similar names, it should not have selected a family name for trade purposes—a name not the subject of a trade mark.

This is the American law and the Italian court is a little presumptuous in attempting to interpret an American contract according to Italian law, and it is more presumptuous for plaintiff to attempt to ask American judges to be guided by it.

If the Italian court had rendered judgment on a promissory note for the fixed sum of $1,000, the judgment would, if properly exemplified, be perhaps, a *prima facie* foundation for an American suit, if properly pleaded, but no foreign equity degree merely interpreting an American contract will be recognized either as a bar or an estoppel, or as even persuasive.

Lang v. *Holbrook* (1837, U. S. District Court for Pennsylvania); Crabbe (U. S.), 179, headnote states:

> "Where a foreign court, not of admiralty, "has decided a case on different principles "from those here recognized, and leading to "a different result from what would be here "arrived at, though professedly according to "our law, this court is not concluded by such "decision."

POINT III.

The determination of this action cannot be affected by the decision in any other action subsequently brought.

The law was early declared by our United States Supreme Court and never departed from.

See

Wallace v. *McConnell*, 13 Peters. 136.

There an action was pending on a note in United States District Court for Alabama. An action for the attachment of debt founded on the note, was then instituted in the Alabama State Court and judgment rendered thereon.

The United States Supreme Court held, per Thompson, *J.* (150):

> "The plea shows that the proceedings on "the attachment were instituted *after* the "commencement of this suit. *The jurisdic-* "*tion of the district court of the United* "*States, and the right of the plaintiff to* "*prosecute his suit in that court, having at-* "*tached, that right could not be arrested or* "*taken away by any proceedings in another* "*court.* This would produce a collision in "the jurisdiction of courts that would ex- "tremely embarrass the administration of "justice. If the attachment had been con- "ducted to a conclusion, and the money re- "covered by the defendant *before the com-* "*mencement* of the present suit, there can "be no doubt that it might have been set "up as a payment upon the note in ques- "tion. * * * The attaching creditor "would, in such case, acquire a lien upon

"the debt, binding upon the defendant, and "which the courts of all other governments, "if they recognize such proceedings at all, "would not fail to regard. If this doctrine "is well founded, the priority of suit will "determine the right. *The rule must be "reciprocal;* and when the suit in one court "is commenced prior to the institution of "proceedings under attachment in another "court, such proceedings cannot arrest the "suit and the maxim *qui prior est in tem-"pore, portior est in jure*, must govern the "case.

"This is the decision of this Court in the "case of *Renner* v. *Marshall*, 1 Wheat 216, "and also in the case of *Beaston* v. *Farmers' "Bank of Delaware*, 12 Pet. 102; and is in "conformity with the rule that prevails in "other courts in this country, as well as in "the English courts; it is essential to the "rights of the garnishee; and will avoid all "collisions in the proceedings of different "courts, having the same subject matter be-"fore them. 5 Johns. 100; 9 *ibid.* 221, and "the cases theer cited. In the case now be-"fore the Court, the suit was commenced "prior to the institution of proceedings un-"der the attachment. The plea was there-"fore, bad, and the demurrer properly sus-"tained."

See also

American Bank v. *Snow*, 9 R. I. 11.

POINT IV.

ITALIAN DECREE.

The Witness Accetta was admitted to the lower courts only and is not a competent witness to testify concerning a decree rendered in the higher courts as the decree claims to have been.

The testimony of Accetta shows that there are two points still left open in the Italian litigation (fols. 5419, 5422). He first stated positively that they referred to the assessment of damages (fol. 5427). On cross examination he testified that the assessment of damages was merely his impression, but without examining the briefs he could not state what particular points were left open (fol. 5438). His whole testimony shows his ignorance of the Italian procedure.

The Italian decree is interlocutory only and not final. The Italian courts do not recognize our interlocutory decree (see opinion of the court [p. 27 of supplemental proofs] and testimony of Mr. Accetta [fols. 5460, 1, 5465]). Under the rule laid down by Judge Gray in *Hilton* v. *Guyot*, the principle of reciprocity is ever dominant, and since Italy does not recognize our interlocutory decrees, we cannot recognize its interlocutory decree.

At page 26 of the plaintiff's supplemental proofs we find that the Italian court states that the underlying motives for its decision

> "are settled by precise rules of *our* positive
> "law which prevent the recognition *in Italy*
> "of the legal effect of the decision of July 14,
> "1910, of the North American District Court
> "for the Southern District of New York"

and likewise that of the Circuit Court of Appeals for the Second Circuit which, interpreting the agreement of June 12, 1905, concludes that thereunder the defendants have an absolute right to the use of the name of A. A. Waterman & Co.

If the foregoing language quoted from the opinion does not show that Italy does not recognize our decrees and decisions, even as between our own citizens, where such decrees are contrary to "precise rules of our (Italian) positive law" then it is hard to understand what the court means. The whole decree is peculiar. It would appear from page 19 of the supplemental proof that the question decided by the Italian court was whether or not the contract of June 12, 1905—having no reference to the Italian territory or sales therein —was sufficient to permit the use of the name of A. A. Waterman—not A. A. Waterman & Co.— under articles 5 and 12 of the Italian Laws of August 10, 1868, and articles 296 and 297 of its Penal Code, and 1151 of its Civil Code.

The Italian court looks upon the Italian action as one where the plaintiff demands "a decision declaring the legal invalidity of the instrument dated June 12, 1905" (recorded in Milan under Nos. 22975 to 22986), under which Cabrini used the name A. A. Waterman in selling fountain pens in competition with the plaintiff, but nothing is said as to the name of A. A. Waterman & Co., the use of which is sought to be enjoined in this action (page 24 of supplemental record).

The defendant never claimed the right to the use of A. A. Waterman standing alone. And the relief that the plaintiff in the Italian action demanded was such injunctions and penalties as are provided for in articles 5 and 12 of the Italian law of August 10, 1868, and in articles 251 of the Civil Code and 370 of the Code of Civil Proced-

ure, as the result of such unlawful practice (pages 24, 25 supplemental proof). It will therefore be seen that the plaintiff in the Italian action merely claims certain rights under local Italian laws. But it would be monstrous to suppose that the court of any country having a peculiar law could by its decision, based on such law, wipe away valuable contract rights which even the Congress of the United States or the legislature of any state could not do. Of what possible value would a contract right be, if by bringing an action in Siam or Java, a decree could be had under its own peculiar law holding the contract ineffectual?

The Court should read carefully the Italian record, and it will note throughout that what the plaintiff sought was an injunction restraining the use of the name of A. A. Waterman and not that of A. A. Waterman & Co.

That the judgment is purely interlocutory is shown in the concluding portion of the opinion and decree which states:

> "Whereas there is occasion to reserve the "determination of the costs in the case to "the final decision. * * * The L. E. Wa- "terman Company, of New York, is allowed "to prove by witnesses the circumstances "detailed in the two interrogatories em- "bodied in its conclusions and herein before "literally transcribed, the recording judge "being appointed to take the evidence. Costs "reserved."

What are those two interrogatories?

There can be no final judgment in an action where there are still questions outstanding requiring additional testimony to support the contentions of the parties thereto.

A final judgment means finality as to all the

issues. With questions of fact still open, it cannot be final. This Italian decree, so-called, is no more a final judgment, ultimately determining the rights of the parties, than were the decrees of our United States Circuit and Circuit Court of Appeals, which Italy declined to recognize because they were interlocutory only, and because they were opposed to theories "settled by precise rules "of our positive law which prevent the recognition "in Italy of the legal effect" thereof.

However, the Italian decree has since been appealed and affirmed and appealed again. The highest court is, apparently, awaiting the decision of the Supreme Court of the United States.

Analysis of the Italian so-called Decree.

It is difficult to determine exactly what the instrument is, a translation of which is Exhibit 144, beginning at page 17 of the supplemental proofs.

From page 19, it would appear that the decree contains the statement and argument of counsel, and that the pleadings are oral. We do know, however, from a copy of the complaint put in evidence by the defendant, at page 1717 of the record, that there was a written complaint wherein it was alleged that there was no such firm as "A. A. "Waterman & Co." and that Mr. Carbrini was representing a purely fictitious firm.

From page 20 it would appear that the plaintiff's counsel asks the Court that it should

> "admit at this stage of the proceedings the "interrogatories for the taking of testimony "of witnesses, hereinafter set forth.
>
> "This judgment to be provisionally exe- "cutable."

This indicates that the so-called decree is provisional only. The interrogatories "(A)" and "(B)" set forth at page 20 would indicate that testimony was yet to be taken, on the one question of prime importance as to whether or not people had been deceived by the similarity of names.

At the bottom of page 20 we find the following:

> "The attorneys for the defendant *pleaded*
> "and summed up as follows:"

On page 21 is the defendant's counter plea, and request that the L. E. Waterman Company be mulcted in damages. It also states at the bottom of that page:

> "2nd.—And that after admission, if neces-
> "sary, of the *evidence hereinafter set forth*,
> "the Court may condemn the plaintiff in all
> "damages, both material and *moral*, suffered
> "by the defendant. Likewise, with condem-
> "nation in the costs and with executory
> "judgment."

This would indicate the interlocutory character of the decree.

At page 22, are further interrogatories to be administered and

> "circulars are to be exhibited to the wit-
> "nesses" (in the future).

The fourth interrogatory at the bottom of page 22 indicates that Cabrini, like everybody in America, was very careful that his customers should not confuse the *good* pens manufactured by A. A. Waterman & Co. with the *inferior* pens sold by the L. E. Waterman Company.

Interrogatories 7th, 8th, 9th and 10th (page 23), indicate that evidence was yet to be taken in matters relating to the fact that the L. E. Waterman Company did not manufacture their pens at all, while A. A. Waterman & Co. made all of their pens, and that the L. E. Waterman Company patents had long since expired, while those of A. A. Waterman & Co. were still existing.

From page 24, it would appear that the L. E. Waterman Company demanded an interpretation of the co-partnership agreement of June 12, 1905, although it was not a part of any pleading either written or oral. The whole object of the suit seems to have been changed, and the L. E. Waterman Company demands an injunction under certain specific Italian laws, not under any American law.

From page 25 we see that this action was begun July 2, 1910, *after* the beginning of this action in America.

The decision then goes on to say (in the middle of page 25):

> "In the second place, the Court recog-
> "nized by reason of evident legal effect in
> "Italy, the irrelevancy in this case of cer-
> "tain judgments rendered by North Ameri-
> "can Courts, exhibited by Cabrini and the
> "intervening parties in order to sustain the
> "alleged unlawfulness of the use made by
> "them of the name 'Waterman' for desig-
> "nating the fountain pens in which they
> "dealt. Finally, the Court decreed the pro-
> "duction in Court of partnership agreement
> "of June 12, 1905, from which Cabrini and
> "the intervening parties claim to derive the
> "right to use the said designation, in or-
> "der that this Court might be *enabled, by*
> "*its examination*, to judge whether the de-

"fendant by virtue of the same, 'were law-
"'fully, actually and effectively invested
"'with the right to use the name of Water-
"'man, or whether a fraud existed which
"'was to be suppressed.'"

The decision says at page 26:

"The Court, in the previous decision, has
"already exhausted forth the motives
"(which, in fact, are incontrovertible be-
"cause they are settled by precise *rules of*
"OUR *positive law*) which prevent the recog-
"nition *in Italy* of the legal effect of the de-
"cision of July 14, 1910, of the North Amer-
"ican District Court for the Southern Dis-
"trict of New York, and of that rendered
"on appeal on November 15, 1910, by the
"second Circuit Court of the United States,
"by which, according to the allegations of
"the defendants, the lawful right of the
"Chapmans to call by the name of 'Water-
"'man' the fountain pens in which they
"dealt in the territory of that State, had
"been recognized."

This is an express repudiation of the decisions of our courts and their interpretation of an American contract made by Americans.

On page 28, the decree further rejects the American decisions because they are preliminary and not final judgments, and then goes on to hold that the decisions in New York were only upon the "supposition" that A. A. Waterman & Co. had the right to use the firm name, and then by a mere inspection of the instrument, proceeds to show that the partnership agreement itself is a fraud upon its face.

On page 28, it states that it is unnecessary to consider evidence—an inspection of the agreement is sufficient—and then goes on to show that the

"far West," which includes Illinois and everything to the West thereof, was such a remote country that it did not connote an adequate consideration, and concludes what no court has ever concluded before, and what has heretofore not even been argued by plaintiff's attorneys, that the partnership agreement of June 12, 1905, was a mere pretext for the acquisition of the name by the Chapmans, who, as a matter of fact, had supplied substantially all of the money for the enterprise since January, 1901.

We note on page 30 that the Italian Court criticises the co-partnership agreement because it does not set forth within its own terms what had become of the property owned by the former firm of A. A. Waterman & Co. This is rather amusing. Equally amusing is the following quotation from the top of page 31, wherein the Court holds that Mr. Waterman, after contributing his name to the firm "must immediately quit the firm, and go far "away for vague and *solitary* ventures in the far "West."

The bottom of page 31 shows again that there must be further testimony taken before a final decree, and at the top of page 32, it states expressly "Whereas there is occasion to *reserve* the deter- "mination of the costs in the case to the FINAL "decision," indicating that the judgment is interlocutory only.

The decision also states at page 32:

> "The L. E. Waterman Company, of New "York, on the other hand, is allowed to prove "by witnesses the circumstances detailed in "the two interrogatories embodied in its con- "cessions and herein before literally trans- "cribed, the recording judge being appoint- "ed to take the evidence.
>
> "Costs reserved."

This shows conclusively that this so-called decree is preliminary only.

We will say in addition that Mr. Geyer went to Milan to be there on August 9th on a further hearing of the case, when he found that it had already been adjourned.

The translation of this decree is very crude and the knowledge of the Italian lawyer sworn to interpret it is still cruder, but this is accounted for by the fact that he was admitted only to practice in the lower courts and apparently knew nothing of the proceedings in the higher courts in which this action was brought.

To sum the whole matter up, the attempted introduction of this ridiculous Italian decree is on a par with the methods of litigation pursued by the L. E. Waterman Company. For eleven years after the decree of 1898, they lay quiet, and made no objection to the use of the trade name of A. A. Waterman & Co. During these years the Chapmans were advancing a fortune ($30,000 on loans alone) in the business until it became a success. *Then* plaitniff obtained, by consent, the Cleveland decree, which was afterwards repudiated by the court, which stated that it would never have been granted if it had been contested. Then they obtained the Washington decree, which, like the Cleveland decree, was founded on a complaint which was innocuous on its face, but the decrees, when entered, were not only illegal, but immoral, in that they enjoined the defendants therein from the use of the trade name "A. A. Waterman & Co.," when no such prayer was contained in the complaint. This was stabbing an adversary from ambush. When the Messrs. Chapman began an action in New York State Court to prevent a multiplicity of suits, the L. E. Waterman Company then came into this forum in order to determine all the issues

between the parties, and to determine apparently in a fair fight, the exact relationship between the parties.

Having selected this forum, it was not fair play to go to Italy and try to get a judgment in a Latin court, concerning rights under an American contract, and it will be noted in passing that the Italian court finally was called upon to pass upon, not any contract between the parties in interest, but on a contract between third parties to the litigation.

In Italy they claimed that Mr. Cabrini had advertised the A. A. Waterman & Co. pens as "Wa-"terman" pens only, and that advertisement is set out at page 954 of the record.

There is no claim, however, that A. A. Waterman & Co. or the Modern Pen Company were at all responsible for that Cabrini advertisement. It was pure ignorance on his part, and as a matter of fact, he was given very explicit instructions as soon as the advertisement was called to the defendant's attention when it appeared as an exhibit on the motion for a preliminary injunction.

Of course, this defendant is not responsible for any wrong done by Mr. Cabrini, unless it was done by the authority or with the knowledge of the defendant.

The very recent case of *Rathbone, Sard & Co.* v. *Champion Steel Range Co.*, 189 Fed. Rep. 26, contains the following:

> (30) "Judge Tayler was also of opinion "that complainant's right of action was "barred by *laches*, in failing for nearly three "years to take action, while defendant was "actively building up its own trade. * * * "[The Chapmans were building up their "trade for over five years.]

"The rule is well settled that nothing less "than conduct tending to pass off one man's "merchandise or business as that of another "will constitute unfair competition. [There "is no claim that the defendant did this.] "In *Goodyear Co.* v. *Goodyear Rubber Co.*, "128 U. S. 598, 604; 9 Sup. Ct. 166, 32 L. Ed. "535, Justice Field said:

" 'The case at bar cannot be sustained as " 'one to restrain unfair trade. Relief in " 'such cases is granted only where the de- " 'fendant, by his marks, signs, labels, or in " 'other ways, represents to the public that " 'the goods sold by him are those manu- " 'factured or produced by the plaintiff, thus " 'palming off his goods for those of a dif- " 'ferent manufacturer, to the injury of the " 'plaintiff. *McLean* v. *Fleming*, 96 U. S. " '245 (24 L. Ed. 828); *Sawyer* v. *Horn* (C. " 'C.), 4 Hughes 239 (1 Fed. 24); *Perry* v. " '*Truffitt*, 6 Beav. 66; *Croft* v. *Day*, 7 Beav. " '84.'

"In *Howe Scale Co.* v. *Wykoff, Seamans & "Benedict*, 198 U. S. 118, 140; 25 Sup. Ct. "609, 614; 49 L. Ed. 972, Chief Justice Ful- "ler said:

" 'The essence of the wrong in unfair com- " 'petition consists in the sale of the goods " 'of one manufacturer or vendor for those " 'of another, and if defendant so conducts " 'its business as not to palm off its goods as " 'those of complainant, the action fails.'

"In *American Washboard Co.* v. *Saginaw "Mfg. Co.*, 103 Fed. 281; 43 C. C. A. 233; 50 "L. R. A. 609, it was held by this Court in "an opinion by Judge (now Mr. Justice) "Day that the fact even that the defendant "deceives the public as to his goods by

"fraudulent means does not give a right of "action unless it results in the sale of such "goods as those of the complainant. * * *

(32) "[2] There is some evidence tending "to show an actual deception of customers "on the part of dealers by representing de- "fendant's heater as that of complainant. "It also appears that on the inside of some "of the castings of defendant's heater, due "to the use of parts of complainant's heater "as patterns, the letters 'A' and 'Sol. A' are "found, and that this fact would *enable* a "dishonest dealer to misrepresent defend- "ant's heater as a 'Solar Acorn.' This last "consideration does not impress us as im- "portant, and there is no evidence of actual "deception thereby. So far as concerns ac- "tual misrepresentation by dealers of the "identity of heaters, not only is the proof "thereof not highly convincing, but *defend- "ant is not responsible for the fact that "tricky retailers represent its manufacture "as that of complainant, knowing better, pro- "vided defendant has done its legal duty in "distinguishing its own product from that "of complainant. Royal Baking Powder Co.* "v. *Royal*, 122 Fed. 345; 58 C. C. A. 499; "*Hall's Safe Co.* v. *Herring, etc., Co.*, 146 "Fed. 43; 76 C. C. A. 495; 14 L. R. A. (N. "S.) 1182.

"We have no doubt that sales of com- "plainant's heater have been materially less- "ened through defendant's competition. The "effectiveness of this competition, in our "judgment, has resulted from the activity "with which defendant has pushed its heater, "the publicity and extent of defendant's ex- "hibitions and advertising, the advantage

"which the defendant has, especially in the "large and valuable district of Ohio, in being "a local manufacturer; and to complainant's "advance of prices for 1907, before which "time the prices of the two competing heaters "were substantially the same. This compe- "tition was legitimate."

We have quoted rather freely from this opinion recently handed down because it seems to cover nearly everything contained in this litigation, and emphasizes the fact that this defendant is not answerable for the fact that the Standard Drug Company passed off a Parker pen for an Ideal, or that Mr. Saadi violated the trade mark Ideal nor that Mr. Cabrini had ignorantly advertised "Water- "man" pens.

From neither a legal nor a moral standpoint, therefore, can this so-called Italian judgment be deemed *res adjudicata*, estoppel or even persuasive as to any of the matters set forth therein.

The Bill of Complaint should be dismissed with costs in all courts.

April 15, 1914.

Respectfully submitted,

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Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

Supreme Court of the United States

L. E. WATERMAN COMPANY,
Plaintiff,

against

MODERN PEN COMPANY,
Defendant.

October Term
1913—
Nos. [redacted]
54472

ANSWERING BRIEF OF MODERN PEN COMPANY.

The plaintiff's brief devotes nearly all of its space to trying to prove that A. A. Waterman & Co. do not manufacture pens. This is new. Nothing of the kind has ever been suggested before. If A. A. Waterman & Co. do not manufacture these pens, who does? There can be no question that thousands of dozens are manufactured every year, and are sold in every State and Territory. The Modern Pen Company advertises itself as the sole selling agent of A. A. Waterman & Co. The factory is situated at No. 22 Thames Street; the sign on the door is A. A. Waterman & Co., or, now, Arthur A. Waterman & Co. A. A. Waterman & Co. order all the goods, and pay for them; pay the workmen; and pay the rent; have their own set of books, and take their own profits. Nobody before has ever suggested that A. A. Waterman & Co. pens are not made by A. A. Waterman & Co.

When the testimony of A. A. Waterman was

taken in Seattle, Oregon, by some error the instructions to attorneys went astray, and there was substantially no cross examination. When the error was discovered, the attorney was telegraphed to, but he knew nothing about the circumstances of the case. A. A. Waterman was then intensely hostile, as there was trouble between the Western and Eastern firms of A. A. Waterman & Co., because the Western firm had not paid some $4,500 that was due to the Eastern firm for show cases that were scattered throughout the Western territory, and Mr. Waterman made some absurd statements which were contradicted by the written evidence of the contracts which he did not have with him when testifying.

The claim that the defendant should have produced the books and papers of A. A. Waterman & Co. in court to prove that they were actively manufacturing pens is absurd. Why should they bring books into court to prove what nobody denied? That issue is not raised by the pleadings. We have never heard it intimated before that A. A. Waterman & Co. do not manufacture A. A. Waterman & Co. pens.

To be sure, Mr. Frank D. Waterman, a nephew of the original L. E. Waterman, swore to a complaint in Italy that there was no such firm as A. A. Waterman & Co., but that is wholly different from saying that the A. A. Waterman pens are not made by *anybody*, as this brief apparently assumes.

The plaintiff might just as well have sued any of the thousand dealers who sell A. A. Waterman pens as to have sued the Modern Pen Company. It is the sole selling agent, but there are many other sub-agents. They all get their rights through A. A. Waterman & Co., the manufacturer, and the allegation that they do not manufacture their own pens

s indeed a surprise that has never appeared before this brief in the United States Supreme Court.

Medals.

We are a little surprised that this brief should mention the fact that the L. E. Waterman Company has obtained a great many medals for their inferior wares, when their own manager swore on cross examination that he could not tell who had made a single pen for which they had received a medal. Never in the whole course of its experience has the plaintiff ever made the rubber parts of a fountain pen. Only within a very few years has it ever made *any* pen points. It merely assembles the parts, and that is done by the cheapest kind of female unskilled labor, while A. A. Waterman & Co., since July 1, 1905, and their predecessor, Frazer & Geyer Company, since about 1898, have manufactured every part of their pens in their own factory, rubber holders and gold pen points.

To obtain medals at expositions without competition is one part of the plaintiff's stupendous bluffs in advertising enormously and selling an inferior old-fashioned pen, unpatented. Indeed, we do not think that its salient features ever were patented. Its only pretext for a living patent relates to an adjunct to an antequated "feed" that other first-class pen makers would not use in any circumstances whatever.

On the other hand, the defendant's specialty is the "Modern" self-filler, the invention of Mr. A. A. Waterman. Its second specialty is the "Modern" middle joint, also the invention of Mr. A. A. Waterman. The "self-filler" patent belongs exclusively to A. A. Waterman & Co. The middle joint patent is used equally by the Sterling Pen Company and A. A. Waterman & Co., while the plaintiff's pens

can be made by anybody, and have not been substantially varied in thirty years.

Generally speaking, A. A. Waterman & Co. never exhibit at expositions. However, their Italian agent exhibited at the Turin Exposition, and obtained the gold medal in preference to the L. E. Waterman Company, the only other exhibitor.

Waterman v. Shipman.

At page 17 the brief has a quotation from *Waterman against Shipman*, 130 N. Y. 301, stating: "As far back as the year 1888, the courts of the "State of New York have recognized the adoption "of the trade mark 'Waterman's Ideal Fountain "'Pen, N. Y.'" The quotation does not, however, contain the real finding in that case. Judge Cullen says at page 312:

"We think that the word 'Ideal' as applied by "Mr. Waterman to fountain pens of his own manu- "facture, comes within the comprehensive definition "of a trade mark as given in *Selchow* v. *Baker*, 93 "N. Y. 59, 45 Am. Rep. 169, and that the plaintiffs, "as the owners of the name, are entitled to the "protection which the law affords to owners of trade "marks, notwithstanding the fact that the name is "also used to designate the invention. Upon the "facts found, the plaintiffs were entitled to an in- "junction restraining the defendants from using "the word 'Ideal' as applied to fountain pens."

130 N. Y. 301, confirmed the trade mark "Ideal," but did not, as the brief would lead one to assume, confirm the trade mark "Waterman's Ideal Foun- "tain Pen, N. Y."

L. E. Waterman Co. v. Waterman & Gibson.

On pages 17 and 18 the brief sets out the long quotation from the judgment in *L. E. Waterman Com-*

pany against Arthur A. Waterman and Edward L. Gibson, which judgment, by the way, is a curious combination of decision and judgment, and was drawn by the attorneys, not by the Judge. It contains a great deal of fulsome praise of L. E. Waterman pens, and there is no doubt that the judgment was entered by consent. At that time neither the plaintiff nor defendant manufactured any pens at all, and no two orders were alike. The quotation on page 17 does not contain, however, the statement found several times in the decision, as follows: "But the defendants are not prohibited from indi-"cating that fountain pens made by them are made "or prepared or sold for or by Arthur A. Waterman "& Company or A. A. Waterman & Company." This very important part of the decision is omitted. Mr. Waterman's offense at that time was in assuming a *corporate* name, instead of a *firm* name.

The brief states at page 18 "that the defend-"ant has also infringed the plaintiff's trade mark "consisting of the representation of a globe." It refers to the record, page 1339, but that record does not say that the defendant infringed the design of a globe. As already explained, Mr. Saadi, who had for some time been doing business under the firm name of the Royal Ideal Pen Company, used a circle containing the map of Africa and asked the defendant to make a few pen holders, stamped Royal Ideal Pen. He had what he called a copyright of this trade name. The amount of the order was trifling, the profit on the whole number of pens and points was only about $21; the pen points were sent back and replaced by others marked—not "A. A. Waterman & Co.," but "14 karat." The name on the holders was burned out by Mr. Saadi, and only one gross was ever sold. The profits to the defendant would be substantially nothing, and on account of this friction, Mr. Saadi saw fit not

to pay a bill of two hundred odd dollars, which he has never paid to this day. Defendant never infringed the representation of plaintiff's "globe."

This insignificent order went through without attracting the attention of anybody who was then an officer of the defendant, and nobody remembered it. Attention was called to it long after the beginning of this action. It was so trifling that no court has suggested that there should be any accounting in reference to it. It does not compare in importance with the infringement by plaintiff of A. A. Waterman & Co. patents referred to in the correspondence where the defendant was polite enough to call their attention to the infringement, whereupon they abandoned them.

Misrepresentation and Substitution.

According to the plaintiff's methods of quoting from the testimony, anything can be proved. It is like the old story of proving by the Bible that there is no God, by omitting the words: "The fool hath said in his heart." If the quotations taken from the testimony of Mr. Rightmire, Mr. Bartlett and Mr. Blatz will be read in reference to their context, it will be seen that each one of these salesmen said emphatically over and over and over again that their instructions were *never* to represent the defendant's goods merely as Waterman pens, but to be very careful and call them "A. A. Waterman pens to distinguish them from the inferior, out-of-date pens sold by the plaintiff. Nothing could be more emphatic than the testimony of those three salesmen from which sample illustrations are taken. They never represented defendant's pens as "Water-"man" without the initials.

The reference to the Wolfson advertisements where, after a number of scolding letters to the New

Jersey dealer, the defendant finally agreed to pay $3 on the cost of the advertising provided the offence should never be repeated, is a fair sample of the plaintiff's unfair quotations. When Mr. Guyer consented to allow $3 on the next bill for one-half of the cost of the advertisement, he thought that he was paying for the second advertisement which was all right. He said (p. 1260, fol. 3779):

"A. (Continued) When their bill came for the ad.
"I took it for granted that it was for the ad. in
"the second week's paper and allowed it."

The plaintiff devotes a heading to a statement that the defendant encourages the use of the name "Waterman" by dealers and agents. This is absolutely untrue, and the record will be searched in vain for even one single instance where the defendant ever knowingly sold or encouraged the sale of an "A. A. Waterman pen" as merely a "Waterman "pen." The plaintiff's own manager admitted that he had never known of such a case, and in reading the testimony of the salesmen referred to, the court will see with what great care they distinguished their own pens as "A. A. Waterman" goods in comparison with the inferior pens put out by the plaintiff.

On page the brief says: "The defendant ad-
"mits that there is confusion (Record, p. 199); it
"is shown that three of the defendant's salesmen,
"Rightmire (p. 1242), Bartlett (p. 1178), and Blatz
"(p. 1486), sold and recommended the sale of the
"goods of the defendant to its dealers as 'Waterman
"'Pens.' Twice has the complainant company been
"obliged to bring action against dealers in the so-
"called A. A. Waterman & Co. pens." The statements of that paragraph are false.

The Cleveland and Saadi Actions.

We are a little surprised that this brief should refer to the Cleveland case and the Saadi case where the bills of complaint were innocuous, not even mentioning A. A. Waterman & Co., while the decrees, taken by default or consent, contained an injunction against the use of the name "A. A. Waterman & "Co." This litigation is disgraceful and unethical, and as shown in the principal brief, in the opinion of Judge Killette, the Cleveland decree would not have been signed if it had been contested (brief, p. 143). The defendant had never heard of the Standard Drug Company of Cleveland, which had sold the *Parker* pen as a Waterman pen. This was a mere pretext for bringing this action, just as Saadi's use of a map of Africa in a circle was a pretext for bringing the other action, as an infringement of a globe.

The same may be said with reference to Saadi. He was an Egyptian who sold "novelties" under the trade mark of a circle with a map of Africa within it. He afterwards started to sell fountain pens of every kind. He sold L. E. Waterman as well as A. A. Waterman pens, and finally smuggled through the A. A. Waterman factory an insignificent order of cheap pens with "Royal Ideal Pen" marked on the holder.

The first decision in this action in the Circuit Court of Appeals was made just before the signing of the Saadi decree, and the Judge struck out the paragraph preventing the defendant, Saadi, from using the name A. A. Waterman & Co., but in another part of the decree, this was inadvertently left in.

We are not prepared to say that this Cleveland and Saadi litigation and the use that has been made of it as indicated in the principal brief, are not

sufficiently unethical to warrant its reference to the Bar Association.

The brief says at page under the title "Con-
"fusion": "Hobart W. Geyer, treasurer of the de-
"fendant Modern Pen Company and the principal
"witness of the defendant, testified: 'We admit
"'there is confusion' (Record, p. 1356, XQ. 934)."

The context is as follows:

"XQ. 931. How about the letter signed by K. M.
"Dickson, November 22, 1910? Does that show any
"confusion? A. I don't know. He addresses us
"plainly at 22 Thames Street; as A. A. Waterman
"& Co., 22 Thames Street, and he asks about an
"Ideal pen.

"XQ. 932. 'One of your Ideal pens'? A. Yes, 'One
"'of your Ideal pens.'

"XQ. 933. Does that show any confusion? A. I
"think so, perhaps.

"XQ. 934. You are not prepared to say positively
"that shows confusion? A. I DON'T KNOW. We
"admit that there is confusion.

"XQ. 935. I ask you if you are prepared to say
"positively that it does not show confusion? A. I
"think so, perhaps.

"XQ. 936. You are not prepared to say positively
"that it does; it is only 'perhaps'? A. That is a
"question of judgment entirely.

"XQ. 937. I ask you if you are prepared to say
"that it does not positively show confusion? A. I
"say I think it does, but I cannot state positively."

The quotations throughout are erroneous, or fractions of sentences, or isolated sentences taken from their context, and are wrenched from their true meaning. For instance, the brief says:

"We could differentiate our goods from those of
"the L. E. Waterman Company in any quantity of
"ways if we wanted to (Record, p. 1372, XQ.
"1052)."

The following is the record (p. 1371):

"XQ. 1082. If you wanted to differentiate your "goods from those of the L. E. Waterman Company "would it not be easy for you to do so *by omitting* "*the use of the name Waterman?*

Objected to as immaterial.

"A. We could do it in any quantity of ways.

"XQ. 1083. As a matter of fact, you admit there "is a lot of confusion between the goods of the L. E. "Waterman Company and those put out by A. A. "Waterman & Co., do you not? A. Yes. The bulk "of the confusion that we complain of is the fact "that L. E. Waterman Company's representatives "go around talking to the trade that there is no "such concern as A. A. Waterman & Co. and that "they have no right to sell our goods.

"XQ. 1084. Do you know of any such representa-"tion being made? A. I know I have had from 150 "to 250 reports from my salesmen and others.

"XQ. 1085. When did you have those reports? "A. They keep coming in continually. There is "apparently no break in them. * * *

"XQ. 1094. That confusion came from the fact "that the name and marking of the goods were so "similar, did it not? A. The marking is not sim-"ilar. There is no similarity to the marking at all. "The only similarity is that they both have the name "Waterman.

"XQ. 1095. What causes the confusion between "the goods? A. The same that causes the confusion "between the Baker's Cocoa and the three Fabers "lead pencils; simply because there is a family name "and more than one party of the same name making "similar goods.

"XQ. 1096. The question is repeated. A. There "is no confusion between the goods."

The brief says: "I am able to say that there has "been considerable or quite extended confusion in

"the trade or minds of the public from the letters "we get and from the reports that I get" (XQ. 1107).

The record is as follows:

"XQ. 1105. And in your experience you have "never found any confusion resulting from simi- "larity in the marking of the goods? A. No, per- "sonally I have not run across anybody that has "been mistaken in it at all.

"XQ. 1106. You never have seen any confusion "in the trade? A. Not personally, no.

"XQ. 1107. Why are you able to say then that "there has been considerable or 'quite extended,' "as you put it, confusion in the trade or in the "minds of the public? A. From the letters that we "get and from the reports that I get.

"XQ. 1108. Does not the confusion come because "of the similarity of the names of the concerns and "the similarity in the marking of the goods? A. "Some part of it is confusion and some of it care- "lessness. Within two weeks I got a letter from "Aiken-Lambert Co. [owned by plaintiff], address- "ed to A. A. Waterman Co., signed by one of the "officers, I think it was. They certainly ought to "know the difference between A. A. Waterman & "Co. and L. E. Waterman Co. I don't think that "is confusion; I think it is carelessness. A lot of "these others are carelessness in my opinion."

It would be very foolish to say that there is no confusion, but that confusion is very slight, and comes wholly from the fact that the name Waterman is contained in both trade names, a name that cannot be trade marked. This confusion is lessened by the great care taken by the defendant. It is added to very largely by the unethical business methods of the plaintiff. This slight confusion is such as the courts will not provide against as shown in the principal brief.

Mr. A. A. Waterman's Career in the Fountain Pen Business.

Under this heading the brief gives a misleading history of Mr. Waterman's pen career. He is a thousand times more a pen expert than Mr. Lewis E. Waterman was. He is a manufacturer and accomplished salesman, but a very poor financier, while the L. E. Waterman people are absolutely nothing but "publicity agents."

After leaving the L. E. Waterman Company's employ in about 1895 Mr. A. A. Waterman went into partnership with Mr. Gibson, and he made the initial mistake of doing business as the "A. A. "Waterman Pen COMPANY." After the litigation of 1898, and in compliance with the requirements of the decree of September 3, 1898, he conducted business as a *firm*, under the express permission of that decree. Neither he nor Mr. Gibson had started in with much capital, but they did not need much. They, like the plaintiff to this day, bought their holders of one dealer and their pen points of another, assembled the parts, and sold them as "A. A. "Waterman & Co." pens. That first firm did not fail. It simply went out of business. Gibson went with the Sterling Pen people, and for a few months, Mr. Waterman did business as "A. A. Waterman, "Maker, Boston."

As to this little know period, Mr. Stevens' testimony is wholly unworthy of any consideration, as shown in our principal brief. The circulars issued by both parties tell the whole truth about the matter. See pages 578, 579, 580.

In closing up that business, Rhodes Lockwood (The Sterling Pen people) took over a certain amount of the goods on hand and sold them. They never made any *new* goods marked "A. A. Water- "man & Co."

It is not true, as stated in the brief: "The busi-"ness name and good will of the Waterman-Gibson "concern were assigned and turned over to one "Rhodes Lockwood for the debts of the partner-"ship." See quotations in former brief and see the circulars issued at that time (pp. 578-80).

During this hazy period, Mr. Waterman seems within a few months to have organized the Colonial Pen Company which sold pens manufactured by a new firm of A. A. Waterman & Co. We know very little about the few months of the existence of this combination. It was during this time that Frazer & Geyer Company, who were then actually manufacturing every part of their fountain pens, sold goods to A. A. Waterman, who at that time was selling goods from the Atlantic to the Pacific, and had a very large trade. These sales led to the partnership arrangement of January, 1901, when a new firm of A. A. Waterman & Co. (Waterman, Frazer & Geyer) was organized to be the sales agent of the pens manufactured by Frazer & Geyer Company. This company had a small factory in Brooklyn, but as a part of the combination agreed to get $25,000 in capital from friends. They did get that year $50,000 in capital from the Chapmans, and from 1901 up to this date the Chapmans and their friends have been the financial backers of this enterprise, no matter what form it took.

Inasmuch as A. A. Waterman & Co. were in 1901 taking the entire product of the Frazer & Geyer Company, and might, as such, absorb all the profits while the Chapmans who put in substantially all of the money got nothing, Frazer and Geyer assigned their profits to the company. But Mr. Waterman retained an entirely different relationship. He had his salary and his royalties, and at all times retained in his own hands all matters of detail of manufacture, and he was not willing

that any pen bearing his name should not be subject to his exclusive direction as to details of manufacture, prices, etc., *and that fact continued to the very end.*

Mr. Waterman was very much pleased with his new arrangement as long as they continued to make large profits, but when they moved into a larger factory and began to lose money under Mr. Frazer's mismanagement, he then began to twist out of his contracts, and wanted North America divided into two parts, giving him the Western part. He was very familiar with this region. It was well advertised (with the Chapman's money) and A. A. Waterman & Co. show cases covered the whole district, and had cost thousands of dollars. In February, 1905, he made a new contract with Frazer and Geyer Company. It was not materially different from the later contract of June, 1905. He had been given outright $5,000 of stock in the Frazer & Geyer Company, and in May, 1905, he entered with much enthusiasm into the new reorganization which was to get rid of Frazer who had substantially no stock, but under a foolish pooling agreement with the Chapmans, he could not be ousted. Not only did the Chapmans own a large majority of the stock, but they had loaned $30,000 on chattel mortgage. The first reorganization proposed to put up $15 a share. Everybody agreed to it, including Waterman, Frazer and Geyer. Then Mr. Weaver, Waterman's lawyer, injected himself into the proposition and Frazer, Geyer and Waterman withdrew, thinking that they could destroy the reorganization.

Then the Chapmans began suit against all of these people, and sold out all interests, and Waterman and Geyer came back into the combination. The reorganization then took in all of the old stock excepting about four or five shares owned by Mr.

Frazer's wife and a friend. The circulars and the minutes of the meetings during this time of reorganization tell the whole story.

In Plaintiff's Exhibit 133, page 938, A. A. Waterman & Co. in liquidation, sold to the Frazer & Geyer Co. (fol. 2815) "all its right, title and interest in "and to all its assets of every name and nature "whatsoever" in consideration of its debts being paid (this was done), and by Plaintiff's Exhibit 134, page 939, 40, the Sheriff sold for the benefit of the reorganization (fol. 2818) the lease "also, "machinery and material for manufacturing foun- "tain pens, fixtures, patents, accounts and bills re- "ceivable and *all other personal property* of the "Frazer & Geyer Co."

The brief very frequently speaks of the Frazer & Geyer Company being in the hands of a receiver, but this receiver was obtained long after the reorganization and long after the Sheriff had sold out all its assets and which were bid in for the benefit of the reorganization. The receiver received absolutely nothing, as everything had been sold by the Sheriff and he very soon petitioned to be relieved of his receivership because he did not have enough money to pay the premium on his bond.

Under the new reorganization plan, where everybody put up $20 a share, a new corporation, the Modern Pen Company was to be the selling agent of A. A. Waterman & Co., the manufacturers. Elaborate agreements were drawn between all of the parties, and their relation fixed beyond any peradventure. In Mr. Waterman's testimony he states his recollection of these agreements, but that is all he pretends to do. It is the agreements themselves that fix the status of the parties, and no one has ever suspected before that there would be any question that A. A. Waterman & Co. were manufacturing the thousands of dozens of pens that go out under their name every year.

The difference between A. A. Waterman & Co and the Modern Pen Company is very distinct. Mr. Waterman was a stockholder, director and officer of the Modern Pen Company. He was also a partner of A. A. Waterman & Co., of which he had one-third of the profits. Everything is absolutely distinct between the two. Separate books are kept, and A. A. Waterman & Co. have distributed profits, while the Modern Pen Company has not yet declared any dividends.

When Mr. Geyer and Mr. Van Valer, the manager and superintendent of A. A. Waterman & Co., swore that A. A. Waterman & Co. were manufacturing pens, they knew what they were saying. As that fact had never been questioned at that time, it would have been foolish to have produced their separate books to show that they were actually doing business, when no one ever dreamed that that fact would be controverted.

The brief states as follows: "Mr. Waterman tes-
"tifies that the alleged firm of A. A. Waterman &
"Co. in which Waterman and the two Chapmans
"were concerned and for which firm the defend-
"ant company was the sole selling agent, never
"made anything, nor sold anything, nor brought
"anything, nor did anything; it kept no books,
"nothing was done by it (Record, p. 101)."

The following is the record at page 101: "XQ.
"That is, under the contract from December, 1901,
"to June 12, 1905, you received no profits from A.
"A. Waterman & Company? A. They audited my
"salary through the A. A. Waterman & Company.
"It was a nominal salary and expense account, but
"the profits, the returns to me that I depended
"upon, were a certain share of the earnings of the
"corporation and the dividends on stock that I got.
"I had a contract that called for certain share of

"their *gross earnings* as well as the net earnings "which came in the form of a dividend.

"Q. 76. That is from the gross earnings and the "net earnings of the one corporation? A. Yes. I "got it on the corporation's earnings. Not from the "firm; *these earnings had nothing to do with the "firm at all.*

"Q. 77. Now, June 12, 1905, you testified that "you entered into a partnership of A. A. Waterman "& Company, with Isaac E. Chapman and William "L. Chapman. Did that new partnership assume "any of the indebtedness of the old partnership? "A. No; I cannot recollect that it assumed any-"thing.

"Q. 78. Now, what were your functions under "this new partnership of June 12, 1905? A. I do "not recollect that I had any functions. Possibly, "I was to be consulted as regards forms and styles "of goods."

The above was the evidence of an intensely hostile witness, who made no pretense of doing otherwise than recollect what was contained in written contracts. When the defendant put those written contracts in evidence, Mr. A. A. Waterman's recollection of them became worthless. Where the brief gets the idea that A. A. Waterman & Co. of 1905 to keep no books, we cannot conceive. Everything connected with the manufacturing and the selling are absolutely distinct.

Mr. Geyer in his testimony says at page 1246:

"Q. 1. Please state your name, residence and oc-"cupation? A. Hobart W. Geyer, Ridgewood, N. "J., treasurer of the Modern Pen Company and "manager for A. A. Waterman & Co. of New York." He then goes on to tell the history of the various firms with which he had been connected since 1899.

At bottom of page 1277 he says:

"Q. 166. For how many years have you been "manufacturing pens? A. About thirteen years.

"Q. 167. The Modern Pen Company makes the "entire pen, does it? A. *The Waterman Company* "*makes the pens.*

"Q. 168. A. A. Waterman & Co.? A. Yes.

"Q. 169. They do the manufacturing? A. Yes.

"Q. 170. And they make pen points? A. Yes; "the pen point and the holder and all parts com- "plete except for fancy pens, we do not make the "mountings; we buy them and put them on our- "selves."

He then continues in great detail to explain their shop methods.

(Page 1280): "Q. 186. In the present state of "the art is it possible to make a better pen than "that manufactured by A. A. Waterman & Co.?

"Mr. Watson: Objected to as entirely incompe- "tent and not within the knowledge of this wit- "ness.

"A. No.

"Q. 187. And you are familiar with all the pens "manufactured in this country? A. Practically, "yes.

"Q. 188. Hundreds come in every week for re- "pairs? A. Yes.

"Q. 189. And they are all under your supervi- "sion? A. Yes.

"Q. 190. Kindly describe the manufacture of the "holders, stating first how long you have been manu- "facturing pen holders? A. I have been manufac- "turing pen holders since I first went into the "business in 1897."

(Page 1286): "Q. 244. Is it a fact that from "1901 up to July 1, 1906, Mr. A. A. Waterman "was continuously without interruption a member "of some firm of A. A. Waterman & Co. with "which you were connected?

"Objected to as immaterial.

"A. Yes."

(Page 1346): "XQ. 836. It is not a matter of "fact that you did not do any business until Aug- "ust 15, 1905, in the Modern Pen Company? A. I "think they did business right from the start. I "think they began business just as soon as they "were organized. In fact I know the business was "going along all the time. The factory was never "closed down at all, neither was the office.

"XQ. 837. What does the firm of A. A. Water- "man & Co. own around there now—anything at "all? A. Yes; they own all the goods that are "being made up. We buy them from them when "they are made up.

"XQ. 838. They do not own any of the factory "do they? A. Not the plant; no.

"XQ. 839. Is it not a matter of fact that all your "accounts there are kept together?? A. *I have "testified that they were not kept together. We "keep separate sets of books. They are entirely "separate.*

"XQ. 840. Does the firm of A. A. Waterman & "Co. owe the Modern Pen Company now? A. The "Modern Pen Company is now selling agent for the "A. A. Waterman & Company. Before it was the "other way around.

"XQ. 841. The old concern in which you were a "partner, A. A. Waterman & Co. never manufac- "tured any goods at all did they? A. They did the "assembling, the same as the L. E. Waterman Com- "pany testified they do in their manufacture.

"XQ. 842. The present concern of A. A. Water- man & Co. does not do any selling at all except to "the Modern Pen Company does it? A. That is "all."

A. A. Waterman & Co. have filed with the County Clerk the necessary certificate to do business under that name (Ex. A-31, p. 1706-1707).

"XQ. 900. Was this decree [of 1898] ever dis-

"cussed between you and Mr. Frazer and Mr. Wa-"terman as to whether the firm of A. A. Waterman "& Co. of which you are a member were bound by "that decree? A. It was always so understood and "we always so instructed our salesmen about the "selling of our goods, that we were selling them "under that decree and they must be very partic-"ular to sell them as pens made by A. A. Waterman "& Co., so as not to have anybody think they were "L. E. Waterman & Company goods.

"XQ. 901. Don't you know that the decrees en-"joining the calling of the pens made by A. A. Wa-"terman & Co. as Waterman pens? A. No.

"XQ. 902. You don't know that? A. No.

"XQ. 903. I would like to have you look at a "copy of the decree which is in evidence? A. It "was something that never entered into the ques-"tion because we never did call them Waterman "pens; we always called them A. A. Waterman & "Co. pens. That is one of the things we were "very particular about."

(Page 1357): "XQ. 957. You testified that the "Modern Pen Company never paid any dividends, "is that correct? A. Yes. I did not testify that "it had not earned any though.

"XQ. 957. *Has there been any distribution of "profits at any time among the firm of A. A. Wa-"terman & Co.? A. Yes; I think so. The profits "have been turned over to them, so I presume they "divided them among themselves.*

"XQ. 958. Did you ever know that A. A. Water-"man got any profits from the firm of A. A. Water-"man & Co. composed of himself and the Chap-"mans? A. They get their profits. I don't know "what they do with them.

"RXQ. 1309. Did A. A. Waterman & Co. take "any action independent of the Frazer & Geyer "Company? A. A. A. Waterman & Co. attended to

"the selling of the goods entirely, *practically run-*
"*ning the business.* * * *

"RXQ. 1312. And A. A. Waterman & Co. did "not do any business except with the goods that "they got from the Frazer & Geyer Company? A. "Yes; they bought thousands of dollars of stock "outside; they bought pearl goods and boxes and "advertising matter and paid all their bills for ad-"vertising."

(Page 1405): "RXQ. 1372. During the year "from 1905 to 1906, Mr. Waterman was still con-"nected with you, was he not? A. Yes; he was a "member of the firm of A. A. Waterman & Co. "and was a director and officer of the Modern Pen "Company."

Who or what does the plaintiff *now* think that "A. A. Waterman & Co." is? In the scores of pages of alleged misdirections (pp. 956-1107) and in the various letters written by the plaintiff to A. A. Waterman & Co., to whom or to what were the references made? In the agreements drawn by Mr. Watson for the purchase of the trade name of "A. A. Waterman & Co." (pp. 1724, 1727), were they trying to buy a myth? Why were they trying to buy the plant of A. A. Waterman Co. if that firm was not manufacturing pens?

The partnership agreement, Exhibit A-13, took substantially all of the time of Mr. I. E. Chapman, W. L. Chapman, Hobart W. Geyer, Arthur A. Waterman and the writer from before the temporary agreement dated May 27, 1905 (Exhibit A-12, page 1666), until June 12, 1905 (Exhibit A-13, page 1668). For two weeks and a half, for substantially every day in the week, the former partnership agreement between Waterman, Frazer and Geyer, dated February 11, 1905 (Exhibit A-10, page 1650), was gone over and the variations thereof in the new contract were considered in minutest de-

tail. On some days the parties remained in New York for dinner and continued the discussion during the evening. The writer has never drawn a contract involving millions that took so much time and got so thoroughly upon his nerves as the drawing of this contract, Exhibit A-13. It went into effect immediately. The Modern Pen Company was organized to carry out its provisions, and the old factory of Frazer & Geyer Company was continued under the new management of A. A. Waterman & Co. The partnership agreements of February and June, 1905, are the same in their essential features. Each provided for allowing Mr. Waterman to get out of his old 40-year contract, and gave him possession of the western territory which was particularly *his* field, and in which "A. A. Waterman & "Co." show cases were scattered in every state and territory. It was thoroughly advertised (at the expense of the enterprise where for years the Chapmans had furnished the money) and it was considered the choicest part of the whole country, including Chicago and everything to the West.

This new contract, Exhibit A-13, was a part of the reorganization in which Mr. Waterman kept his $5,000 in shares of stock, and the Chapmans put up for him the 20 per cent assessment. Nobody was frozen out. If any one was not able to pay the assessment, it was advanced for him and his note taken. The only stock left out was five or six shares belonging to Frazer's wife, who refused to come in.

Both the Modern Pen Company and A. A. Waterman & Co. immediately entered into their respective duties; had their separate books and offices (adjoining) and A. A. Waterman & Co. have divided their profits among themselves while the Modern Pen Company has not yet declared a dividend, although it has accumulated a surplus. To intimate that

A. A. Waterman & Co. never actually continued the manufacture of pens is simply absurd. Mr. Geyer and Mr. Van Valer swear to the manufacturing done under the terms of the partnership agreement, and Mr. Waterman's testimony, which has been twisted as the plaintiff desires, made no pretense of testifying as to anything except the contents of written agreements which he did not have with him, and which he did not pretend to remember with accuracy. They were later put in evidence by the defendenat.

After the formation of this partnership, the duties were divided up among the different parties according to their respective abilities, the Chapmans continuing to finance the enterprise, while Mr. Waterman went on the road to market the product, and Mr. Martling was made manager of the factory. Not proving a success, Mr. Geyer was promoted, and under him the factory of A. A. Waterman & Co. has been exceedingly prosperous, and no one before the plaintiff's brief in the United States Supreme Court has ever suggested that A. A. Waterman pens are made by anybody except A. A. Waterman & Co.

We notice that the plaintiff's brief sets out nearly five pages of the Italian decree, just as if it were persuasive. It certainly is not *stare decisis* or *res adjudicata*, and for a Latin judge, unfamiliar with the common law, having nothing before him but this one contract, and with his strange conception of the remote Western country, to assume to criticise a contract made in America, between Americans, a contract which has passed the criticism of a number of American judges, is the height of presumption, and we are surprised that any American lawyer should present such an opinion as one to be taken as persuasive in an American court.

The brief says that this Italian decree was af-

firmed in the highest Italian court on April 9, 1914. The defendant has never heard of any such decission. Its latest advices from its correspondent in Turin is to the effect that the Italian court was waiting for the decision of the United States Supreme Court, having heretofore refused to follow the Circuit Court of Appeals, because it was not a court of last sort.

The Decree of September 3, 1898.

The plaintiff claims that that decree is not binding because for a few months, in 1899, Mr. Waterman made and sold pens for himself individually and not as a member of some firm of A. A. Waterman & Co. "That the present firm of A. A. Water-"man & Co. is not the direct successor or assignee "of the original firm composed of Waterman and "Gibson." This argument is, of course, foolish. The plaintiff in that decree has continued at all times since to sell fountain pens. The principal defendant, A. A. Waterman, has continued at all times since to sell, and most of the time, actually to manufacture fountain pens. There never has been a day from September 3, 1898, to July 1, 1906, that the defendant in that decree has not been in the fountain pen business, selling or manufacturing fountain pens under the authority of that decree.

L. E. Waterman Company is its own privy, and A. A. Waterman was his own privy. He has a continuing right under the decree of September 3, 1898, and if either L. E. Waterman Co. or A. A. Waterman sold out, it is its or his business. The vendee would be the direct privy of the original parties to that suit.

The brief claims at page 56, as follows:

"At the most, the permission to indicate that "fountain pens made by the said Waterman & Gib- "son 'were made or prepared or sold for or by " 'Arthur A. Waterman & Company, or A. A. Wa- " 'terman & Company,' was a purely *personal* right "or license conceded solely because the name of "one of the partners was Waterman, and was a "*purely personal right or license* to use one's own "name in one's own business."

The above quotation is, of course, wholly erroneous, and not founded in law. Mr. A. A. Waterman had as much right to assign the use of his name and his rights under the decree of 1898 as he had to sell a horse.

Mr. A. A. Waterman had an absolute right to sell the use of his name to his partners, and that is a matter between him and his partners with which this plaintiff, a third party, has no concern.

Laches and Acquiescence.

Everything under this heading has been covered in the principal brief. The Messrs. Chapman put many thousands of dollars into this enterprise, relying upon the validity of the 1898 decree. Nobody ever questioned it, least of all, this plaintiff.

The matter of negotiations between Frank E. Waterman and Mr. Watson, his attorney, for the purchase of the trade name, "A. A. Waterman & "Co." was proved beyond any peradventure. It was proved by the documents themselves and by some of the parties who did the negotiating. See quotations from documents at pages 133-136 of brief.

The brief continually refers to the fact that neither of the Messrs. Chapman were sworn. There was positively nothing that they could swear to that would change conditions in the least. It would

have been merely cumulative of undisputed facts. Mr. I. E. Chapman was, some years ago, struck by lightning, and his nervous condition is such to make testifying very undesirable. His brother had comparatively little to do with this matter. Mr. Geyer, who was for days on the stand, is the one who had charge of everything, and whose former connection with the Frazer & Geyer Company made him the one man who could testify as to every phase of this controversy. The Messrs. Chapman are officers of the Merritt & Chapman Derrick & Wrecking Company, and that business occupies their whole attention. They have nothing to do with A. A. Waterman & Co. or the Modern Pen Company except in a financial way. The practical duties are devolved upon Mr. Geyer and his associates.

The brief comments upon the fact that when Mr. Waterman entered into his various partnerships, he used the firm name of A. A. Waterman & Co., and not Waterman & Gibson, Waterman, Frazer & Geyer, etc. That is a matter of taste, with which this plaintiff has nothing to do. A. A. Waterman & Co. is a proper and usual trade designation. Besides, Mr. A. A. Waterman was at all times the principal figure in these various firms, and he had been long in the field and known from coast to coast. While he was never strong financially, he controlled an enormous trade from ocean to ocean, and he invented the middle joint pen and the self filler which has made A. A. Waterman & Co. famous.

THE ONLY DISTINCTIVE WATERMAN PEN IS THE A. A. WATERMAN "MODERN" SELF FILLER, MANUFACTURED UNDER THE A. A. WATERMAN PATENTS. THE L. E. WATERMAN "IDEAL" PEN IS AN OLD FASHIONED LEAKY UNDER-THE-FINGER JOINT, PROTECTED BY NO PATENT.

When his firm became the sole agent of Frazer & Geyer Company, the manufacturers, he brought 80 per cent of the trade to the new combination, and when in 1905, Mr. Weaver, his attorney, sent out his circular to all the stockholders advising them not to go into the reorganization, it was on the ground that Mr. Waterman controlled substantially all of the trade and that the new combination would therefore be a failure, and its stock not worth fifty cents on a dollar. See Exhibit A-62, pp. 1773, 1774-6.

However, Mr. Waterman soon abandoned his attorney and he and Mr. Geyer came into the reorganization, and it became a great success under Mr. Geyer's management. At all times the different firms of A. A. Waterman & Co. have made a specialty of pens manufactured under Mr. A. A. Waterman's patents, and have been successful through his skill as a salesman and capacity as an inventor. While he was intensely hostile to the defendant when his testimony was taken, he is now with them, covering the western territory.

It is a little late in the day, when the plaintiff arrives at the Supreme Court of the United States, to introduce for the first time the unheard of claim that A. A. Waterman & Company do not manufacture pens and have never done anything under the partnership contract of June 12, 1905.

There was no such controversy or suggestion in any former brief or when the testimony was being taken, and if that had been the issue, it would have been the simplest thing in the world to have met it. It was met by the testimony of Mr. Geyer and Mr. Van Valer, and of all of the traveling men, who knew perfectly well that they were working for the sales agent, but that the pens were manufactured by an entirely different concern.

Inasmuch as Mr. A. A. Waterman was not only

a partner of the manufacturing firm of A. A. Waterman & Co., but was a director and stockholder of the Modern Pen Company, and under all the contracts retains the power of dictating the styles and prices that were to be placed on goods that bore his name, the statements contained in the brief are, to say the least, curious.

Besides, there is no question but what the old firm of A. A. Waterman & Co. (Waterman, Frazer & Geyer), were a going concern for years, and they had a perfect right to sell out their interests to a stranger if they wanted to.

The New York Law Journal of May 2, 1914, contains a reference to the case of *Stix, Baer & Fuller D. Goods Co.* v. *American Piano Co.*, 211 Fed. Rep. 271, November 28, 1913. The general principles enunciated in this case confirm every contention of the defendant. Descendants of the original Knabbe sold out their interests to what might be called a "trust" and started a new "cor-"poration" called Knabbe Bros. Company. The headnote contains the following:

"The second user of a family name in trade may "make an article which possesses all the qualities "of the first manufacture, and may freely so adver-"tise. It would be a grievous perversion of the law "of unfair trade competition to use its doctrines "so as to convert a trade name into a patent right."

The real effect of this decision is absolutely ridiculous, however, requiring the defendant to publish the notice found at page 277, which would take about half a page of ordinary printing. This appears, however, to refer to "circulars," catalogues "and advertisements" only. This case shows how the courts are drifting into the absurd. If that notice were required to be put on every pen manufactured by A. A. Waterman & Co., it would take a microscope to read the notice.

We notice that the plaintiff has substantially nothing to say about the suffix which is the principal point in this appeal. The plaintiff evidently finds that it is not doing its trade any good to require A. A. Waterman & Co. to advertise the plaintiff with a suffix "Not connected with the L. E. "Waterman Company."

The plaintiff's conduct throughout this entire litigation has been wholly reprehensible. The defendant has never at any time done anything not of good business and moral ethics, and this complaint should be dismissed with costs on all courts.

New York, May 5, 1914.

Respectfully submitted,

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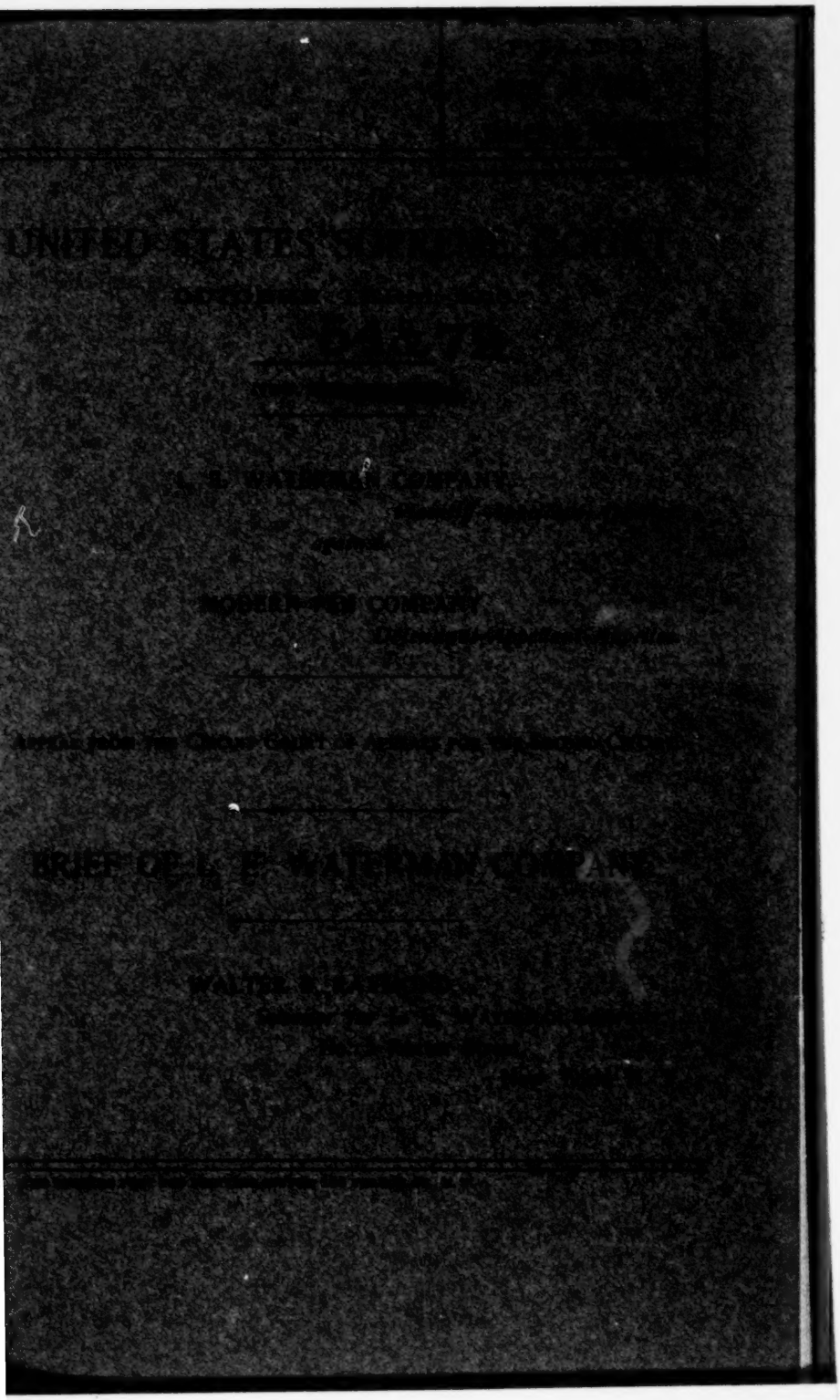

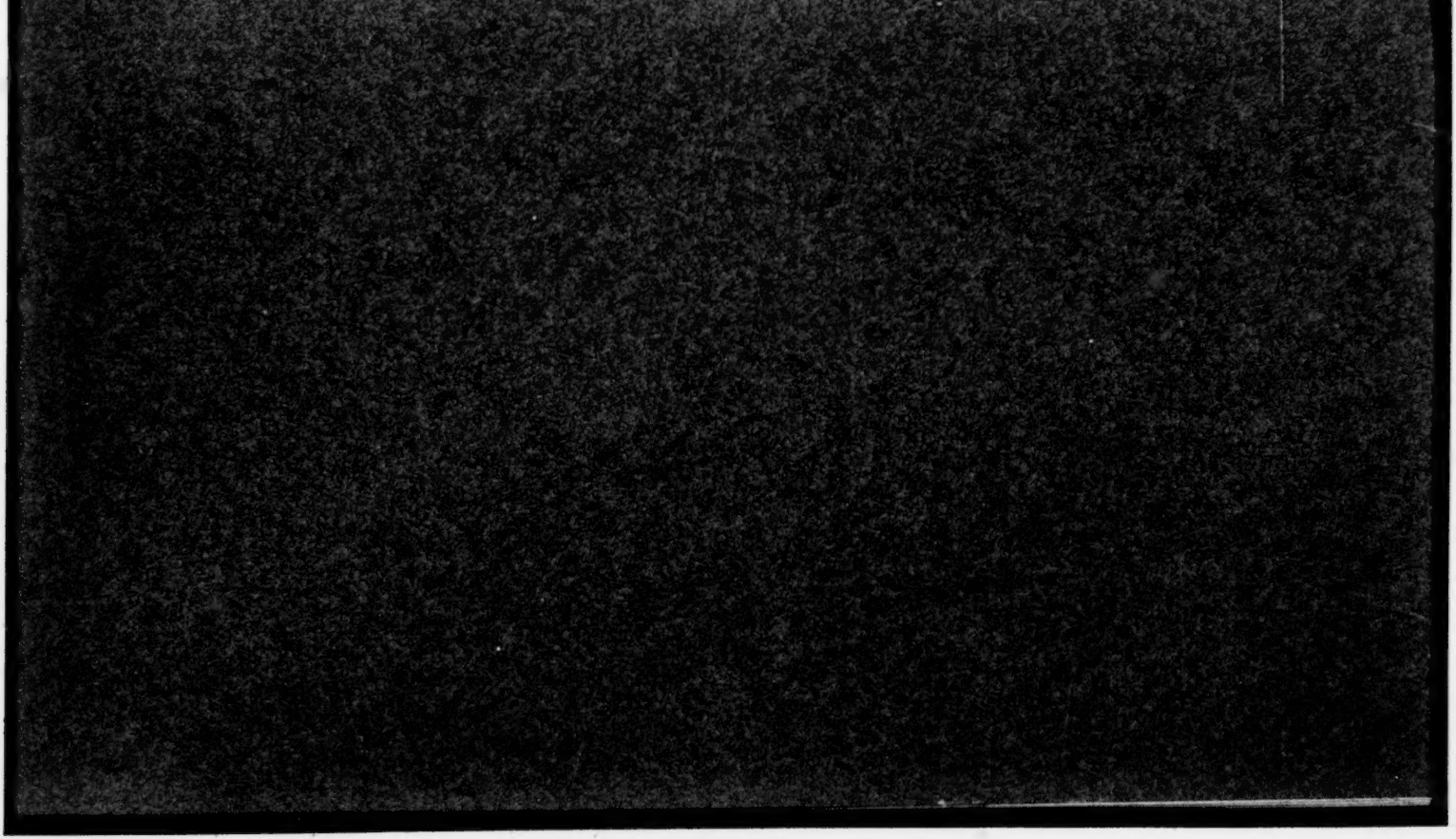

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Supreme Court of the United States.

OCTOBER TERM, 1913.

L. E. WATERMAN COMPANY, Plaintiff-Appellant-Appellee, AGAINST MODERN PEN COMPANY, Defendant-Appellant-Appellee.	Nos. 340 and 393.

BRIEF ON BEHALF OF THE L. E. WATERMAN COMPANY.

Statement of Case.

The plaintiff below, L. E. Waterman Company, filed its bill against the defendant below, Modern Pen Company, in the United States Circuit Court, for the Southern District of New York, on the 11th day of April, 1910; subsequently, on the 16th day of July, 1910, its amended bill was filed (find Bill at Record, p. 2; and Amended Bill at Record, p. 16), and it is upon that amended bill that the case has proceeded.

This is a case in equity and involves infringement of trade-marks and unfair competition in trade. The trade-marks involved were set up both as common law trade-marks and as duly registered trade-marks under the Act of 1881.

The following decisions have been rendered in this action, to wit.:

1. Opinion (memorandum), by Judge Hough on motion for preliminary injunction (Record, p. 1108).

2. Opinion (*Per Curiam*), Circuit Court of Appeals on appeal from preliminary injunction (Record, p. 1114), officially reported in 183 Fed. Rep., page 118.

3. Opinion, by Judge Hand on final hearing (Record, p. 1816), officially reported, 193 Fed. Rep., page 242.

4. Opinion (*Per Curiam*), Circuit Court of Appeals on Appeal from Decree on Final Hearing (Record, p. 1893), officially reported, 197 Fed. Rep., 534.

5. Opinion, Circuit Court of Appeals on petition of L. E. Waterman Company for rehearing (Record, p. 190), Officially Reported, 197 Fed. Rep., page 536.

6. Opinion (*Per Curiam*), Circuit Court of Appeals on petition of Modern Pen Company for rehearing (Record p. 1906), officially reported, 197 Fed. Rep., page 536.

Summary of Amended Bill of Complaint.

The bill alleges diversity of citizenship, the plaintiff being a New York corporation, the defendant a West Virginia corporation, both, however, having their principal places of business in New York City (Record, p. 16, Par. I, fol. 48).

The plaintiff's business of manufacturing fountain pens was founded by Lewis E. Waterman in 1883 and he at that time adopted and used as trademarks for said pens the words, "Waterman's" and "Waterman's Ideal Fountain Pen, N. Y." and "Ideal" (Record, p. 17, Par. II, fols. 49–50).

The plaintiff company was incorporated in 1887 and succeeded to the business, good will, trade-marks, etc., of Lewis E. Waterman and has continued the business to the present date (Record, p. 17, Par. III, fol. 51).

In 1900 and 1901, the plaintiff company registered the trade-marks above set forth in the United States Patent Office (Record, p. 18, Par. IV, fols. 53–54).

The plaintiff has expended in the excess of $2,500,000 in advertising its pens and its business under the said trade-marks and for the past four or five years has expended in such advertising a sum exceeding $200,000 per annum. Its business has steadily increased from year to year until thousands of these fountain pens are annually sold. The fountain pens have become widely known and recognized and are called for and purchased by the general public as "Waterman Pens" or "Waterman Ideal Fountain Pens." The name "Waterman" for more than twenty years has been well known to the trade and public as indicating the plaintiff company and its goods (Record, p. 19, Par. IV, fols. 56–60).

The defendant, Modern Pen Company, has sold fountain pens not made by plaintiff but stamped with the words "Waterman" and "A. A. Waterman & Co." and has thus infringed plaintiff's trade-marks and simulated plaintiff's corporate name and the trade name of its goods (Record, pp. 20–21, Par. V, fols. 60–61).

Dealers have advertised and sold defendant's pens as "Waterman" pens and "Waterman Ideal" pens and are encouraged by the defendant to do so. These acts are damaging the plaintiff's reputation and good will (Record, p. 21, Par. V, fol. 62).

There is no person of the name "Waterman" connected with the defendant's business since July, 1906. Defendant advertises and holds itself out as sole selling agent of A. A. Waterman & Co., a fictitious business name. This fictitious name is used for the purpose of deceiving the public and

passing off defendant's pens as and for plaintiff's pens. The result has been great confusion among the trade and public as to the identity of origin of plaintiff's and defendant's pens, and plaintiff charges that defendant's act, as aforesaid, constitutes unfair competition and infringement of plaintiff's registered trade-marks (Record, pp. 22–23, Par. VI–VII, fols. 64–69).

Summary of Answer.

The defendant, Modern Pen Company, admits diversity of citizenship and incorporation (Record, p. 1139, Par. A, fol. 3416).

Defendant denies the material averments of plaintiff's bill and sets up that the trade-marks "Waterman" and "Waterman's Ideal Fountain Pen, N. Y." are not susceptible of being valid trade-marks, inasmuch as the word "Waterman's" is a family name and "Fountain Pen, N. Y." is descriptive (Record, p. 1139, Par. B–C, fols. 3417–3418).

Defendant denies that the name "Waterman" in connection with fountain pens indicates the plaintiff company as maker, and avers that the use of the word "Waterman" in connection with fountain pens has not been exclusive with the plaintiff for at least twelve years last past. That during the twelve years, various firms of A. A. Waterman & Co. have made fountain pens to the knowledge of and without interference from the plaintiff and that the use of the word "Waterman" by said firms has been by virtue of a decree of the Supreme Court of the State of New York, and avers that the defendant has equal right with the plaintiff to the use of the name "Waterman" (Record, p. 1140, Par. D, fols. 3419–3421).

Defendant admits that there is no person now connected with the Modern Pen Company by the name of "Waterman"; that the Modern Pen Company holds itself out as sole selling agent of A. A. Waterman & Co., which manufactures and sells

the fountain pens marked "A. A. Waterman & Co." (Record, p. 1141, Par. E-F, fols. 3422-3423).

Avers that the firm name of "A. A. Waterman & Co." is the name of an actual firm, its use legal and rightful, and denies that it has used it for purposes of deception (Record, p. 1141, Par. F, fols. 3423-3424).

Defendant admits that confusion has necessarily arisen between the plaintiff's name, "L. E. Waterman Company" and the name, "A. A. Waterman & Co.," and asserts that the defendant company has as much right to use the name "Waterman" as has the plaintiff (Record, p. 1142, fols. 3425-3426).

By way of special justification of the use of the name "Waterman" by the Modern Pen Company, the defendant alleges that it is the sole selling agent of a firm of A. A. Waterman & Co., composed of Isaac E. Chapman and William L. Chapman, who legally do business under the firm name of "A. A. Waterman & Co," with the same rights that the said firm of A. A. Waterman & Co. had to use the said name as the said firm had prior to July 1, 1906, when one Arthur A. Waterman was a member of the said firm. The Modern Pen Company further claims that Arthur A. Waterman, either individually or as a member of some firm of A. A. Waterman & Co., has continuously manufactured and sold fountain pens bearing the said name for more than twelve years. That complainant is not entitled to the exclusive use of the word "Waterman" in that it is a family name; that the use of the said name, "A A. Waterman & Co.," was expressly permitted by a decree of the Supreme Court of the State of New York in 1898 in an action wherein the plaintiff sued Arthur A. Waterman and E. L. Gibson, and that ever since the said decree the said Arthur A. Waterman, either individually or as a member of some firm of A. A. Waterman & Co., has manufactured and sold fountain pens bearing

the stamp "A. A. Waterman & Co." (Record, pp. 1143-1144, Par. K (1), fols. 3427-3431).

On this answer issue was duly joined.

This case is before this Court on cross-appeals from the following decree:

Decree.

"This cause having come on to be further heard, and on reading and filing the mandate of the United States Circuit Court of Appeals, for the Second Circuit in this cause bearing date the 10th day of June, 1912, A. D., it is now hereby

Ordered, adjudged and decreed, that the former decree entered and filed herein on the 9th day of February, 1912, be and the same is now hereby modified in obedience to said mandate and in cognizance with the opinion of said United States Circuit Court of Appeals. And it is now hereby

Ordered, adjudged and decreed, that a writ of permanent injunction, in due form, go against the defendant, its agents, officers and servants forbidding it or them, or any of them, from using the words, 'Waterman' or 'Waterman's' or 'A. A. Waterman & Co.' or 'A. A. Waterman & Company,' or 'A. A. Waterman,' or 'Ideal' or any representation of a globe, upon any part of any fountain pen or in connection with the sale of fountain pens. And it is now hereby

Ordered, adjudged and decreed, that a writ of permanent injunction, in due form go against the defendant, its agents, officers and servants, forbidding it or them, or any of them, under any of the circumstances hereinafter enumerated, from using the words 'Arthur A. Waterman & Co.,' or 'Arthur A. Waterman & Company,' or 'Arthur A. Waterman,' without the words 'Not Connected with the L. E. Waterman Co.,' in appropriate juxtaposition therewith, written in letters at least as large and equally conspicuous as the said words 'Arthur A.

Waterman & Co.,' or 'Arthur A. Waterman & Company,' or 'Arthur A. Waterman.' The following are the circumstances referred to: engraved or otherwise marked upon any parts of fountain pens sold by them, or offered for sale; in any way marked upon all such boxes containing such pens; whenever in any other way by advertisement, or otherwise, they use the words to denote any fountain pens made or sold, or offered for sale, by them, or that they are the makers or sellers of any fountain pens, but permitting them to use said words without such suffix under all other circumstances.

The pen holders which the defendant had in good faith already marked in accordance with the said former decree of this court with the suffix 'not connected with the original Waterman pen' prior to the decision of the United States Circuit Court of Appeals, or in accordance with the opinion of the United States Circuit Court of Appeals with the suffix 'not connected with the L. E. Waterman Co.,' before the use of the name '*Arthur*' was required by that court, may be sold. It is now hereby

Ordered, adjudged and decreed that the plaintiff L. E. Waterman Company, have and recover of and from the said defendant, Modern Pen Company, its costs, charges and disbursements paid or incurred in this action prior to November 14th, 1910; that the costs, charges and disbursements paid or incurred by both parties in this action, both in this court and in the Circuit Court of Appeals, for the Second Circuit, subsequent to November 14th, 1910, be divided equally between the parties hereto; that all such costs, charges and disbursements be taxed in the usual manner by the clerk of this court; that the same be offset one against the other; and that the party in whose favor there be any balance have execution against the other party for such balance.

LEARNED HAND,
United States District Judge."

The assignment of errors filed by the Modern Pen Company is found in the record at page 1918 and relate solely to unfair competition in trade, and the Modern Pen Company appeals only from that portion of the decree which compels the Modern Pen Company to use the suffix "Not connected with the L. E. Waterman Co." in connection with the words "Arthur A. Waterman & Co."

The appeal of the L. E. Waterman Company is based upon alleged errors relating to trade-marks registered under the laws of 1881 and to matters of unfair competition.

The assignment of errors of the plaintiff below, L. E. Waterman Company, are set forth below (Record, p. 1910):

Complainant's Assignment of Errors.

"The appellant in the above entitled cause in connection with its petition for appeal herein, presents and files therewith its assignment of errors as to which matters and things it says that the judgment and decree entered herein on the 10th day of June, 1912, is manifest error and that the United States Circuit Court of Appeals, for the Second Circuit, erred in this, to wit:

1. The Court erred in holding and deciding that the appellee could use the name 'Arthur A. Waterman & Co.' or 'Arthur A. Waterman & Company' if used with the suffix 'not connected with the L. E. Waterman Co.' in marking, advertising and selling fountain pens.

2. The Court erred in not passing a decree of injunction absolutely prohibiting the appellee from using in connection with the manufacture or sale of fountain pens, or parts thereof, the name 'Arthur A. Waterman & Co.' or 'Arthur A. Waterman & Company' or 'Arthur A. Waterman.'

3. The Court erred in not holding that the alleged partnerships (*a*) between Arthur A. Waterman and Dewey; (*b*) between Frazer, Geyer and Waterman; (*c*) between the two Chapmans and Waterman, were all mere shams or fraudulent devices used as cloaks and covers to secure the names 'Waterman,' 'A. A. Waterman,' 'Arthur A. Waterman,' 'A. A. Waterman & Co.,' 'Arthur A. Waterman & Co.,' and 'Arthur A. Waterman & Company' in the fountain pen business for the purpose of filching the trade and business of the appellant's long prior and established and existing business.

4. The Court erred in holding that any of the alleged partnerships (*a*) of Dewey and Waterman. (*b*) of Frazer, Geyer and Waterman, or (*c*) of the Chapmans and Waterman were *bona fide* firms or at any time did a *bona fide* business.

5. The Court erred in not holding that the agreement of June 12, 1905, upon which the appellee depends for its rights to use the names 'Arthur A. Waterman,' 'Arthur A. Waterman & Co.,' or 'Arthur A. Waterman & Company' was a mere sham or fraudulent device.

6. That Court erred in not holding that neither the appellee, nor the alleged partnership of which the appellee is the selling agent, are the assignee or successors, or in privity with any prior *bona fide* concern entitled to use in any manner whatsoever in the fountain pen business the names 'Arthur A. Waterman,' 'Arthur A. Waterman & Co.,' or 'Arthur A. Waterman & Company.'

7. The Court erred in not decreeing to the appellant the damages which it has suffered by reason of the appellee's infringement of appellant's trademarks and for the damages appellant has suffered by reason of the appellee's unfair trade practice.

8. The Court erred in not decreeing that a writ of permanent injunction issue against the appellee, its agents, officers and servants, forbidding it or them, or any of them, from

(*a*) Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any fountain pen of other manufacture than that of the appellant under the name of 'Waterman' or 'Waterman's' or 'Waterman Pens,' or 'Waterman's Pens,' or 'Waterman Fountain Pens' or "Waterman's Fountain Pens' or 'Ideal Pens,' or any mark or name in imitation thereof or near resemblance thereto as might be calculated to deceive or be likely to cause confusion or mistake in the mind of the public or deceive purchasers, or which could indicate that the fountain pens sold, represented or advertised are fountain pens of appellant's manufacture.

(*b*) Infringing the appellant's trade mark "Waterman's Ideal Fountain Pen, N. Y.' or infringing the appellant's trade-mark 'Ideal' and from manufacturing or selling fountain pens (other than fountain pens of appellant's manufacture) having the said trade marks or either of them, or any simulation or colorable imitation thereof, on such fountain pens, whether on the holder or on the gold pen, or on labels, boxes, signs, letterheads, billheads, circulars or advertisements accompanying or used in connection with the making or selling of such fountain pens, or in any manner whatsoever.

(*c*) Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any fountain pens of other manufacture than that of the appellant, engraved, imprinted or otherwise marked with any representation of a globe on such fountain pens, or upon boxes containing such pens, or on labels, signs, circulars or advertising accompanying or used in

connection with the advertising or selling of such fountain pens.

(*d*) Using in connection with the manufacture or sale of fountain pens or parts thereof, other than fountain pens of appellant's manufacture, the name 'Waterman' or 'Waterman's' or 'A. A. Waterman' or 'A. A. Waterman & Co.,' or "A. A. Waterman & Company' or 'Arthur A. Waterman & Co.,' or 'Arthur A. Waterman & Company,' or 'Arthur A. Waterman.'

9. The Court erred in not taxing all of the costs against the appellee.

WHEREFORE appellant prays that said judgment and decree of said United States Circuit Court of Appeals, for the Second Circuit, may be corrected according to the laws and customs of the United States."

The questions involved and the manner in which they are raised on the pleadings are as follows:

1. The amended bill alleges the foundation of a business in 1883, the adoption of the trade-mark "Waterman's Ideal Fountain Pen, N. Y.," the continuous and extensive use of that trade-mark through many years; the building up of a large business under this trade mark and the business and trade name "Waterman," and by the expenditure of millions of dollars in advertising such trade-mark and trade name.

The answer denies the acquirement of any trade-mark or trade name rights by the plaintiff.

2. The amended bill alleges that "Waterman's Ideal Fountain Pen, N. Y." is a valid trade-mark duly registered under the Act of 1881 in the United States Patent Office on February 5, 1901, and that

the defendant, Modern Pen Company, infringes such trade-mark.

The answer denies validity and infringement of this trade-mark.

3. The amended bill alleges infringement by the defendant, Modern Pen Company, of its trade-mark "Ideal," duly registered under the Act of 1881 in the United States Patent Office in the year 1900.

The answer denies such infringement.

4. The amended bill alleges that the use of the word "Waterman" by the defendant upon fountain pens and in connection with the sale of fountain pens is confusing and that in the hands of retail dealers defendant's pens marked with that word are instruments of fraud and that dealers use defendant's pens bearing the word "Waterman" for purposes of substitution. That defendant knows of such substitution and encourages it with full knowledge of the rights of the plaintiff.

The answer denies that the plaintiff has any right whatsoever in the use of the name "Waterman" on the ground that the name "Waterman" is a family name and alleges that the defendant company is the sole selling agent of a copartnership called "A. A. Waterman & Co.," composed of Isaac E. Chapman and William L. Chapman, who have acquired certain rights from one Arthur A. Waterman, which alleged copartnership makes the pens sold by the defendant corporation and rightfully stamps them with that name, "A. A. Waterman & Co." The defendant denies any knowledge as to what dealers may do in the substitution of goods.

The answer admits confusion but justifies it on the ground that it is necessary and merely incidental to its ordinary use of the name "Waterman", and admits that there is no one connected with the business of the defendant company of the name of "Waterman" and that there has been nobody connected with the copartnership of "A. A. Water-

man & Co." of the name of "Waterman" since July 1, 1906.

THE PLAINTIFF, THEREFORE, BEARS THE BURDEN OF ESTABLISHING ITS PRIORITY, ITS TRADE-MARK, TRADE NAME, GOOD WILL, RIGHTS AND THE ACTS OF THE DEFENDANT ALLEGED TO VIOLATE THE SAID RIGHTS.

If the plaintiff establishes these facts, the burden then shifts to the defendant to justify its use of the name "Waterman" either as a trade-mark or trade name, and to prove affirmatively each and every allegation of its answer set forth by way of affirmative justification of the use of the name "Waterman."

THE DEFENDANT, MODERN PEN COMPANY, THEREFORE MUST BEAR THE BURDEN OF PROVING THE FOLLOWING AFFIRMATIVE ALLEGATIONS SET FORTH IN ITS ANSWER:

1. That it is the selling agent of a copartnership of A. A. Waterman & Co.

2. That such copartnership of A. A. Waterman & Co. is a legal, valid and existing copartnership.

3. That the said copartnership obtained a right to the use of the name "Waterman."

4. That the said copartnership actually makes fountain pens and rightfully stamps them "A. A. Waterman & Co."

5. That the pens which the defendant, Modern Pen Company, sells are the pens so made and stamped by the said copartnership of A. A. Waterman & Co.

Summary of Evidence of Plaintiff's Rights.

In 1883, Lewis E. Waterman was engaged in the fountain pen business in New York City and adopted as his trade names and trade-marks for his fountain

pens the names "Waterman's", "Ideal" and "Waterman's Ideal Fountain Pen, N. Y." (Record, pp. 32, 33). In 1887, Mr. Lewis E. Waterman organized the plaintiff company which took over and has since carried on said business (Record, pp. 32, 33); fountain pens bearing said trade names and trade-marks (Record, Exs. 7, 8, 103 and 104 offered at pp. 36, 37, 570 and 577), have been continuously made and sold in large numbers by the plaintiff and its predecessors since 1883 and have been widely known, advertised and sold under said trade-names and trade-marks, and have acquired and enjoyed a high reputation for quality and utility; Ferris' Deposition (Record, pp. 34, 35); Lancaster's Deposition (Record, p. 612, Qs. 67–96); Ferris' Deposition (Record, p. 58, Qs. 272–277; p. 72, Q. 286); Plaintiff's Exhibit 21 (Record, pp. 846–847); Stephens' Deposition (Record, p. 279, Q. 16); Poulson's Deposition (Record, p. 560, Qs. 15–18); Chaffee's Deposition (Record, p. 346, Q. 23); Tandy's Deposition (Record, p. 148, Q. 15); Burgoyne's Deposition (Record, p. 374, Qs. 13–16); Bailey's Deposition (Record, p. 381, Q. 10); Flaherty's Deposition (Record, p. 391, Qs. 12–13); Stott's Deposition (Record, p. 395, Q. 10); Barry's Deposition (Record, p. 566, Qs. 24–32); Brook's Deposition (Record, p. 520, Qs. 20–21); Brown's Deposition (Record, p. 445, Q. 18); Wilson's Deposition (Record, p. 486, Qs. 12–13; Cooper's Deposition (Record, p. 356, Qs. 14–16); Joel's Deposition (Record, p. 358, Qs. 11–13); Mason's Deposition (Record, p. 354, Q. 16); Nunn's Deposition (Record, p. 584, Qs. 32–34); Steinmuller's Deposition (Record, p. 1126, Qs. 26–28); Staunton's Deposition (Record, p. 433, Q. 13); Whiting's Deposition (Record, p. 363, Qs. 12–13); and Whiting's Deposition (Record, p. 368, Q. 14) such was the finding of the Supreme Court of the State of New York in 1888 (130 N. Y., 301), and in 1898 (Exhibit B, Record, p. 1603), and is true now, as it was then, as is abundantly shown by the present record cited *supra*. A large and extensive business

has been built up by the plaintiff and a valuable good will and reputation established, and its fountain pens are well known and sold under said trade-marks and trade names in every civilized country of the world (Ferris' Deposition, Record, p. 35) and are generally recognized by dealers and the public as the standard and best fountain pens on the market (Record cited *supra*). The plaintiff has expended a sum exceeding $2,500,000 in advertising and popularizing its fountain pens under said trade-marks and trade names and during the last five years has expended about $200,000 a year in such advertising (Ferris' Deposition, Record, p. 75, Qs. 301, 302-311). The plaintiff's goods are commonly and generally known and advertised the world over as "Waterman Pens" and "Waterman's Fountain Pens" and the name "Waterman" in connection with fountain pens has long since acquired a secondary meaning when applied to fountain pens as indicating plaintiff's goods, and the names "Waterman" and "Waterman's" are the distinguishing characteristic feature by which the complainant company and its wares are known, and such has been the fact for twenty-five years (Record, p. 35, Ferris' testimony, Qs. 28-32; Record, p. 1367, Geyer's (defendant's witness) testimony, Qs. 47-51, x-Q. 1052). It is testified to by a score or more of witnesses called in this case that the trade and public know and call for complainant's fountain pens as "Waterman Pens" and "Waterman's Fountain Pens." See list of witnesses *infra*.

The names "Waterman Pens," "Waterman's Pens" and "Waterman's Fountain Pens" have been the names by which plaintiff's and its predecessors' goods have been commonly known and called for by the trade and public since 1883 (Record, p. 611, Lancaster's Deposition, Qs. 39-49; Record, p. 39, Ferris' Deposition, Qs. 60-67; 196, 197; Record, p. 51; Record, p. 53, Qs. 229-233; Record, pp. 74, 75, Qs. 291-299). These names do not, and never did, designate any special construc-

tion, workmanship or style of fountain pens made and manufactured by the complainant but indicated origin and pointed to the maker, that is, the plaintiff and its predecessors (Record, p. 74, Ferris' Deposition, Qs. 291–296).

In the year 1883 Mr. Lewis E. Waterman was awarded the medal of excellence from the Mechanics' Institute of New York for fountain pens (Record, p. 72, Ferris' Deposition, Q. 286). The plaintiff's pens have been of high excellence in the quality of material, workmanship, design and construction and have been awarded the twenty-five highest awards for fountain pens at various expositions beginning with the year 1883 and extending up to the year 1910. These awards have been for excellence and superiority. At every world's fair and international exposition of prominence held during the last twenty-seven years, fountain pens of plaintiff's and its predecessor's manufacture have been exhibited, and on every occasion when exhibited they have been given the highest award for fountain pens. A list of these awards is found on page 72 to 74 of the Record and a reproduction of some of the medals is found on pages 846 and 847 of the Record (see also Record, p. 612, Lancaster's testimony, Qs. 67–96; Record, p. 58, Ferris' Deposition, Qs. 272–277). Complainant's pens are known and generally recognized as the best and standard fountain pens on the market and such has been the fact for many years. This is testified to by a large number of leading dealers in various cities: Portland, Me. (p. 279, Q. 16); Boston, Mass. (p. 560, Qs. 15–18); New York City, N. Y., (p. 344, Q. 42); Brooklyn, N. Y. (p. 148, Q. 19); Philadelphia, Pa. (p. 374, Qs. 13–16); Washington, D. C. (p. 381, Q. 10; p. 391, Qs. 11–13; p. 395, Q. 10); Rochester, N. Y. (p. 566, Qs. 24–32); Cambridge, Mass. (p. 520, Q. 20); Montreal, Canada (p. 445, Q. 18; p. 486, Qs. 12–13); Pittsburg, Pa. (p. 356, Qs. 14–16; p. 358, Qs. 11–13; p. 354, Qs. 16–18); Baltimore, Md. (p. 584, Qs. 32–34; p. 1126, Qs. 26–28); Toronto, Canada (p. 493,

Q. 13; p. 486, Qs. 12-13); Buffalo, N. Y. (p. 366, Qs. 12-13; p. 368, Q. 14); Lancaster testimony, (p. 611, Qs. 34-52; p. 612, Qs. 67-96).

As far back as the year 1888, the courts of the State of New York have recognized the adoption of the trade-mark "Waterman's Ideal Fountain Pen, N. Y.," and in 1891 in the case of *Waterman Co.* v. *Shipman*, 130 N. Y., 301, Mr. Justice Cullen of the New York Court of Appeals, said:

> "In July of the same year (1883), said Waterman adopted the name 'Waterman's Ideal Fountain Pen' for the fountain pens. * * * It commanded an extensive sale and was a source of great profit to the proprietor. * * * Also that it is known as such article to the public and to the buyers and consumers thereof by that name."

In the case of *L. E. Waterman Co.* v. *Arthur A. Waterman and Edward L Gibson*, Mr. Justice Kellogg, of the Supreme Court of the State of New York, entered a decree in favor of the plaintiff on September 3, 1898 (Defendant's Exhibit B, Record, p. 1603), from which we quote as follows:

> "For several years before 1887 Lewis E. Waterman, the inventor and patentee of such fountain pens, was engaged in their manufacture and sale, and in 1887 he transferred to the plaintiff the said business, and he has since continued as plaintiff's president and general manager. During all this time these fountain pens were stamped 'Waterman's Ideal Fountain Pens, N. Y.' and sometimes 'Waterman's Fountain Pens, N. Y.', and during all this time such fountain pens were known to the trade and to customers and to purchasers at retail as 'Waterman's Pens,' or as 'Waterman's Fountain Pens,' and during such time they have been so advertised by the said Lewis E. Waterman and by the plaintiff and by customers of the said Lewis E. Waterman and of the plaintiff who disposed of such pens at retail.
>
> That the plaintiff corporation since 1887

has been known to the trade and to its customers and to purchasers of such pens as the 'Waterman Company,' or the 'Waterman Pen Company,' and such names indicated to such persons the plaintiff company as the manufacturers and sellers of the said fountain pens. * * *

The plaintiff and said Lewis E. Waterman have largely advertised the said fountain pens and they became well and favorably known to the trade and world and are well made and operative fountain pens. * * *

That these acts of the defendants were done by them with the intent that the public and the trade and purchasers of fountain pens should be led to believe that the fountain pens manufactured by the defendants were Waterman's pens or Waterman's fountain pens, as manufactured for many years by the plaintiff and its predecessor, Lewis E. Waterman, and with hope and expectation that by the use of the said corporate name and by the use of the word Waterman the defendants might be able to obtain a sale for their pens and to obtain an advantage from the name of 'Waterman Company,' and the name of 'Waterman' or 'Waterman's,' which, for many years, have been well known to the trade as indicating the plaintiff Company and its fountain pens."

Summary of Evidence of Defendant's Wrong-doing.

The defendant admits the validity of plaintiff's trade-mark "Ideal" and its infringement (Record, p. 1335), Geyer's testimony, x-Qs. 714–720). Defendant has also infringed plaintiff's trade-mark consisting of the representation of a globe (Record, p. 1339, Geyer's testimony, x-Qs. 758–762; see Exhibit 8, Complainant's Pen, Exhibits 14 and 15, "Royal Ideal Pen" and box).

DEFENDANT MISREPRESENTS AND SUBSTITUTES ITS GOODS AS AND FOR THOSE OF THE PLAINTIFF.

Fred R. Rightmire, defendant's travelling salesman, testifies as follows:

> "I said to the trade that our pen was a genuine Waterman pen, as much as any pen was a Waterman pen. Ours was the genuine A. A. Waterman & Co. pen regardless of what the other fellows had" (Record, p. 1242, rd-Q. 452). "I told the trade that A. A. Waterman & Co. is a genuine Waterman pen" (Record, p. 1242, rx-Q. 457). "When the question was brought up, I have sold all the pens as A. A. Waterman & Co. pens; if it was a genuine Waterman, I answered it, yes, and told them so" (Record, p. 1242, rx-Q. 458).
>
> "x-Q. 155. You say one in a hundred does not know the difference in the pen he is getting? A. In that he is getting a Waterman pen; the same as the man is getting a Faber pencil.
>
> x-Q. 156. Dealers are selling A. A. Waterman & Co. as a genuine Waterman pen? A. As a genuine A. A. Waterman pen.
>
> x Q. 157. Are they not selling them as genuine Waterman pens? A. As a genuine Waterman pen?
>
> x-Q. 158. Yes? A. Yes, a genuine Waterman pen" (Record, p. 1221).

Harry C. Bartlett, Jr., another of defendant's travelling salesmen, testified as follows:

> "If it is a self-filling pen, we call it a Modern A. A. Waterman Company. If it is a middle joint I call it a Modern A. A. Waterman" (Record, p. 1178, x-Q. 406). "I do not always call them Waterman pens when I talk about them for any length of time." (Record, p. 1178, x-Q. 407.) "Sometimes I do, I call them A. A. Waterman pens." (Record, p. 1178, x-Q. 408.)
>
> "x-Q. 427. And that is the position you always take with all your dealers?
>
> A. How do you mean?

x-Q. 428. That they have the right to call them Waterman pens?

A. Yes, they have the right to call them Waterman pens if they want to."

"They have the right to call them Waterman pens because it is a Waterman pen." (Record, p. 1178, x-Q. 432.)

Max L. Blatz, another of defendant's travelling salesmen, testified as follows (Record, p. 1486):

"x-Q. 99. If she had sold one of your pens as a Waterman pen and given a written receipt for it as a Waterman pen, she would have been doing something that was not right, wouldn't she?

A. I don't know; that is a difficult question. If she gave an A. A. Waterman & Co. receipt, she would be giving a receipt that read A. A. Waterman & Co.

x-Q. 100. But if she had given a receipt as a Waterman pen, when she in reality sold an A. A. Waterman & Co. pen, would she be doing what was right?

A. She would be doing what was right, yes."

The defendant paid one-half the cost of advertisements by certain dealers in which defendant's pens were advertised as "Waterman Fountain Pens ideal for Christmas giving" and made such payments after seeing such advertisements (see Advertisements, Exhibit 11, Record, p. 337; Ash's testimony, Record, pp. 335–376, Rd-Q. 34–40).

"Rd-Q. 38. A copy of the advertisement was submitted to the Modern Pen Company before they paid their portion of the cost?

A. Yes." (Record, p. 336).

The advertisement covered by this answer is shown at Record, page 337, and appeared in at least two newspapers (Record, p. 332, Qs. 7–12).

The Defendant has Encouraged the Use of the Name "Waterman" by its Dealers and Agents, and has Sought to Unfairly Profit by the Resulting Confusion in the Trade.

The defendant's manager, Geyer, admits that the name "Waterman" indicates in the trade the plaintiff's goods (Record, p. 1367, x-Q. 1052).

The testimony of the defendant's salesmen, Rightmire (Record, p. 1242, rx. Q. 458; Record, p. 1221, x-Qs. 155-158); Bartlett (Record, p. 1169, x-Q. 287; p. 1182, x-Q. 474; p. 1178, x-Qs. 406-407; x Qs. 427-428-432); and Blatz (Record, p. 1486, x-Qs. 99-100) shows conclusively the sales methods of the defendant in putting into the hands of the dealers their goods under the name "Waterman" as a tool of fraud for their substitution by the dealers as and for the goods of the plaintiff company.

The testimony of Geyer, himself, refers to A. A. Waterman & Co. as the "Waterman Company," which is again illustrative of the facility with which the defendant creates confusion as to its identity and the origin of its goods (Geyer's deposition, Record, p. 1277, Q. 167).

It is testified by a score or more of witnesses called in this case that the trade and public know and call for plaintiff's fountain pens as "Waterman pens" or "Waterman's Fountain Pens;" see depositions of:

Edward M. Stevens, who has been handling these pens for ten years in Portland, Maine (p. 279, Qs. 14-24).

Richard H. Waldo, who has known of these pens for ten years (p. 288, Qs. 18-27).

Arthur N. Chaffee, who has been selling these pens for seventeen years in New York City (p. 346, Qs. 21-25, 30-49).

H. Lee Mason, Jr., who has been handling and

selling these pens for twenty years in Pittsburg, Pa. (p. 353, Qs. 9-17).

John A. Cooper, who has been selling these pens for twenty-three years in Pittsburg, Pa. (p. 355, Qs. 11-16, 26-28).

Ephriam M. Joel, who has been selling these pens for eight years in Pittsburg, Pa. (p. 358, Qs. 8-18).

Du Monte A. Whiting, who has been selling these pens for twelve years in Buffalo, N. Y. (p. 362, Qs. 10-13, 32-35).

Willis P. Whiting, who has been selling these pens for fifteen years in Buffalo, N. Y. (p. 368, Qs. 10-16).

Sidney J. Burgoyne, who has been selling these pens for sixteen years in Philadelphia, Pa. (p. 373, Qs. 6-16, 25-27).

Ralph S. Bailey, who has been selling these pens in Washington, D. C., for fourteen years (p. 380, Qs. 3-10, 18-19).

Rolland E. Fleharty who has been selling these pens in Washington, D. C., for fourteen years (p. 390, Qs. 6-13).

Charles G. Stott who has been selling these pens in Washington, D. C., for fifteen years (p. 395, Qs. 7-10).

William Foster Brown who has been selling these pens in Montreal, Canada, for twenty years (p. 444, Qs. 6-18).

James Southerland who has been selling these pens in Montreal, Canada, for twelve years (p. 465, Qs. 10-16).

William J. C. Wilson who has been selling these pens for fifteen years in Toronto, Canada (p. 486, Qs. 6-13).

Warren N. Lancaster who has been familiar with these pens since 1883 (p. 611, Qs. 39-51).

George F. T. Brooks who has been selling these pens for fifteen years in Cambridge, Mass. (p. 519, Qs. 7-17; 56).

William J. Chaplin who has been familiar with

these pens in Boston, and selling them for ten years (p. 526, Qs. 11-24).

Howard L. Wheeler who has been selling these pens for seventeen years in Providence, R. I. (p. 556, Qs. 10-14).

Harper W. Poulson who has been selling these pens in Boston, Mass., for fifteen years (p. 560, Qs. 15-25).

Kevin W. Barry who has been familiar with these pens for some years, and selling them in the City of Rochester, N. Y., three years (p. 564, Qs. 10-14).

J. Edward Nunn who has been selling these pens in Baltimore, Md., for fifteen years (p. 582, Qs. 18-25, 69-71).

Theodore A. Steinmuller who has been selling these pens in Baltimore, Md., for twenty-five years (p. 1125, Qs. 14-21).

Van Brunt Tandy who has been handling fountain pens for sixteen years in Brooklyn, N. Y. (p. 148, Qs. 14-16).

O. B. Stanton who has been handling these pens for eighteen years in Toronto, Canada (p. 494, Q. 23; p. 492, Qs. 8-11.

George P. Kneeland for eleven years in Cleveland, O. (p. 513, Qs. 3-6; 10-11).

The defendant admits that there is confusion (Record, p. 199); it is shown that three of the defendant's salesmen, Rightmire (p. 1242); Bartlett (p. 1178), and Blatz (p. 1486), sold and recommended the sale of the goods of the defendant to its dealers as " Waterman Pens." Twice has the complainant company been obliged to bring action against dealers in the so-called A. A. Waterman & Co. pens.

The Cleveland Case.

L. E. Waterman Company vs. *Standard Drug Company.*

This action was begun in October, 1909, in the United States Circuit Court at Cleveland, Ohio, for

infringement of trade-mark and unfair competition in trade.

The complaint was somewhat similar to the one in the case at bar and is contained in full in the record (Defendant's Exhibit A–28, p. 1694).

The motion for a preliminary injunction came on before Judge Tayler, who, after hearing counsel for the respective parties at length, stated he would grant the preliminary injunction. Thereupon the Standard Drug Company stated they had no further defense to make and would consent that the injunction be made permanent, and it was entered in the form shown in the record at page 1703 (Defendant's Exhibit A-29).

The defendant's claims as urged in this case were all presented and considered. The defendant has strenuously urged that this decree was obtained by fraud and collusion between the plaintiff and the Standard Drug Company. The later history of this case is found in 202 Fed. Rep., p. 167, where the complainant moved for an attachment in contempt against the Standard Drug Company, and one Sol Teller was alleged to be a tenant of the Standard Drug Company and a customer of the defendant herein.

Sol Teller was represented by counsel retained by the Modern Pen Company. The Circuit Court of Appeals there found that the decree entered by Judge Tayler was not fraudulent or collusive or entered by consent of the parties. See *L. E. Waterman Co.* vs. *Standard Drug Co.*, 202 Fed., pp. 167-172 (C. C. A.).

The Washington Case.

L. E. Waterman Company vs. *John Saadi.*

This case was started in the early part of December, 1909, in the Supreme Court of the District of Columbia.

The complaint generally was somewhat similar to

the complaint at bar. The attorneys for the defendant Saadi were also retained and employed by the defendant at bar and by A. A. Waterman & Co. to defend their alleged rights in the Saadi connection (see Record, pp. 134-5).

Saadi was selling a pen made by A. A. Waterman & Co., stamped with a globe containing a representation of the continent of Africa and marked "Royal Ideal."

The judgment and decree in favor of the plaintiff is found at page 842 of the Record. It finds the defendant guilty of unfair trade by his use of "A. A. Waterman & Co."

The plaintiff contends that this is binding on the defendant at bar, the defendant having retained and paid the counsel for the said Saadi.

21. *Souffront* vs. *Compagnie des Sucreries*, 217 U. S., 475.

The defendant, although admitting the validity of the trade mark "Ideal" and denying in its answer, verified by the very man who sold Saadi the pens, was compelled to admit an infringement of the trade-mark "Ideal" (Record, pp. 1335-7, Qs. 1714-1740).

The above cases are illustrative of the acts of the defendant's customers, aided and encouraged by the defendant itself and the position of its salesmen, to wit, that its customers are entitled to use the name "Waterman" alone in the sale of its goods.

The plaintiff contends that these acts of the defendant constitute an infringement of its trade-marks "Ideal" and "Waterman's Ideal Fountain Pen, N. Y.", registered under the Act of 1881.

Confusion.

Confusion is admitted in defendant's answer in the following words, to wit:

> "The defendant admits that some confusion necessarily has arisen by reason of

> the fact that the names L. E. Waterman Company and A. A. Waterman & Co. are somewhat similar" (Record, Answer, p. 1142, fol. 3425).

Hobart W. Geyer, treasurer of the defendant Modern Pen Company and the principal witness of the defendant, testified: "We admit there is confusion" (Record, p. 1356, x-Q. 934). "I think the words Waterman's Fountain Pens in the trade generally mean L. E. Waterman Company's goods" (Record, p. 1367, x-Q. 1052). "We could differentiate our goods from those of the L. E. Waterman Company in any quanity of ways if we wanted to" (Record, p. 1372, x-Q. 1082). "I am able to say that there has been considerable or quite extended confusion in the trade or minds of the public from the letters we get and from the reports that I get" (x-Q. 1107).

Furthermore, complainant has proven beyond any doubt that confusion exists among the trade and public between plaintiff's and defendant's goods and that people that had received A A. Waterman pens when asking for Waterman's pens thought they were pens of the L. E. Waterman Company make and were genuine Waterman's Fountain Pens. When purchasers asked for a *Waterman* pen, they wanted and expected to receive a Waterman's Ideal Fountain Pen of the manufacture of L. E. Waterman Company, as shown by the following depositions:

Arthur N. Chaffee in New York (p. 347, Qs. 30-49); John A. Cooper in Pittsburg, Pa. (p. 356, Qs. 18-28); Ephraim M. Joel in Pittsburg, Pa. (p. 558, Qs. 15-25; 39-40); Du Monte A. Whiting in Buffalo, N. Y. (p. 364, Qs. 24-35); Rolland E. Fleharty in Washington, D. C. (p. 391, Qs. 14-18); William Foster Brown in Montreal, Canada (p. 447, Qs. 44-48); William J. C. Wilson in Toronto, Canada (p. 487, Qs. 20-21); James Southerland in Montreal, Canada (p. 466, Qs. 19-24); Oliver B. Stanton in Toronto,

Canada (p. 495, Qs. 38–41); Theodore A. Steinmuller in Baltimore, Md. (p. 1115, Qs. 14–28); George F. T. Brooks, Cambridge, Mass. (p. 519, Qs. 17–21); Howard L. Wheeler in Providence, R. I. (p. 557, Qs. 15–17; 31–36); Kevin W. Barry in Rochester, N. Y. (p. 565, Qs. 15–26); Harper W. Poulson in Boston, Mass. (p. 562, Qs. 52–58); Van Brunt Tandy in Brooklyn, N. Y. (p. 148, Qs. 18–22).

Confusion is further shown in a mass of letters, envelopes and other exhibits in this record in connection with the depositions of William I. Ferris (Record, p. 36); Plaintiff's Exhibit 6 (Record, pp. 956–1107); William H. Kernan (Record, pp. 247–264); Plaintiff's Exhibits 47–99*a* (Record, pp. 868–922), and Edward J. Kastner (Record, pp. 188–193); Plaintiff's Exhibits 31–46 (Record, pp. 851–867); advertisements (Record, pp. 337, 848, 849 and 866).

Synopsis of Evidence in the Record as to Arthur A. Waterman's Career in the Fountain Pen Business.

Prior to 1897, Arthur A. Waterman was employed by the complainant as a salesman (Record, p. 1605, fol. 4814); and in 1897 in partnership with one Edward L. Gibson, he began the manufacture and sale of fountain pens under the name "A. A. Waterman Pen Company" (Record, p. 93 Waterman's testimony, Qs. 5 and 6), which name in 1898 was changed to A. A. Waterman & Co. (Arthur A. Waterman's testimony, Record, p. 93, Qs. 9–12; Stevens' testimony, Record p. 792, Q. 32; Record, pp. 800–802, x-Qs. 115–134); in 1897, the complainant began an action against the said Arthur A. Waterman and Gibson for unfair competition in trade, which resulted in a decree favorable to complainant, entered on September 3, 1898 (Record, p. 1603). On February 1, 1899, the partnership composed of Arthur A. Waterman and Gibson was dissolved

(Record, p. 93, Arthur A. Waterman's testimony, Q. 12). This Waterman-Gibson partnership had existed only five or six months (Stevens' testimony, Record, p. 794. Qs. 27–31; A. A. Waterman's deposition, Record, p. 93, Q. 12; Plaintiff's Exhibit 100, Record, p. 578; Exhibit 102, Record, p. 590; Stevens' deposition, Record, p. 795, Qs. 38–39; Record, p. 796, Qs. 44–45, 49, 56; Record, p. 801, x-Q. 124; Record, p. 803, x-Qs. 159–165). The business name and good will of the Waterman-Gibson concern were assigned and turned over to one Rhodes Lockwood for the debts of the partnership (Stevens' Deposition, Record, p. 795, Qs. 38–45, 49, 56, 60, 61; Record, p. 798, Q. 75; Record p. 803, x-Qs. 150–159, x-Q. 164; Record p. 805, x-Q. 187; Record, p. 807, x-Q. 207; Record, p. 810, x-Qs. 256–272; Record, p. 813, Rd-Qs. 292–294; Record, p. 814, Rd-Qs. 300–301; Record, p. 816, Rx-Qs. 337–341). After the dissolution of the partnership composed of Arthur A. Waterman and Edward L. Gibson, Arthur A. Waterman continued in the fountain pen business, using the name A. A. Waterman, Maker, Boston, on his pens. He had no partners and there was no firm of A. A. Waterman & Co. in existence (Arthur A. Waterman's testimony, Record, p. 93, Qs. 12–16; Record, p. 111, x-Q. 5; Chaplin's testimony, Record, p. 532, x-Qs. 73–86; Record, p. 545, Rd-Qs. 189–192; Stevens' testimony, Record, p. 797; Qs. 57–59). Thereafter Arthur A. Waterman helped organize the Colonial Pen Company by which he was employed (Chaplin's testimony, Record, p. 533, x-Qs. 87–89). This concern afterwards had a factory and stamped its fountain pens in various ways, including the stamp "A. A. Waterman & Co." (Chaplin's testimony, Record, p. 534, x-Qs. 92–93; Record, p. 545, Rd-Qs. 199–203).

Arthur A. Waterman had no interest in this factory; it belonged to the Colonial Pen Company (Chaplin's testimony, Record, p. 553, Rd-Qs. 309–317). In the latter part of 1900, Arthur A. Waterman severed his connection with the Colonial Pen Company which failed and all its assets as a

going concern were sold to one Lancaster (Record, p. 550, Rd-Qs. 260–261). Thereafter A. A. Waterman made a contract with William G. Frazer and Hobart W. Geyer, dated January, 1901 (Record, p. 94, Qs. 18–19, Waterman's testimony; Defendant's Exhibit A-4, Record, p. 1635; Geyer's testimony, Record, p. 1290, x-Qs. 279–283; Record, p. 1293, x-Qs. 304–306). Arthur A. Waterman entered into an arrangement at that time with said Frazer and Geyer for a term of ten years (Record, p. 94, Waterman's deposition, Qs. 21, 22), and pens were made and marked "A. A. Waterman & Co., N. Y." (Record, p. 94, Q. 19, Waterman's deposition). The Frazer & Geyer Company, a corporation, was hired to manufacture the parts. Arthur A. Waterman had no interest in the corporation of the Frazer & Geyer Company (Record, p. 94, Waterman's deposition, Q. 24), and looked solely to the alleged copartnership composed of Frazer, Geyer and Waterman for his remuneration, which were a salary and a royalty, so-called, so much per pen that bore his name (Record, p. 95, Waterman's deposition, Qs. 26, 27). In the fall of 1901, the contract between Frazer, Geyer and Waterman was extended for a term of forty years to obtain the use of Waterman's name (Record, p. 95, Q. 32) and the interests under the contract transferred to the Frazer & Geyer Company; and Waterman assigned all his interest and royalties under the contract and took back a block of stock of the Frazer & Geyer Company, this stock being placed in the hands of a trustee to insure that Waterman would stay with them for a number of years (Record, p, 96, Waterman's deposition, Q. 34). Arthur A. Waterman had no business management in the Frazer, Geyer, Waterman combination, but he was to be consulted in reference to the form or style of the goods (Record, p. 96, Waterman's deposition, Qs. 41–42). On December 12, 1901, Frazer & Geyer Company, the corporation, made a contract with the firm of A. A. Waterman & Co., composed of Frazer, Geyer and Waterman, whereby the Frazer

& Geyer Company agreed to make all the goods that A. A. Waterman & Co. could sell, and A. A. Waterman & Co. agreed that the Frazer & Geyer Company should have the exclusive right to make all the goods that Frazer, Geyer and Waterman required and agreed not to give orders elsewhere and certain other conditions were thereunto attached (Defendant's Exhibit A-8, Record, p. 1645).

On February 11, 1905, a further agreement (Defendant's Exhibit A-11, Record, p. 1659) was made between Frazer & Geyer Company and Arthur A. Waterman, which provided for an assignment to the corporation, Frazer & Geyer Company, of all the profits of the firm of A. A. Waterman & Co.; fifty shares of stock given to Arthur A. Waterman by agreement of December 12, 1901, in trust, were transferred to him absolutely. Arthur A. Waterman agreed not to engage in the fountain pen business or to permit any person, firm or corporation to use his name except the existing firm of A. A. Waterman & Co. (Frazer, Geyer and Waterman), and the corporation, Frazer & Geyer Company, except that Arthur A. Waterman may engage in such business in the western part of North America, in accordance with the agreement of even date (Defendant's Exhibit A-10, Record, p. 1650); that Arthur A. Waterman, upon request, would consent to the incorporation of a new company under the corporate name of A. A. Waterman Pen Company or A. A. Waterman & Co., or other similar name, to do business in the eastern part of North America, upon receiving sufficient surety against liability to the L. E. Waterman Company by reason of the use of such corporate name (Record, p. 98, Qs. 57-69), and that Arthur A. Waterman was to be released from all present claims against him by the firm of A. A. Waterman & Co. (Frazer, Geyer and Waterman), and the corporation, Frazer & Geyer Company, and Arthur A. Waterman to assign to the corporation of Frazer & Geyer Company his individual interest in all patents, trade-marks, etc., in

which A. A. Waterman & Co. (Frazer, Geyer and Waterman) was interested, including the right to the name of A. A. Waterman & Co. (Defendant's Exhibit A–11, Record, p. 1659).

On June 24, 1905, A. A. Waterman and Geyer, acting as liquidating partners of the firm of A. A. Waterman & Co. (composed of Frazer, Geyer and Waterman), transferred to the Frazer & Geyer Company certain assets and property expressly enumerated or scheduled in detail (Exhibit 133, p. 938), thereby reducing the indebtedness of A. A. Waterman & Co. to the Frazer & Geyer Company to $10,449.27. Attention is called to the fact that there is no mention in this transfer of the business, or good will, or trade name or trade-marks, and Geyer and Frazer both testify that this is the only transfer or assignment ever made except the assignments of profits made in 1901 (Exhibits A–6, A–7, pp. 1639, 1642), previously referred to (Geyer's testimony p. 1316, x-Qs. 548–556; p. 1343, x-Qs. 805, 806; Frazer's testimony, p. 786, Rd-Qs. 191–200) and Geyer testifies that this transfer (Exhibit 133, p. 938) is the only transfer or assignment that he (Geyer) knows anything about. Obviously, the good will and the right to use the firm name did not pass by this transfer, especially in view of the receivership proceedings.

That thereafter one Alexander D. Henderson was duly appointed receiver of the copartnership property, assets and effects of the firm of A. A. Waterman & Co. (Frazer, Geyer and Waterman) by an order made in the Supreme Court of the State of New York on the 10th day of July, 1905, and entered on the 11th day of July, 1905 (Record, p. 951; Plaintiff's Exhibit 130, Record, pp. 933-935). The said receiver, Alexander D. Henderson, qualified thereunder and furnished a bond in the sum of five thousand dollars on the 14th day of July, 1905, conditioned for the performance of his duties as such receiver (Plaintiff's Exhibit 138, Record, p. 952, fol. 2854). That thereafter such receivership was made

permanent and continued until 1908 (Plaintiff's Exhibit 138, Record, p. 952, fol. 2855).

In May, 1905, the Frazer & Geyer Company sued Frazer, Geyer and Waterman, composing the firm of A. A. Waterman & Co. (Complaint, verified May 17, 1905), and recovered judgment (entered June 4, 1908), for $12,338.50 (Plaintiff's Exhibit 131, p. 936). In May, 1905, Isaac E. Chapman sued Frazer & Geyer Company and recovered judgment in June, 1905, for $20,163.90 (Plaintiff's Exhibit 134, p. 939). Isaac E. Chapman sued Frazer individually for money loaned and in May, 1905, secured judgment for $1,677.58, on which execution was issued and returned unsatisfied and a receiver in supplementary proceedings was appointed on June 7, 1905, for Frazer individually (Exhibit A-3, p. 1634). It was claimed by the Chapmans that this receivership dissolved the firm of Frazer, Geyer and Waterman and left Waterman free to enter into the agreement of alleged partnership of June 12, 1905; Frazer and Geyer claimed (see Exhibit 127, p. 924, fols. 2771-2773) that this was a part of a scheme to get rid of Frazer and Geyer, and give an excuse for the arrangement which followed between the Chapmans and A. A. Waterman and which had been previously arranged by the agreement of May 27, 1905 (Defendant's Exhibit A-12, p. 1666).

On June 10, 1905, an execution was issued on the judgment in favor of Isaac E. Chapman against Frazer & Geyer Company, and certain assets as scheduled in Plaintiff's Exhibit 134, page 938, which it had on June 10, 1905, were sold on June 16, 1905, by the Sheriff, under this execution, for $4,900, subject to a mortgage of $10,000, and were purchased by one Quackenbush (p. 939). The good will or trade names or trade-marks were not mentioned as a part of the assets sold and the testimony of the defendant's own witnesses is that no other assignment or transfer was made or business of any kind transacted by the Frazer & Geyer Company after this sale. The only witness called, familiar with

these matters, was Geyer, defendant's treasurer, who testified to the above effect (see Geyer's Deposition, Record, p. 1309, x-Qs. 479–481; pp. 1316–17, x-Qs. 548–556; p. 1330, x-Qs. 668–671).

The sale made by the Sheriff was to T. T. Quackenbush, of No. 17 Battery Place, New York City, and there is no evidence in the record to show what, if anything, Quackenbush, ever transferred or sold to anybody, and as far as any witness knows or the record shows the title of whatever was sold by the Sheriff on June 16, 1905, is still in Quackenbush; the only witness who might have any knowledge of this matter is Geyer, defendant's treasurer, who was asked (Record, p. 1314, x-Qs. 521–528) what was sold and he replied:

> "I don't know what was included in it. At the time I was not with the concern. It was during the short time that Frazer and myself were out of there fighting the Chapmans and I don't know just what was done" (p. 1314, x-Q. 522).

The "CHAPMAN, WATERMAN AND CHAPMAN" Agreement under which defendant, Modern Pen Company, "*Justifies*".

On the 12th day of June, 1905, Isaac E. Chapman, Arthur A. Waterman and William L. Chapman made an agreement of alleged partnership. This contract (Defendant's Exhibit A-13, Record, p. 1668) of June 12, 1905, is the entire basis of the Modern Pen Company's justification of the use of the name "Waterman" (Record, pp. 1340–41, x-Qs. 777–782) and will be discussed in detail and the Court's attention particularly directed to the same.

On June 17, 1905, the Modern Pen Company, defendant herein, was organized, Isaac E. Chapman and William L. Chapman being officers and directors from its incorporation.

It is submitted that plaintiff's uncontradicted evidence in support of the good will and acts of infringement fully sustains the allegations of the bill,

and *prima facie* establishes plaintiff's priority in use of name "Waterman" as a business name, trade-name and trade-mark. *The burden is on a defendant who uses plaintiff's trade-name to justify the using thereof.*

1. *Jacobs* v. *Beecham*, 221 U. S., 263.

No evidence is offered by the defendant in contradiction of the good will rights and the alleged acts of trade-mark infringement and unfair competition in trade.

Evidence in Support of Affirmative Defense or Justification set up in Answer.

This "Justification" is, shortly stated, that the defendant company is the selling agent of a partnership of Isaac E. Chapman and William L. Chapman, which is alleged to be the successor of a partnership of which Arthur A. Waterman was a member; that the present partnership of the two Chapmans has a right by contract to continue the use of the name of the original partnership, A. A. Waterman & Co.; that the partnership of the two Chapmans makes and stamps pens "A. A. Waterman & Co." and that the defendant company sells these pens.

This "Justification" involves proof by the defendant company of these allegations of the answer:

1. That there was formed a partnership, the members of which were Arthur A. Waterman and Isaac E. Chapman and William L. Chapman, from which A. A. Waterman retired (Answer, Par. K (1), Record, p. 1143, fol. 3428).

2. That the present partnership of Chapman and Chapman has a right to continue the use of the firm name of A. A. Waterman & Co. (Answer, Par. K (1), Record, p. 1143, fol. 3428).

3. That the present co-partnership of Chapman and Chapman makes fountain pens and stamps them "A. A. Waterman & Co." (Answer, Par. K (1), Record, p. 1144, fol. 3430).

4. That the pens which the defendant, Modern Pen Company, sells are pens madeby Chapman and Chapman (Answer, Par. K (1), Record, p. 1143, fol. 3427).

Unless the defendant has established by competent evidence each and every one of the above propositions 1, 2, 3, and 4, the "Justification" fails.

1. If the Modern Pen Company fails to prove that there was a partnership of which Arthur A. Waterman was a member, obviously the justification fails.

2. If the Modern Pen Company proves "1" but fails to prove that the present partnership of Chapman and Chapman has the right to use the firm name of "A. A. Waterman & Co." the justification fails.

3. If the Modern Pen Company proves "1" and "2" but fails to prove that the present co-partnership of Chapman and Chapman makes fountain pens and stamps them "A. A. Waterman & Co.", the justification fails.

4. If the Modern Pen Company proves "1", "2" and "3" but fails to prove that the pens which the defendant Modern Pen Company sells, are the pens so made, the justification fails.

The only evidence in the record in reference to "1" is the agreement, bearing date June 12, 1905, Exhibit A-13 (Record, p. 1668) on Defendant's behalf, and the deposition of Arthur A. Waterman, a witness called by complainant (Record, p. 107 *et seq.*).

The only evidence in the record in support of "2" is the said partnership agreement of June 12, 1905,

and the agreement between Arthur A. Waterman and the Modern Pen Company, dated July 5, 1905, Exhibit A-14 (Record, p. 1673.)

The evidence in support of 3 and 4 is contained in the depositions of Arthur A. Waterman and Geyer, the manager of the defendant company. Nowhere else in the record is there any reference to these matters. Mr. Waterman testifies that the alleged firm of A. A. Waterman & Co. in which Waterman and the two Chapmans were concerned and for which firm the defendant company was said to be the sole selling agent, never made anything, nor sold anything, nor bought anything, nor did anything; it kept no books, nothing was done by it (Record, p. 101). Mr. Waterman was a witness for the complainant under subpœna. He, if any one, should know what the alleged firm of A. A. Waterman & Co. was and did. Whatever inference may be drawn from the fact that Mr. Waterman testified for the complainant is fully met by the fact that neither of the Chapmans who were equally well acquainted with the facts, appeared as witnesses for the defendant company, although they are respectively the president and treasurer thereof.

If Waterman did not tell the truth this defendant's officers might be expected to appear and say so. Mr. Geyer testifies for the defendant that "the Waterman Co." makes the pens marked "A. A. Waterman & Co." (Record, p. 1277, Qs. 167–8; p. 1346, Qs. 837–8). Upon cross-examination he states that the firm of A. A. Waterman & Co. did not own the plant in which the pens were made; that he was in charge and Mr. Van Valer made the pens (Record, p. 1146). No books were produced, no records of production or pay-rolls, no bills for supplies or sales and absolutely no proof offered as to the actual manufacture of goods, except the statement of Geyer that "the Waterman Co." "make the pens" (Record, p. 1277, Qs. 167–8–9). This testimony surely is not sufficient to sustain the defendant's burden in view of the positive testimony of A. A. Waterman that the

firm did nothing, and the Modern Pen Company did all the business, including the manufacture of pens (Record, p. 101 *et seq.*).

Van Valer, the superintendent of the alleged A. A. Waterman & Co. factory, testifies that he worked for A. A. Waterman & Co. ever since they were in existence in New York, and then testified that he worked for the Frazer & Geyer Company "from 1897 until the Frazer & Geyer Company went out, if they are out. I don't know" (Record, p. 1495, Q. 4; p. 1510, x-Qs. 173–179).

When the Court considers that under the contracts between Frazer, Geyer and Waterman, A. A. Waterman & Co. was a mere selling agent for Frazer & Geyer Company, the manufacturer, and that under the contracts between Chapman, Waterman and Chapman, the condition was reversed, the alleged firm of A. A. Waterman & Co. becoming the manufacturer and the Modern Pen Company, the sole selling agent, it is perfectly plain that Van Valer did not know as a fact for whom he was working. He knew he had a job and was making pens marked "A. A. Waterman & Co." Further than that he did not know anything of the organization of the various firms and companies and their respective functions. The Modern Pen Company has clearly failed to sustain the burden of proving that the alleged firm of A. A. Waterman & Co. (Chapman & Chapman) are the actual manufacturers of the pens it is selling.

There is absolutely no evidence in the record that the Modern Pen Company has any right independent of the alleged partnership of Chapman and Chapman to use the name of "Waterman."

The Alleged Partnership of Chapman-Waterman-Chapman.

The partnership contract between Chapman, Waterman and Chapman (Exhibit A-13, Record, p. 1668), the contract between Arthur A. Waterman

and the Modern Pen Company (Exhibit A-14, Record, p. 1673), and the deposition of Arthur A. Waterman, constitute the evidence in support of 1 and 2, and we will now proceed to analyze and discuss the said evidence and refute the justification set up in defendant's answer.

The essential features of the alleged contract of partnership of June 12, 1905, are:

1. Declaration that Arthur A. Waterman, Isaac E. Chapman and William L. Chapman enter into a partnership under the firm name of A. A. Waterman & Co. for the purpose of manufacturing, purchasing and selling fountain pens (fols. 5003, 5004).

2. Term of the partnership thirty-six years (fols. 5004-5).

3. Any capital contributed by any member of the firm shall be deemed a loan, shall bear interest and be repaid before any profits (fol. 5005).

4. The management shall be and remain in the hands of Messrs. Chapman who alone are authorized to enter into any contracts or obligations that shall bind the partnership.

5. A new corporation, the Modern Pen Company, shall be formed which shall be the sole sales agent of A. A. Waterman & Co. and for which company, Arthur A. Waterman shall be salesman for hire (fol. 5006).

6. A perpetual grant to the partnership by Waterman of the use of the name A. A. Waterman and A. A. Waterman & Co. and the transfer of all the good will *now existing* and attaching to the name of A. A. Waterman and A. A. Waterman & Co., this grant not to be modified or diminished by Waterman ceasing to have an interest in the firm or by his death or otherwise.

7. That Waterman shall retire from the firm in any event on July 1, 1906, and the firm shall then belong exclusively to Isaac E. Chapman and William L. Chapman (fol. 5009).

8. Arthur A. Waterman to have the option of doing business on his own account in the Western territory (fols. 5007–5010).

9. If Waterman does not engage in business independently in the Western territory, he shall have an agency from the defendant Modern Pen Company for that territory on commission (fol. 5015).

10. Waterman agrees that he will not authorize or permit any other person, firm or corporation to use the name Waterman or A. A. Waterman & Co. except as provided in this instrument.

This contract must be considered in connection with the testimony of Mr. Waterman, one of the alleged partners and the only one of the alleged partners who testified in this case. **Mr. Waterman** testifies as follows:

> "I received no pecuniary profit from A. A. Waterman & Co. I had nothing there at all (Record, p. 101, Q. 74). The new partnership of Chapman, Waterman and Chapman, did not assume any of the indebtedness of the old partnership. I cannot recollect that it assumed anything (Record, p. 101, Q. 77). I do not recollect that I had any functions under this new partnership of June 12, 1905. Possibly I was to be consulted as regards forms and styles of goods (Record, p. 101, Q. 78). I had no management whatsoever in the partnership (Record, p. 102, Q. 80). The co-partnership was only organized to continue the good will and name of the business and the firm was to have no function whatever. A. A. Waterman & Co. was just on paper and Col. Bacon said it was not necessary for it to do anything but just let the Modern Pen Company go ahead as though it were the only party (Record, p. 102, Q. 81).

> Ostensibly the Modern Pen Company were to be the selling agents of the manufactory of A. A. Waterman & Co. but actually A. A. Waterman & Co. was not to do anything (Record, p. 102, Q. 83). There were no accounts at all between the firm and the Modern Pen Company and no relationship in the matter (Record, p 102, Q. 84). The entire business was done by the Modern Pen Company (Record, p. 102, Q. 86). It almost goes without saying, *sine qua non*, I was to go in and drop out at a certain time and they were to continue the name. It was effectively provided that I was to have no management in this new copartnership (Q. 99). I was a salesman for the Modern Pen Company (Q. 101). I strove to get a position there that would give me more or less control of the business but it was impossible (Q. 108). The Chapmans said I was not financially important. My experience was not sufficient; they were the ones who furnished the money and managed the business (Q. 109). My name was the large asset; that was the reason for making the partnership. They would not have made that with me if I had some other name (Q. 110). It was insisted that I should drop out on July 1, 1906, or they would not have signed the papers. They insisted on that as one of the conditions (Q. 124). I worked for the Modern Pen Company as a salesman for a year until July 1, 1906 (Record, p. 108, Q. 138) when I dropped out of the firm and went West (Record, p. 107, Qs. 124, 5 and 6)."

The alleged partnership agreement between Waterman and the two Chapmans, as Mr. Waterman's testimony shows, never ripened into an actual partnership. According to Mr. Waterman's testimony, he never took any part or did any work in connection with the firm. Under the terms of the instrument, he was excluded from all participation in the management of the alleged firm's affairs and was at the outset ejected from the firm automatically at the end of one year. Mr. Waterman testifies that

the alleged firm never did any business; it bought nothing; it sold nothing; it made nothing; it did nothing. It was, as Mr. Waterman says, a paper partnership, which the writers venture to think is no partnership at all. Under the authorities, such a state of affairs creates no partnership.

2. *Davis* vs. *Key*, 123 U. S., 79.
4. *R. Heinisch's Sons Co.* vs. *Boker et al.*, 86 Fed., 765.
22. *Gray* vs. *Gibson*, 6 Mich., 300.
27. *Shea* vs. *Nilima*, 133 Fed., 209.

The alleged transfer of good will contained in the instrument (Exhibit A-13, Record, p. 1668) by Waterman could not have been effective in any sense, as a matter of law, because no going business was transferred and the good will could not be transferred in gross.

4. *R. Heinisch's Sons Co.* vs. *Boker et al.*, 86 Fed. Rep., 765.
5. *Abel Morrall, Ltd.*, vs. *Hessin & Co.*, 20 R. P. C., 429.
10. *Meyer Co.* vs. *Virginia Carolina Co.*, 35 App. D. C., 425.
12. *Thorneloe* vs. *Hill*, 11 R. P. C., 61, 1894 (Ch. Div.).

As a matter of fact, since whatever good will existed at the time in connection with the firm name "A. A. Waterman & Co." was in the receiver for the Waterman, Frazer and Geyer partnership, and the receiver did not convey the good will to the Chapman, Waterman and Chapman partnership, nor any other person, firm or corporation. So, that upon the coming together of Waterman and the two Chapmans there was no antecedent right to acquire.

The contract of June 12th, 1905, was a *de novo* partnership. It is perfectly clear that this partnership subsequent to June 12, 1905, could acquire no good will in the use of the name "Waterman" or

"A. A. Waterman," for the reason that at the very time of the inception of the alleged partnership, it was provided that the partner whose name was granted for the perpetual use of the firm, should retire absolutely and unconditionally at the expiration of one year. The effect of this preliminary requirement that Waterman should retire at the end of the year is to deprive the contract of even the slightest element of a legitimate transfer of a business name and renders the contract nothing more or less than a naked cession of the family name "Waterman" for the purpose of competing with the plaintiff company.

The record shows (Waterman's deposition, Record, p. 94, Q. 20; pp. 100–101, Q. 71), that the partnership of A. A. Waterman & Co., composed of Waterman, Frazer and Geyer, was a selling concern and merely sold goods made by the corporation of Frazer & Geyer (Geyer's Deposition, Record, p. 1248, Qs. 10–12; Pltff.'s Ex. 137, fol. 2833). On the other hand, the alleged partnership of A. A Waterman & Co., composed of Chapman, Waterman and Chapman, was supposed to be a manufacturing concern, and the concern which came in contact with the public in the sale of goods was the defendant Modern Pen Company. So, it is difficult to see, even assuming that the trade name of "A. A. Waterman & Co." (Waterman, Frazer and Geyer) had not been in the hands of a receiver, how the good will of a selling concern was to benefit A. A. Waterman & Co. (Chapman, Waterman and Chapman) as a manufacturing concern not coming in selling contact with the public.

It is peculiarly significant that the two Chapmans, men of financial standing who showed alacrity in acquiring to themselves all control of the Frazer & Geyer Company and the principal offices in that corporation, and later the presidency and treasurership of the Modern Pen Company, when they came to deal with Arthur A. Waterman, a thrice failure in the fountain pen business whom they

would not trust with a voice in the management, should modestly retire from public view and insist on remaining the "& Co." to the Waterman patronymic. One may well inquire why the name of the alleged firm was chosen to be "A. A. Waterman & Co." instead of "Chapman, Waterman & Chapman," particularly when the two Chapmans were the only persons connected with the firm who could lend a tinge of financial responsibility thereto.

The possibility that Mr. A. A. Waterman's ability as a salesman and acquaintance with the trade might be useful, is not the good will of a business; that was Mr. Waterman's personal qualification for a position as salesman; that the alleged partnership of A. A. Waterman & Co. would not gain by Mr. Waterman's personal ability is evident when it is considered that the firm of A. A. Waterman & Co. was supposed to be a manufacturing concern, having but one customer, the defendant Modern Pen Company; and when it is further considered that by the very terms of the alleged partnership agreement Mr. Waterman was permitted to go to the Modern Pen Company, the selling concern, as a salaried salesman. Had the firm of A. A. Waterman & Co. been a really existing concern and actually doing business, A. A. Waterman would have drawn his remuneration from the same and not merely as a salesman for the Modern Pen Company.

The Italian courts in the case of *L. E. Waterman Co.* v. *Cabrini Guido*, with A. A. Waterman & Co., consisting of Isaac E. Chapman and William L. Chapman, intervening as defendants, have passed specifically upon the validity of this contract in the Royal, Civil and Penal Tribunal of Milan, Italy, in its judgment filed July 19, 1911, which said judgment has been affirmed by the King's Court at Milan and again by the Supreme Court of Italy at Turin on the 9th day of April, 1914. The Court held that the alleged partnership agreement of June 12, 1905 was without any judicial effect and nothing

else but the assignment of a name. The opinion, decision and judgment are very long. We quote material parts, from the translation (Plaintiff's Exhibit 144), as follows (p. 1853):

> "Now this is precisely the subject (left undecided by the New York Court) of the investigation submitted for the consideration of this Court, namely, to see whether it may be held, under the terms of the contract of June 12th, 1905, that Arthur Waterman has '*actually, seriously and effectively*' become a partner in the said business, so as to give him the right to assume his own name in the firm name.
>
> "It, therefore, now behooves this Court to answer this question on the ground of the examination of the exhibited partnership agreement of June 12th, 1905, and therefore, for such purpose, to ascertain, as stated in the previous decision, whether the Messrs. Chapman are '*lawfully, seriously and effectively*' invested by that agreement with the right to use the firm name 'A. A. Waterman' to designate their firm, or whether the lending of that name falls within the meaning of an *artful and fraudulent agreement.*
>
> "Now it appears to the Court that it is unnecessary to have recourse to the statements made on September 14th, 1910, by the said Arthur Waterman in his interrogatory '*de bene esse*' before the Circuit Court of the United States (Southern District of New York) but that the examination of the abovementioned agreement is sufficient to lead in itself necessarily to the conclusion that by such transparent agreement the Messrs. Chapman did not covenant anything else with Arthur Waterman but *the assignment of a name.* That is the only covenant which stands out very distinctly, among the rigorous precautionary clauses of said agreement and constitutes evidently for the contracting parties the *only purpose* of the agreement. As a matter of fact, the imprudent and significant provisions relative to the allotment of the Company's capital (in the form of a loan at the rate of 6% with preferred right to the profits) the absolute exclusion of Waterman—

a partner with unlimited liability—from any share in the Company's management and the peculiar position given him, viz.: that of a *customer* of the firm for the supplying of pens to be sold in the *far west*, imparts such an extraordinary meaning to this partnership agreement as to convey strong doubts as to the earnestness and sincerity of the parties who wished to carry it into effect. But the aforementioned conclusion is irresistibly deduced from the *ninth* clause of the agreement which in the text of the agreement follows the seriously binding one relating to the *irrevocable and perpetual* transfer to the firm of the use of the name of '*A. A. Waterman.*' Under the terms of the clause in question, Arthur Waterman is authorized to undertake the handling of fountain pens from July 1st, 1906, on, for his own account in the Western territory of North America, with the provision, however, that '*in such case he shall cease to retain any interest in the partnership constituted by that agreement*' which is to belong exclusively to the Chapmans and their heirs; but it is added that if Waterman does not avail himself of this right within the aforesaid term '*he shall likewise cease to form part of the partnership in the same way and in every respect similarly as if he had availed himself of this right.*'

"In substance, at the same time at which Waterman entered into partnership with the Chapmans, his *exclusion* from the said partnership in any event, *and within the peremptory period of one year*, was determined on by the agreement itself, so that in this way, one of the essential elements of the agreement came to be rendered void *a priori*, that is the element of *effectio societatis* based on the equality of the contractual standing of the partners with regard to the common end, and thus deprived the agreement of the motive, legally sufficient to constitute its *cause of being.*

"The advantages promised to Waterman by this agreement, the compensation granted him (really unexplainable in a country enjoying such great commercial freedom as North America) to work the West, constitutes for

Waterman the consideration for the rendering of a service which is necessarily *foreign* to the partnership agreement because the members of the partnership agreed, as far as he was concerned, upon its *dissolution* at the very instant when it was constituted. And inasmuch as the only service which Waterman assumes to render in the said agreement is that of ceding the use of his own paternal name, there is no doubt that this cession constitutes the *sole and real substance of the agreement* which the Chapmans were led to stipulate, because they knew that the use of that name might place them in a position of advantage in competing with the genuine L. E. Waterman firm, and that they hid this transfer of name under the mendacious appearance of a *partnership* agreement, knowing it to be unlawful. The historical precedents of such agreement to which reference had been had, afford nothing contrary to this conclusion.

"It is asserted that the Chapmans came to make the agreement of June 12th, 1905, for the purpose of reorganizing their business subsequent to the withdrawal of the partner Frazer. This pretended purpose of the parties, however, cannot change the legal significance of the agreement, since the same results from its tenor as above pointed out. The said tenor, in the significant simplicity of the form adopted, does not afford grounds for holding that the subject matter of the agreement referred to an organization that already possessed legal existence, under the name of 'A. A. Waterman,' because there is not a single provision in the said agreement which regulates the fate of that property made up of industrial improvements, invention and progressive measures, such as would necessarily have accumulated under a name already commercially established. Whatever the status of the previous intercourse between the parties may have been, it is an '*ex novo*' business, arising originally from this agreement, a business upon which Waterman, according to the agreement, does not confer any of these elements of his own technical or commercial personality which alone would

have rendered legitimate the transfer to the firm of a name indissolubly connected with such personality. He intervenes merely for the sake of contributing his name to the same, not because it has or contains any concrete commercial value in itself, but merely on account of the casual similarity in names; and after this transfer he must immediately *quit* the firm, and go far away for vague and solitary ventures in the far West.

"If, therefore, the agreement of June 12th, 1905, contains an obligation based on a *false* and *illicit* motive, it is necessary to conclude that it cannot have any judicial effect, and that it cannot, therefore, confer on the defendants the right of using that name whether severally or jointly with other imaginary names, to differentiate the fountain pens of their own handling in competition with their similarly named rivals. The L. E. Waterman Co. is therefore rightfully entitled to proceed against the defendant for this illicit use of its own name, the suppression of which is independent of examinations into the technical industrial superiority of the respective fountain pens, because the name 'Waterman' in common parlance has not yet become identified with the product constituting the specialty of the firm which first placed it on the market, but represents the reputation and specialty which it has been able to acquire in this business, and it therefore forms part of its commercial rights and as such deserves protection against the unlawful use of it made by others.

"AND WHEREAS the motions principally made by the plaintiff must be admitted, representing as they do the natural remedy against the injury sustained.

"AND WHEREAS also the two interrogatories for the direct testimony of witnesses must be admitted to clear up this confusion between the products of the contending parties, which constitutes an element of indemnifiable damage, as being a result of the unfair competition brought about by this unlawful use of name:

"WHEREAS, consequently the motions made by the defendant Cabrini in the cross-

plea be rejected as a whole on the strength of the well known principal: *Qui jure suo utitur neminem laedit.* * * *

"NOW, THEREFORE,

"All motions to the contrary are rejected.

"The Court declares as unlawful the use made by Guido Cabrini, both in his own name and as representative of Isaac and William Chapman, of the names 'Waterman,' 'Waterman's,' 'A. A. Waterman,' 'Waterman Modern,' 'Waterman's Modern Fountain Pen,' for the purpose of introducing and of selling fountain pens in Italy and for *advertising purposes.*

"The use of said names constitutes an unlawful use of the firm name of the plaintiff company and an act of unfair competition.

"And the Court orders the confiscation of all articles, products and *advertising matter* bearing any such names and marked. The L. E. Waterman Company, of New York, on the other hand, is allowed to prove by witnesses the circumstances detailed in the two interrogatories embodied in its conclusions and hereinbefore literally transcribed, the recording judge being appointed to take the evidence."

This case has been bitterly contested by the two Chapmans since its beginning in July, 1910, and the highest Court in Italy has just decided that the said contract of June 12, 1905, conferred no rights on the two Chapmans to use the name "Waterman."

The opinion in the lower Italian Court is found at page 1854 of the record.

The plaintiff begs leave to submit to the Court exemplified copies of the judgments in the King's Court, Milan, and the Supreme Court at Turin.

We respectfully call the attention of the Court to the forceful and logical reasoning of the Italian Courts in regard to the effect of this contract of June 12, 1905.

Similar reasoning which leads to the conclusion announced by the Italian tribunal concerning the Chapman-Waterman-Chapman contract of June 12,

1905, was applied in the case of (4) *R. Heinisch's Sons Co.* v. *Bolser et al.*, *86 Fed.*, *765*, which is urged upon this Court's attention by reason of its peculiar applicability to the facts here under review. We quote therefrom the following:

> Defendants, former agent for the firm of R. Heinisch's Sons, complainant's predecessors, which firm enjoyed a high reputation as makers of shears, entered into a contract with H. C. Heinisch, a former member of the firm by which the defendants acquired, among other things, the right to use his name upon all their goods. Henry Heinisch, on withdrawing from the firm, had conveyed to it all his interest in its assets and business; and defendants, in a contract had admitted that the firm was 'sole owner of the Heinisch trade-mark.' Defendants after making the contract with Henry Heinisch at once began to make and sell shears stamped with Henry Heinisch's name and packed in a manner similar to complainant's goods, so as to lead the ordinary purchaser to believe them the same. The defendants also continued to style themselves, upon signs, in circulars, etc., 'agents for R. Heinisch's Sons'. It appeared that nothing had ever been done under any clause of the contract, except that conveying the right to use the name; and the real object appeared to have been solely to acquire, under cover of the other clauses, a claim to that name.
>
> Held, per Townsend, *D. J.*
>
> "The defendants contend that, in any event, they have a right to use the name 'Heinisch' or 'H. C. Heinisch' upon their goods. In 1892 H. C. Heinisch sold his name to them, as a trade-mark. Except for his connection with his patented shears, it does not appear that this transaction represented anything except the purchase of the right to make profit out of the Heinisch trade name. It is true that the ingeniously worded contract purported to provide that H. C. Heinisch should impart 'any special information he may have or acquire as to the best methods of cutlery manufacture.' But said contract further

gave to defendants the right to manufacture any kind of 'cutlery which they desire to make and place on sale with the name 'H. C. Heinisch,' and provided that said name should be 'the property of and belong to the parties of the first part forever.' * * * When H. C. Heinisch made this contract in 1892, allowing the perpetual use of his name, all that he did was to look at some samples of the goods which the defendants were to have manufactured for them, and to express his satisfaction with them, as he considered them equal, if not superior, to the original Heinisch goods. * * * Judging from the conduct of defendants, the actual object of said contract was to appropriate the reputation of the Heinisch shears by the purchase of the name of 'H. C. Heinisch.' * * * This is not the case of a sale of a good-will in connection with a plant or a growing business. * * * Nor is this a case where the party allowing the use of his name on certain goods has associated himself in business with the manufacturers thereof. It does not appear that H. C. Heinisch ever invested any money in said business, or undertook any supervision over, or exercised any skill in, the manufacture of said goods. It thus appears that, while neither of the ostensible objects of said contract has been carried out, the Heinisch name, attempted to be sold thereunder, has been so used as to deceive the public."

See also **5.** *Abel Morall Ltd.* v. *Hessin & Co.*, 20 R. P. C., 429.

The Modern Pen Company, Defendant herein, is not the Selling Agent of a Partnership of A. A. Waterman & Co.

It is true that an agreement was entered into by and between the defendant, Modern Pen Company, and Arthur A. Waterman on the 5th day of July, 1905 (Exhibit A-14, Record, p. 1673), shortly after the organization and formation of the Modern Pen

Company. This agreement refers to the copartnership articles of June 12, 1905, and purports to have engaged the defendant, Modern Pen Company, as the sole and exclusive sales agent for all of the goods to be manufactured by the said partnership. It does not provide for the sale of goods to be made and manufactured by the said partnership to its sales agent. It does not provide for the payment of any moneys received by its so-called sales agent, Modern Pen Company, to the partnership; in fact, the agreement does nothing except recite full knowledge of all the terms of said partnership agreement, and employs Arthur A. Waterman to sell upon commission in the Western territory, and allots the territory to him in its several provisions and the commission to which he is entitled upon the sale of goods by him from the Modern Pen Company.

Unless it is shown by evidence, and we find none, that there exists a partnership of A. A. Waterman & Co., there can be no selling agent thereof. No books of account are produced alleging to be or belonging to A. A. Waterman & Co. (so-called partnership); nothing is shown wherein it could be even assumed that the partnership did business to any extent whatsoever.

Assuming, *arguendo*, that the defendant, Modern Pen Company, manufactures fountain pens and stamps the same with the imprint "Waterman" and "A. A. Waterman & Co.," no right in them to do so is shown in the record.

The brief of the defendant in this Court concedes that there is no separate partnership of A. A. Waterman & Co., as a *manufacturing principal*, and the Modern Pen Company as the selling *agent*, as the following references show:

Defendant's Brief in this Court, page 1, paragraph 1; page 11, paragraphs 1 and 3; page 15, paragraph marked "3"; page 21, paragraph 1; page 34, paragraph 3; page 36, subdivision 3 of

paragraph marked "4"; page 75, paragraph 2; page 76, paragraph 1, second sentence; page 78, paragraph 2; page 79, last paragraph; page 119, second paragraph from foot of page; page 120, last paragraph; page 138, last paragraph.

Thus, on page 36, "* * * the plaintiff has ample protection in the defendant using, as it has *always* done, its firm name of 'A. A. Waterman & Co.'"

On page 78 we quote: "The defendant has a union shop, pays the highest wages known to the trade, and has the most experienced workmen * * *. Its machinery is of the latest design and some of it is exclusive."

On page 119 it is said: "The defendant is entitled to use its own name, unsuffixed, and the suffix should be reversed."

On page 138 appears this naive statement: "We use the word 'defendant' in a general sense to mean not only the Modern Pen Company but A. A. Waterman & Co. and their privies."

We are indebted for a complete disclosure of the fallacy of this jaunty method of assuming the question which is to be decided, to a quotation made by defendant's counsel at page 84 of the same brief, as follows: "* * * the persons forming a new corporation designated like another corporation already formed in the same business are chargeable with assuming a name which does not belong to them."

And on page 90, by way of argument, it is said: "The Court must not overlook the distinction often made between corporations and individuals or firms. * * * The reason apparently is that a corporation can be given any name that may be selected by the incorporators, while an individual or the members of a firm are obliged to use the name given them by their parents."

We could not have more clearly indicated the necessity under which the Modern Pen Company

rests to do business under the name chosen for it by its incorporators.

Thus, we submit by expressly conceding that there is no existing or operative co-partnership making, marking or selling fountain pens under the name A. A. Waterman & Co., and that the pens are not made by a co-partnership of A. A. Waterman & Co. as alleged in their special defense, and that the pens the Modern Pen Company is selling are made by the defendant corporation; the defendant's attorney lends the full weight of his persuasive powers to the plaintiff's contention, to wit: that there is no existing and operative co-partnership of A. A. Waterman & Co. making the pens sold by the defendant, Modern Pen Company, and that the relation of principal and agent as between the defendant, Modern Pen Company, and the alleged co-partnership of A. A. Waterman & Co. is not shown to exist. These quotations from the defendant's brief clearly controvert each and every one of the issues raised in its special defense by way of justification.

The defendant has failed to sustain the burden of its affirmative justification of the use of the name of "Waterman." The burden of proving existence of the partnership and the use of the partnership name rests upon the party alleging it.

In **1.** *Jacobs* v. *Beecham*, 221 U. S., 263:

This proposition of law was settled. A bill was filed by the owner of a patent medicine known as "Beecham Pills" to restrain the defendant from using the name of the pill made by him and trying to appropriate the plaintiff's good will.

The plaintiff obtained a decree in the Circuit Court enjoining the defendant from using the word "Beecham" in connection with pills prepared or sold by him.

The defendant set up that the name "Beecham" was a family name and could not constitute a valid

trade-mark, and the defendant's use of the name was saved from being unfair by a statement that the defendant made the pills.

Mr. Justice Holmes, in rendering the opinion for the Court, held:

> "When the defendant has to justify using the plaintiff's trade-name, the burden is on him."

Not merely has the defendant failed to sustain the burden of proof, but it has failed to meet the proof offered by the plaintiff to disprove in advance defendant's alleged justification, (Deposition A. A. Waterman); which proof would have been easy to produce had it existed.

7. *Kirby* vs. *Tallmadge*, 160 U. S., 379.

8. *Pac. S. S. Co.* vs. *Bancroft*, 94 Fed., 180.

Defendant's Attempted Justification in the Use of the Name "Waterman" by the Decree in L. E. Waterman Company *vs.* Arthur A. Waterman and Edward L. Gibson, Filed September 3rd, 1898 (Record, pp. 1603-11).

Judge Kellogg's decree was strongly in favor of the rights of this plaintiff and the exclusive right to the use of the words "Waterman," "Waterman Co.," "Waterman Pen," "Waterman Fountain Pens" and "Waterman's Ideal Fountain Pens, N. Y.," as indicating and distinguishing the plaintiff company and its fountain pens.

The injunction order is strong in its terms, and enjoins the defendants Waterman and Gibson from use in connection with the business of making or selling fountain pens the words "Waterman," "Waterman's," or "Watermans."

The decree contains the following:

> "But the defendants are not prohibited from indicating their fountain pens made by them are made or prepared or sold for or by Arthur A. Waterman & Company or A. A. Waterman & Company."

The defendant claims that this paragraph of the decree gives the alleged partnersnip of A. A. Waterman & Co. (Chapman, Waterman and Chapman) an absolute right to the use of the name "A. A. Waterman & Co."

The plaintiff contends and the proof shows without contradiction that the firm of A. A. Waterman & Co. (Chapman, Waterman and Chapman) is not the successor or assignee of the firm of A. A. Waterman & Co., composed of said Waterman and Gibson. It is shown, first, that Waterman and Gibson dissolved (Steven's Deposition, Record, p. 794; Qs. 27-31; Waterman's Deposition, Record, p. 93; Q. 12; Plaintiff's Ex. 100, p. 578; Ex. 102, p. 590; Steven's Deposition, Record, p. 795; Qs. 28, 39, p. 796; Qs. 44-45, 49, 56, p. 801; x-Q. 124, p. 803; x-Qs. 159-165); second, Rhodes Lockwood took over all the assets of A. A. Waterman & Co. (Waterman and Gibson), including the good will (Steven's Deposition, Record, p. 795; Qs. 38, 45, 49, 56, 60-61); third, Waterman did business so, marking pens "A. A. Waterman, Maker, Boston"; fourth, Waterman doing business as A. A. Waterman & Co. with Dewey as partner, failed and the assets were sold to one Lancaster (Chaplin's Deposition, Record, p. 550; Rd Qs. 260-261); fifth, the firm of A. A. Waterman & Co. (Frazer, Geyer and Waterman), went into the hands of a receiver who took charge of all of its assets, the receivership continuing from 1905 until some time in 1908 (Plaintiff's Exs. 130, 138, Record, pp. 933, 951); sixth, A. A. Waterman & Co., composed of Chapman, Waterman and Chapman, announced itself to the trade as a new partnership without any connection with any previous business,

and the partnership agreement itself shows that it took over no previous existing concern; seventh, in any event, Chapman and Chapman, under the pretended paper partnership of June 12th, 1905, acquired no rights to continue under the firm name of A. A. Waterman & Co. after A. A. Waterman ceased to have any connection with them.

On this record the plaintiff contends that Chapman and Chapman have no rights whatsoever under or through the Kellogg decree or the firm of Waterman and Gibson.

At the most, the permission to indicate that fountain pens made by the said Waterman and Gibson "were made or prepared or sold for or by Arthur A. Waterman & Company, or A. A. Waterman & Company," was a purely personal right or license conceded solely because the name of one of the partners was Waterman, and was a purely personal right or licence to use one's own name in one's own business.

We desire to impress clearly upon the Court that this is not a case where a right of a man to use his own name in his own business is involved.

The defendant has urged that the use of the name "Waterman" is an inherent right conferred upon Arthur A. Waterman by his parents and inviolate under the law and guaranteed to Arthur A. Waterman by the Kellogg decree.

The many decisions cited by the defendant on this proposition have no application whatever in this case.

This case rests upon the proposition of whether or not a man has the right to cede by contract the use of his name to strangers to that name for the purpose of competition with an already established business.

4. *R. Heinisch's Sons Co.* vs. *Boker*, 86 Fed., 765.

5. Also *Abel Morrall, Ltd.* vs. *Hessin & Co.*, 20 R. P. C., 429.

Such a personal right or license as indicated in the Kellogg decree by its very nature was not such as could be assigned or transferred to others to be used to the detriment and damage of this plaintiff. Inasmuch as such a right was conceded solely as a right to use one's own name in one's own business such a business ceased to be the business of the person bearing such name, such right or license also ceased.

14. *International Silver Company* vs. *Rogers*, 118 Fed. (C. C. A.), 133.

15. *National Distilling Co.* vs. *Century Co.*, 183 Fed. (C. C. A.), 206.

16. *Royal Baking Powder Company* vs. *Royal*, 122 Fed. (C. C. A.), 343.

17. *Garrett* vs. *Garrett*, 78 Fed. (C. C. A.), 472.

Furthermore, plaintiff contends that at most a permission to indicate was intended, and could be construed to mean only that the name could be used by Arthur A. Waterman when properly distinguished from that of the complainant.

> "The mere attaching of that name to a similar product without more would have the effect of a falsehood," it must be "accompanied by information that the defendant is not the original,"

are the words in *Herring, Hall Marvin Co.* vs. *Hall Safe Co.*, 208 U. S., 554–560.

The manner of indicating was not specified in the Kellogg decree, and in this connection we respectfully refer the Court to

18. *Ludlow Valve Manufacturing Company* vs. *Pittsburgh Company*, 166 Fed. (C. C. A.), 26.

19. *Charles E. Hires Co.* vs. *Consumers' Co.*, 100 Fed. (C. C. A.), 809.

20. *Walter Baker* vs. *Sanders*, 80 Fed. (C. C. A.), 889.

Laches and Acquiescence.

About two years prior to the beginning of this suit, plaintiff notified defendant of its rights in the premises, and warned the defendant against further acts of infringement and unfair trade (Record, p. 38, Ferris Deposition, Qs. 49-50, p. 1321; Geyer's Deposition, Qs. 586-587). At about that time a circular, Exhibit 9 (Record, p. 38), was distributed by the defendant among the trade (admitted p. 1321) wherein the defendant Modern Pen Co. announced that it intended to discontinue the use of the name "A. A. Waterman & Co." (see Exhibit 9). Plaintiff, relying upon the assurance of the said Chapman and upon the said circular, did not begin action at that time.

Up to the time this notice was given the defendant Modern Pen Company and "A. A. Waterman & Co.", if it existed at all, amounted to little, either financially or commercially.

Prior to June of 1905 Mr. A. A. Waterman was reputed to be a member of a copartnership, said to have been in actual operation, and was perhaps in a position to conduct business in his own name.

The claim made by the defendant that plaintiff entered into negotiations for the purchase of the Modern Pen Company and the concern "A. A. Waterman & Co.", including the trade name, and agreed to pay $25,000 for all assets except bills receivable, the plaintiff denies positively and absolutely (see Ferris Deposition, pp. 47-48, Qs. 158-165; p. 50, Q. 181: Raymond's Deposition, pp. 739-740, Qs. 1-5; p. 742, Qs. 26-36; p. 744, Qs. 50-55: Watson's Deposition, pp. 745-746, Qs. 5-6; p. 747, Qs. 8-10-13; p. 748, Qs. 15-17; p. 49, Q. 18: Ferris Deposition, p. 758, Qs. 79-94.

It will be noted that the defendant claims these negotiations were had with William L. Chapman or Isaac E. Chapman, both officers of the defendant, Modern Pen Company, but neither one of the said

Chapmans took the stand and testified regarding the alleged negotiations.

Assuming such negotiations to have been conducted as alleged by the defendant, it is submitted that no issue between the parties would have been thereby affected.

It has been repeatedly held that an injunction will not be refused on the ground of delay.

24. *McLean* vs. *Fleming*, 96 U. S., 245;
25. *N. K. Fairbank Co.* vs. *Luckel*, 116 Fed. (C. C. A.), 332;
26. *Bissell Chilled Plow Works* vs. *Bissell Plow Company*, 121 Fed., 357;

In *Feder* vs. *Benkert*, 34 Fed., 534; affirmed 70 Fed. (C. C. A.), page 613, the complainant's trade name and trade-mark was "C. Benkert & Son" and the infringer used "C. F. Benkert & Son, Phila.," and it would appear that the infringement had been going on for five years (p. 615). An injunction, accounting and damages were decreed.

Judge Blatchford, speaking for the Court in *Collins Company* vs. *Oliver Ames & Son*, 18 Fed. Rep., 561, said: "Although Ames began in 1856 the use of the name 'Collins' on shovels because of the reputation of rival shovels made under the name 'Collins,' he will even in 1882 be enjoined from continuing such use, because in the first instance he took the name for the purpose of profiting by Collins' reputation, and without right."

Furthermore, there is no laches or acquiescence where the complainant is only waiting for a sufficient quantity of evidence to secure a successful prosecution of the infringer.

Summary and Conclusion.

The averments of the bill as to the foundation of plaintiff's business, the adoption and use of trade-marks and trade name, extensive advertising and

sales, and confusion and deceit as a result of the acts of the defendant Modern Pen Company, have been fully supported, the burden being upon plaintiff.

The burden of proof is upon the defendant company to prove the affirmative defense set up by the answer, namely, that the defendant, Modern Pen Company, is selling pens made by a partnership rightfully doing business under the name "A. A. Waterman & Co." and rightly making and marking the same with this firm name.

1. *Jacobs* v. *Beecham*, 221 U. S., 263.

To sustain this defense obviously involves proof of the following:

(1) That there is a firm of A. A. Waterman & Co.

(2) That this firm makes fountain pens and rightfully stamps thereon "A. A. Waterman & Co."

(3) That the defendant, Modern Pen Company, is selling pens so made.

In anticipation of this defense, the plaintiff, in its *prima facie* case, traced the history of Arthur A. Waterman, first as a salesman of the plaintiff company, and then, having left that employ, formed a partnership with one Gibson, under the name "A. A. Waterman Pen Co.," changed after suit to "A. A. Waterman & Co." (Note, the firm name *adopted* did not include Gibson's name.) This Gibson and Waterman partnership was a failure and dissolved. Second, a partnership with one Dewey, under the name "A. A. Waterman & Co." (Note, the firm name *adopted* did not include Dewey's name.) This Dewey and Waterman partnership was a failure, and its effects, including good-will, were assigned to a creditor. Third, a partnership with one Frazer and one Geyer, under the name "A. A. Waterman & Co." (Note, the firm name *adopted* did not in-

clude the names of Frazer or Geyer.) This Frazer, Geyer and Waterman firm lasted about three and one-half (3-1/2) years, and was ended by a receivership, and the goods of the firm were sold in liquidation.

The defendant, in support of its affirmative defense, puts in evidence a deed of partnership, dated June 12, 1905, between A. A. Waterman, Isaac E. Chapman and William L. Chapman (Defendant's Exhibit A13, Record, p. 1668), which provides for:

I. A partnership under firm name "A. A. Waterman & Co."

II. To make and sell fountain pens.

III. Profits and losses equally shared.

IV. Term of partnership thirty-six years.

V. No capital provided for.

VI. Waterman has no power to bind the firm.

VII. The Modern Pen Co. to be organized to sell product of firm and A. A. Waterman may have contractual relations.

VIII. A. A. Waterman grants firm exclusive and perpetual right to his name and any good will attaching.

IX. Waterman, if he desires, may have Western United States as exclusive territory. If he accepts within year, he ceases to be member of firm, if he does *not* accept he ceases to be a member of firm.

This is defendant's evidence in support of its affirmative defense: a paper, unsupported by any evidence that the paper was followed by any acts constituting partnership action.

22. *Gray* vs. *Gibson*, 6 Mich., 300.

2. *Davis* v. *Key*, 123 U. S., 79.

In the present case it will be observed that this "proof" goes only to the creation of a firm; it

does not touch the question whether the said firm, *if* it existed, *made* and rightfully *stamped* pens, or whether the pens sold by the defendant company are pens so rightfully made and stamped and are not pens made and stamped by persons having not even a color of right.

Obviously the marking of goods with the maker's name, is a natural and proper thing, and the personal name will be protected against any who cannot truthfully use it.

3. *Brown Chemical Co.* v. *Stearns Co.*, 37 Fed., 360, or, where the later comer has merely a colorable right.

4. *R. Heinisch's Sons Co.* v. *Boker*, 86 Fed., 765.

5. *Abel Morrall, Ltd.*, v. *Hessin & Co.*, 20 R. P. C., 429.

But, where the second comer truthfully uses the name, and honestly, it is *damnum abseque injuria.*

6. *Brown Chemical Co.* v. *Meyer*, 139 U. S., 540.

The defendant here is a West Virginia *corporation*, organized in 1905, under the name "Modern Pen Co." It follows the plaintiff in the fountain pen business more than twenty years.

Confusion between the rival pens is admitted in the answer and established also by plenary proof.

Obviously the "Modern Pen Co." could not truthfully use the name "Waterman" on pens of its manufacture. It would be an untruthful and unauthorized use.

3. *Brown Chem. Co.* v. *Stearns & Co.*, 37 Fed., 360.

Hence the attempt to justify the defendant's sales, as sales of pens *made* and stamped by a second comer in the field, named Waterman, in the honest exercise of his natural right.

6. *Brown Chem. Co.* v. *Meyer*, 139 U. S., 540.

As to the first link in the defendant's chain of proof *i. e.*, the existence of a firm of which A. A. Waterman was a member, plaintiff contends that on the record, there is no proof of this fact because the deed of partnership, as and of itself, is not sufficient to sustain the issue.

2. *Davis* v. *Key*, 123 U. S., 79
22. *Gray* v. *Gibson*, 6 Mich., 300

and because whatever possible evidential effect the mere paper instrument might have is entirely met by the uncontroverted evidence of Mr. Waterman.

Mr. Waterman testifies:

> "That the firm was to do nothing (Rec., 102, Q. 83), that it had no function. It was a 'paper firm', organized to continue the good-will and name (Rec., p. 102, Q. 81), that while ostensibly the defendant, Modern Pen Co., was selling agent for a manufacturing firm of A. A. Waterman & Co. (Rec., p. 102, Q. 83) the entire business was done by the Modern Pen Co. (Rec., p. 102, Q. 85), the firm did not bill goods to the Modern Pen Co. (Rec., p. 102, Q. 86), the firm had no accounts or relationship with the Modern Pen Co. (Rec., p. 102, Q. 84) as a 'member' of the 'firm', Mr. Waterman had no management (Rec., p. 102, Q. 80), he had no function, (Rec., p. 101, Q. 78) under the 'firm' he was a *salesman for Modern Pen Co.* (Rec., p. 104, Q. 101) and worked as such for a year until July 1, '06 (Rec., p. 108, Q. 138) when he was dropped out of the 'firm' and went West (Rec., p. 107, Qs. 124, 125, 126)."

This statement of Mr. Waterman was made in plaintiff's *prima facie* case, in anticipation of the defence which the defendant company has set up. The deposition does not deal with generalities. It deals with *assertions of fact*, easily met if false.

Among other things there were *no accounts*, that the firm never *did* anything and *billed nothing* and that the defendant, the Modern Pen Co., *did the whole thing*. Surely, if these statements were false,

bills for manufacturing materials and for supplies bought and for goods sold, pay-roll vouchers, rent, etc., and books of account and letter books, might easily have been produced to confute Mr. Waterman. The Chapmans, Mr. Waterman's alleged partners, who are and always have been officers of the defendant company, might have taken the stand to explain their doings as "partners." *Nothing*, not even a bookkeeper with some account books and bills, is produced. Under these circumstances the rule is applicable that where proof would be easy, if it existed, rebutting the inferences which the proofs tend to establish, and it is not made, the presumption is that rebutting proof cannot be made.

7. *Kirby* v. *Tallmadge*, 160 U. S., 379.
8. *Pac. S. S. Co.* v. *Bancroft*, 94 Fed., 180.
9. *Penn. R. R. Co.* v. *Anoka Bank*, 108 Fed., C. C. A., 482.

Mr. Waterman's uncontradicted evidence brings the case within the principle of

22. *Gray* v. *Gibson*, 6 Mich., 300.
2. *Davis* v. *Key*, 123 U. S., 79.

i. e., that a partnership deed, not followed by any act in pursuance of the deed, is a nullity, as between the parties.

Furthermore, the evidence shows that the parties to the deed never *intended* the status of partnership to be created.

Intent is the basic fact in the contract of partnership, as of other contracts.

23. *Drennen* v. *London Corp.*, 113 U. S., 51.

The contract and the acts done in connection must be considered to discover the intent.

23. *Drennen* v. *London Corp.*, 113 U. S., 51.

27. *Shea* v. *Nilima*, 133 Fed. Rep., 209.

28. *Salter* v. *Ham et al.*, 31 N. Y., 321.

In the case at bar the instrument (Record, p. 1668) purporting to create the partnership between A. A. Waterman and the Chapmans by its provisions negatives any *intent* to create the relation of mutual trust and confidence that the status of partnership implies. The exclusion of A. A. Waterman from any right to do anything binding upon the parties to the instrument (Par. VI) the proviso that A. A. Waterman's services shall *not* be devoted to the service of the alleged partnership, but shall be devoted, for hire and for the benefit of A. A. Waterman alone, to a corporation to be immediately organized (Par. VII) that while the term of the partnership shall be *36 years*. (Par. IV) A. A. Waterman is automatically ejected at the end of a year (Par. IX, fols. 5008–5009) that provision is made which makes it practically certain that there can be no profits to divide during the year A. A. Waterman is to be nominally a "partner" (Par. V) and the absence of any provision for any capital upon which profits may be earned, all these facts are pregnant as to the real intent of the parties—certainly of the intent of the Chapmans. The fact that the parties supposed that the signing of the instrument, as matter of law, created the status, *if it be a fact*, is immaterial. There can be no partnership unless the facts exist upon which the law bases the relationship. Where the defendants, as here, rely upon an alleged partnership between Chapman, Waterman and Chapman, they must prove an *actual partnership* between these parties, it is not enough to show a fact which would estop the parties to deny partnership as against a stranger misled.

22. *Gray* v. *Gibson*, 6 Mich., 300.

This is obviously a case in which the elemental "intent" to create the *status* of partnership is ab-

sent, and the "contract" is seen to be merely a shell or blind—to give color to a claim of right to use the name Waterman.

4. *R. Heinisch's Sons Co.* v. *Boker*, 86 Fed., 765.

5. *Abel Morrall, Ltd.*, v. *Hessin & Co.*, 20 R. P. C., 429.

The defendants will contend that Waterman, in some mysterious way, brought with him and gave to the Chapman, Chapman and Waterman aggregation a Good-Will derived from all the prior firms of A. A. Waterman & Co. Whether these successive firms and failures created a goodwill or a bad will need not be discussed. It is sufficient to point out that it nowhere appears that the Chapman and Waterman aggregation took over *a going business*. On the contrary, it does appear that the next preceding partnership (Frazer, Geyer and Waterman) was *wound up* and *liquidated* by Waterman and Geyer (Record, p. 938, Exhibit 133).

As a matter of law, therefore, the goodwill up to that time, if any existed, died.

10. *Mayer Co.* v. *Virginia-Carolina Chem. Co.*, 35 App. D. C., 425.

All that Waterman could possibly bring to the new firm was his personal acquaintance. Personal qualities are not business good will. Curiously enough, the only quality Mr. Waterman is alleged to have is the salesman's gift, and the new "firm" is to be a making firm with a selling corporation as agent. Mr. Waterman's personal qualities therefore would not profit his "firm," but might the selling corporation, Moden Pen Co., to which he was promptly shipped (Contract, Defs.' Exh. A-14, Rec., p. 1673, and Waterman's deposition, Rec., p. 108, Q. 101; Q. 138).

It is obvious that if the original aggregation of the two Chapmans and A. A. Waterman did not ripen

into a partnership either because of the entire lack of action in pursuance of the deed (*Davis* v. *Key and Gray* v. *Gibson* above), or because on the deed itself and the facts testified to by Mr. Waterman, it is apparent that the fundamental *intent* to be *partners* was entirely lacking, then nothing accrued to the two Chapmans which would warrant their use of the name Waterman, certainly after the departure of Mr. Waterman for the west in July, 1906.

11. *Peck Bros.* v. *Peck Bros. Company*, 113 Fed., 291.

Mr. Waterman had no goodwill to grant and no going business to which any goodwill could be appurtenant. As to the alleged grant of a right to use Waterman's personal name, such a right cannot be granted in gross,

12. *Thorneloe* v. *Hill*, 11 R. P. C., 61—1894 (Ch. Div.).

13. *Burrow* v. *Marceau*, 124 A. D. (N. Y.), 665,

and any attempt to do so is futile, except perhaps to give a right to the Chapmans as against A. A. Waterman.

But even if it be found that a partnership, having a right to use the name Waterman in its firm name and on its goods, was duly created and that a present firm of Chapman and Chapman, doing business as A. A. Waterman & Co. exists, still the defendant's justification is not made out, for there is no sufficient proof in this record that such a firm ever *made* fountain pens, as against the evidence of the witness, A. A. Waterman, that the alleged firm was to do nothing, that it had no function except to continue the good will and name, which, as no going business was transferred, could not be acquired or continued, that the firm was a "paper firm," and that the entire business was done by the Modern Pen Co., the defendant herein.

If the "firm" made no pens, as the answer sets

up that it did, then certainly the Modern Pen Co. cannot justify the selling of pens made by some one else, under any alleged right in the firm.

The evidence of Waterman, if untrue, might easily have been shown to be so by the Chapmans who had full knowledge of the facts or by other witnesses. The actual making by the Chapman firm might have been proved. No contradiction of Waterman was attempted, although his evidence was taken in plaintiff's *prima facie* case.

The same is true as to the final step necessary to support defendant, Modern Pen Company's justification—namely, that the pens the Modern Pen Co. sells are pens made by the firm having the right to trade under the name and mark its goods "A. A. Waterman & Co." There is not a *scintilla* of evidence to support the answer in this regard, to be found in the record.

The question of the right of Arthur A. Waterman to use his personal name in the conduct of his business is in no way raised by this proceeding. The question for decision is as to the right of a corporation to use a personal name, identified with an old established business, in the marking of goods sold by the corporation. The burden of proof is on the defendant corporation to prove its right. Has the defendant corporation sustained that burden by producing a partnership deed, to which a man named Waterman was a party, in view of the testimony of Waterman as to the real facts of the alleged partnership and in view of the failure to offer any evidence, beyond the deed, in support of the *fact* of partnership, although such evidence must be easily produced, if it exists, and in view of the fact that no actual proof that the alleged partnership ever made any pens, to rebut Mr. Waterman's testimony, and in view of the fact that no evidence is given that the pens sold by the defendant, the Modern Pen Company, are pens made by the alleged partnership, if the alleged partnership ever made pens. All these facts are nega-

tived by Mr. Waterman's uncontradicted testimony (Record, p. 101 *et seq.*).

IT IS SUBMITTED THAT THE DEFENDANT CORPORATION, THE MODERN PEN COMPANY, HAS NOT SUSTAINED THE BURDEN OF PROOF (1. *Jacobs* v. *Beecham*, 221 U. S., 263) AND HAS COMPLETELY FAILED TO JUSTIFY ITS USE OF THE NAME "WATERMAN" AND THAT THE DECREE OF THE COURT BELOW SHOULD BE REVERSED WITH COSTS TO PLAINTIFF IN ALL COURTS AND THE LOWER COURT ORDERED TO ENTER A DECREE FORBIDDING THE DEFENDANT CORPORATION, MODERN PEN COMPANY, TO USE THE NAME "WATERMAN" IN CONNECTION WITH THE MAKING OR SALE OF FOUNTAIN PENS AND DECREEING THAT A WRIT OF PERMANENT INJUNCTION ISSUE AGAINST THE DEFENDANT, MODERN PEN COMPANY, ITS AGENTS, OFFICERS AND SERVANTS, FORBIDDING IT OR THEM OR ANY OF THEM FROM—

(*a*) Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any fountain pen of other manufacture than that of the plaintiff under the name of Waterman or Waterman's, or Waterman Pens, or Waterman's Pens, or Waterman Fountain Pens, or Waterman's Fountain Pens, or Ideal Pens, or any mark or name in imitation thereof or near resemblance thereto as might be calculated to deceive or be likely to cause confusion or mistake in the mind of the public or deceive purchasers, or which would indicate that the fountain pens sold, represented or advertised are fountain pens of plaintiff's manufacture.

(*b*) Infringing the plaintiff's trade-mark "Waterman's Ideal Fountain Pen, N. Y.", or infringing the plaintiff's trade-mark "Ideal," and from manufacturing or selling fountain pens (other than fountain pens of plaintiff's manufacture) having the said trade-marks or either of them, or any simulation or colorable imitation thereof, on such fountain pens, whether on the holder or on the gold pen, or

on labels, boxes, signs, letter-heads, billheads, circulars, or advertisements accompanying or used in connection with the making or selling of such fountain pens, or in any manner whatsoever.

(*c*) Directly or indirectly making or causing to be made, selling or causing to be sold, or offering for sale, or advertising any fountain pens of other manufacture than that of the plaintiff, engraved, imprinted or otherwise marked with any representation of a globe on such fountain pens, or upon boxes containing such pens, or on labels, signs, circulars or advertising accompanying or used in connection with the advertising or selling of such fountain pens.

(*d*) Using in connection with the manufacture or sale of fountain pens or parts thereof, other than fountain pens of plaintiff's manufacture, the name "Waterman" or "Waterman's" or "A. A. Waterman" or "A. A. Waterman & Co." or "A. A. Waterman & Company" or "Arthur A. Waterman & Company."

Respectfully submitted by

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DIGEST OF CASES

1.

Jacobs vs. Beecham, 221 U. S., 263–271:

This was a bill by the owner of a patent medicine known as "Beecham's Pills" to restrain the defendant from using the same name on pills made by him and trying to appropriate the plaintiff's good will. The plaintiff has a decree in the Circuit Court, enjoining the defendant from using the word "Beecham" in connection with pills prepared or sold by him. The defendant set up that the name "Beecham" was a proper name and cannot constitute a valid trade-mark, and the defendant's use of the name was saved from being unfair by a statement underneath that he made the pills.

HELD (Mr. Justice Holmes): "When the defendant has to justify using the plaintiff's trade name, the burden is on him."

2.

Davis v. Key, 123 U. S., 79:

HELD (Mr. Justice Blatchford): A partner cannot maintain an action against his co-partner for an accounting under an agreement of partnership which has been executed, but which has never been complied with and has never gone into effect.

3.

Brown Chemical Co. v. Stearns & Co., 37 Fed., 360:

Where the plaintiff was the proprietor of a preparation known as "Brown's Iron Bitters", and defendant of another, called "Iron Tonic Bitters", which it falsely stated to be made by "Brown & Co., New York," it was held that such statement should be enjoined.

4.

R. Heinisch's Sons Co. v. Boker et al., 86 Fed., 765:

The defendants, former agents for the firm of R. Heinisch's Sons, complainant's predecessors, which firm

enjoyed a high reputation as makers of shears, entered into a contract with H. C. Heinisch, a former member of the firm by which the defendants acquired, among other things, the right to use his name upon all their goods. Henry Heinisch on withdrawing from the firm, had conveyed to it all his interests in its assets and business, and defendants, in a contract had admitted that the firm was "sole owner of the Heinisch trade-mark". Defendants after making the contract with Henry Heinisch at once began to make and sell shears stamped with Henry Heinisch's name and packed in a manner similar to complainant's goods, so as to lead the ordinary purchaser to believe them the same. The defendants also continued to style themselves, upon signs, in circulars, etc., "agents for R. Heinisch's Sons." It appeared that nothing had ever been done under any clause of the contract, except that conveying the right to use the name; and the real object appeared to have been solely to acquire, under cover of the other clauses, a claim to that name.

HELD: per Townsend, *D. J.*: "The defendants contend that, in any event, they have a right to use the name "Heinisch" or "H. C. Heinisch" upon their goods * * *. In 1892 H. C. Heinisch sold his name to them, as a trademark. Except for his connection with his patented shears, it does not appear that this transaction represented anything except the purchase of the right to make profit out of the Heinisch trade name. It is true that the ingeniously worded contract purported to provide that H. C. Heinisch should impart 'any special information he may have or acquire as to the best methods of cutlery manufacture.' But said contract further gave to defendants the right to manufacture any kind of 'cutlery which they desire to make and place on sale with the name "H. C. Heinisch"' and provided that said name should be 'the property of and belong to the parties of the first part forever.' * * * When H. C. Heinisch made this contract in 1892, allowing the perpetual use of his name, all that he did was to look at some samples of the goods which the defendants were to have manufactured for them, and to express his satisfaction with them, as he considered them equal, if not superior, to the original Heinisch goods. * * * Judging from the conduct of defendants, the actual object of said contract was to appropriate the reputation of the Heinisch shears by the purchase of the name 'H. C. Heinisch.' * * * This is not the case of a sale of a good will in connection with a plant or a growing business. * * * Nor is this a case where the party allowing the use of his name on certain goods has associated himself in business with the manu-

facturers thereof. It does not appear that H. C. Heinisch ever invested any money in said business, or undertook any supervision over, or exercised any skill in, the manufacture of said goods. It thus appears that, while neither of the ostensible objects of said contract has been carried out, the Heinisch name, attempted to be sold thereunder, has been so used as to deceive the public."

5.

Abel Morrall, Ltd., v. Hessin & Co., 20 R. P. C., 429:

For one hundred years a needle business had existed under the name of "Abel Morrall". In 1891 plaintiff purchased the good will of the needle business of Joseph Mogg and Joseph John Richard Mogg, which dated from 1846. Abel Morrall's or A. Morrall's needles were famous under these names or simply as Morrall's. Mogg's needles were well known in certain localities. Defendant began the needle business in 1893 as "T. Hessin & Co.," and in 1900 purchased for sixty eight pounds the business of Jabez Yardley Morrall, a former employee of plaintiff company. Defendant also purchased for seven pounds, the business of W. Mogg & Co., provision dealers, who sold to defendant "the whole bag of tricks", the receipt given by defendant mentioning good will, use of name, labels, etc. HELD: These purchases were colorable and made with intent to defraud plaintiff, and that the defendant might obtain trade intended for plaintiff. Injunction granted against use of names J. Y. Morrall or W. Mogg & Co.

6.

Brown Chemical Co. v. Meyer, 139 U. S., 540:

Complainant manufactured a remedy to which it gave the name "Brown's Iron Bitters." Defendants, who are not manufacturers, sold a similar remedy which was originated by one E. L. Brown, who gave it the name "Brown's Iron Tonic." The two articles were distinctly unlike each other in appearance, and there was no evidence of a fraudulent purpose on the part of the defendants or the manufacturers of the article.

Held, that the designation "Iron Bitters" being *public juris*, and, on the facts of the case, the use by the originators of defendants' article of the patronymic "Brown" being legitimate, there could be no relief.

Brown, *J.:* "It is hardly necessary to say that an ordinary surname cannot be appropriated as a trademark by any one person as against others of the same name, who are using it for a legitimate purpose; although

cases are not wanting of injunctions issued to restrain the use even of one's own name where a fraud upon another is manifestly intended, or where he has assigned or parted with his right to use it (*McLean* vs. *Fleming*, 96 U. S., 245; *Goodyear Company* vs. *Goodyear Rubber Company*, 128 U. S., 598; *Russian Cement Co.* vs. *Le Page*, 147 Mass., 206; *Hoxie* vs. *Chaney*, 143 Mass., 592)."

7.

Kirby v. Tallmadge, 160 U. S., 379:

Per Justice Brown:

"While he avers in his answer, and Miller admits, the payment of $3,000 in cash, defendants introduced no testimony whatever in support of their case, but relied solely upon their answers. As they had it in their power to explain the suspicious circumstances connected with the transaction, we regard their failure to do so as a proper subject of comment. 'All evidence,' said Lord Mansfield in *Blatch* v. *Archer*, Cowp., 63, 65, 'is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted.' It would certainly have been much more satisfactory if the defendants, who must have been acquainted with all the facts and circumstances attending this somewhat singular transaction, had gone upon the stand and given their version of the facts. (*McDonough* v. *O'Neil*, 113 Mass., 92; *Com.* v. *Webster*, 5 Cush., 205, 316; 52 Am. Dec., 711.) It is said by Mr. Starkie in his work on evidence (vol. 1, p. 54): 'The conduct of the party in omitting to produce that evidence in elucidation of the subject matter in dispute, which is within his power and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.'"

8.

Pacific Coast S. S. Co. v. Bancroft Co., 94 Fed., 181, 200, reversed on other grounds in 180 U. S., 49:

When the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced would support the inferences against him.

"It necessarily follows that, if such facts are known to him, he must prove them. 'It is not

enough for him to show that it might have arisen from that cause. He must prove that it did.' If the facts are unknown to him then the other methods of proof suggested by Judge Hoffman may be resorted to,—their sufficiency, of course, to be determined by the Court. Common sense and sound reason appeal strongly to the conscience of the Court, against the adoption of any rule that would allow the claimant to withhold the facts within his knowledge, and rely solely on the theory of presumption."

9.

Pennsylvania RR. Co. v. Anoka Nat. Bank, 108 Fed. CCA., 482:

The plaintiff below sued the railroad company to recover for the loss of goods in shipment and introduced evidence tending strongly to show that the defendant managed and controlled the line of road upon which the loss occurred although it was owned by a separate corporation.

HELD: "The defendant Company, of course, knew exactly the relation it sustained, to the Philadelphia, Wilmington & Baltimore Company, and, if it was not such as the mass of testimony introduced by the plaintiff strongly tended to show it to be, it was open to it to produce convincing evidence of the fact, and show precisely what the relation was, and, not having done so, every inference warranted by the evidence may justly be indulged against it. Where the evidence tends to fix a liability on a party who has it in his power to offer evidence of all of the facts as they existed and rebut the inferences which the proof tends to establish and he refuses to offer such proof, the natural inference is that the proof if produced, instead of rebutting, would support the inference against him."

10.

Mayer Co. v. Virginia-Carolina Co., 35 App. D. C., 425:

The appellee claims title under an assignment of the good will and trade-mark which was unaccompanied by the sale of any business with which these were associated. HELD: That the trade-mark and good will did not pass. Also the appellee's assignor having wound up its affairs and abandoned its business, held, that the good will thereby became extinct, citing and quoting:

Wedderburn v. *Wedderburn,* 22 Beavan, 84.

"Good will is a matter distinctly appreciable, which may be preserved (at least to some extent) if the business

be sold as a going concern, but which is wholly lost if the concern is wound up, its liabilities discharged, and its assets got in and distributed."

11.

Peck Bros. v. Peck Bros. Co., 113 Fed. C. C. A., 291:

Peck Brothers & Co., a Connecticut corporation organized for the purpose of manufacturing brass and plumber's goods, passed into the hands of a receiver on petition of creditors. By order of Court all assets, good will, trade-marks, etc., were sold to a committee representing all stockholders who formed a new corporation called "The Peck Brothers & Company." A vice-president of the old concern and parties connected with the receivership, having charge of a branch in Chicago, obtained a charter from the State of Illinois for a corporation to be called "Peck Bros. Co." There were no Peck Brothers or Peck in it. HELD:

> "The name assumed was voluntarily selected, and, as we must believe, for the purpose of appropriating the good will and trade name of another. If not originally so designed, it is clear that, upon failure to procure the right by purchase, the name was afterwards used for the purpose of misleading the public and appropriating to itself, without right, the valuable trade name of another. That wrong has been effected. Furthur wrong should be prevented. The remedy, if the defendants be honest, is simple. They have but, under the law, to change the name which they selected, and which has wrought the injury. In any event, they should be enjoined from further perpetration of the wrong."

12.

Thorneloe v Hill, 11 R. P. C., 61—1894 (Ch. Div.):

Defendant was without any right to do so, selling watches marked "John Forrest". HELD: however, that plaintiff was not entitled to restrain him from doing so, for the reason that his right to use the name was not established; it was traced by various steps to the actual John Forrest, who died many years before, and the particular defect pointed out in plaintiff's title was that the right to use the name was not assignable in gross, without some business or good will to which it was appurtenant.

13.

Burrow v. Marceau, 124 A. D. (N. Y.), 665—1908; 109 N. Y. Sup., 105:

"Napoleon Sarony was a successful New York photographer prior to November 9, 1896, when he died. October 7, 1898, Otto Sarony, his executor, sold to plaintiff's assignor Sarony's business with the trade-mark 'Sarony' and the good will of the business. Later this executor agreed with Marceau to use his, Otto Sarony's name, or any part of it. Marceau then organized the Otto Sarony Co., photographers, a New York corporation in which Otto Sarony owned one share of stock—the consideration for his giving the concern the right to use his name. HELD: 'The object of this transaction is perfectly apparent. It was not an attempt of a man to transact business in his own name or to transfer to another the good will of an established business. Otto Sarony did not intend to go into business using his own name * * *. The only object he (Marceau) could have was thus to secure some of the business of the plaintiff * * *.' 'Sarony' meant nothing except so far as it represented the reputation or skill and artistic merit of the business transacted under that name. It was a fraud if the defendant represented that this company was either the successor of the business and methods established by Napoleon Sarony, or that any member of the Sarony family had any connection with it. It was a fraud upon the plaintiff, in that by the use of the name 'Sarony' it indicated that the Sarony who had established the business known to the public as Sarony's photographic establishment was connected with it, and it was a fraud for Otto Sarony to make such an agreement with the defendant Marceau when he had transferred the right to use the name of Sarony with the business established by Napoleon Sarony and had received consideration therefor."

14.

Wm. G. Rogers Co. v. International Silver Co., 118 Fed. Rep., C. C. A., p. 133:

"It is claimed that the business inaugurated by William G. Rogers was *bona fide*, and that, being such, it stood after its transfer to the respondent corporation with all the same rights as before its transfer. There is nothing that shows any particular finding below on this proposition; but the very small amount for which all the assets of Rogers were transferred to the corporation, as well as some other facts to which it is not necessary to refer, establish, on the present record, beyond any reasonable doubt, that the purpose of Rogers, from the incip-

iency of the business, was as stated in the complainant's bill, and was not *bona fide*, in the sense in which such an expression is used by the courts with reference to protecting established commercial or manufacturing interests. The circuit court was right in holding that Rogers was a joint tort feasor with the corporation to which he assigned his apparent business interests."

15.

National Distilling Co. v. Century Liquor & Cigar Co. *et al.*, Warrington, *J.*, 183 Fed. Rep.: C. C. A., pp. 206, 209, 210:

"The contention is that a surname cannot be exclusively appropriated against anyone bearing the same name or otherwise having a right to use it. Reliance is placed on *Howe Scale Co.* v. *Wyckoff, Seamans, etc.*, 198 U. S., 118, 25 Sup. Ct., 609, 49 L. Ed., 972: *Donnell* v. *Herring-Hall, Marvin Safe Co.*, 208 U. S., 267, 28 Sup. Ct., 288, 52 L. Ed., 481; *Herring, etc., Safe Co.* v. *Hall's Safe Co.*, 208 U. S., 554, 28 Sup. Ct., 350, 52 L. Ed., 616, and other kindred decisons. It must of course be conceded that the principle contended for has long been the settled law. But the essence of appellant's complaint is against the Century Company. * * * It is simply misapplying the rule that one cannot be prevented from using his own name in his own business, to say under the facts of this case, that these men can use their name as a trade-mark in the business of this corporation. The cases relied on by appellee upon this subject do not secure more than a personal privilege, and that only when it is exercised fairly and so as not to mislead the public. *Royal Baking Powder Co.* v. *Royal*, 122 Fed., 337, 348, 58 C. C. A., 499."

16.

Royal Baking Powder Co. vs. Royal, 122 Fed., 337, at pp. 343, 347, 348.

"Now, if the defendant did not bear the family name of 'Royal' there would not be the slightest doubt but that his use of the word 'Royal' in connection with a baking powder made and sold by himself would be absolutely prohibited, upon the ground that the use of so arbibrary and meaningless a word applied to a baking powder could only be with the dishonest intent to appropriate to himself some of the benefits resulting from the demand for the Royal Baking powder made and sold by the complainant. * * * Seeing that he has been trading in the name of Valentine, irrespective of the company * * * I think it is right as asked for by the injunction, that he should not use it without carefully distinguishing himself

from the meat juice company who have been the objects of his attacks. * * * Under any such name or title as aforesaid without clearly distinguishing such business from the business of the plaintiff, and from selling, or offering or exposing or advertising for sale, or procuring to be sold, any such preparation as aforesaid, under any such description as aforesaid, without clearly distinguishing such preparation from goods of the plaintiffs. * * * But the defendant must not use his name in the business in which complainant has embarked, without using every means reasonably possible to distinguish his business from that of the complainant, and his goods from those made by it."

17.

Garrett v. T. H. Garrett & Co., 78 Fed. Rep., C. C. A., p. 472.

The plaintiffs marked snuff "W. E. Garrett, Philadelphia," and the defendants marked snuff "T. H. Garrett, Louisville, Ky.," afterwards changed to "T. H. Garrett & Co."

"That there was any intent to appropriate the good will or to deceive complainant's customers is stoutly denied by T. H. Garrett, and by the officers of the defendant corporation, and it is declared in their affidavits that the retail dealers who were customers of, and those who were solicited by the defendant company, were advised that the snuff was the manufacture of T. H. Garrett & Co. and not the manufacture of William E. Garrett & Sons.

Whether retail dealers were advised that they could sell the snuff as 'Garrett's Snuff' to their customers as and for the snuff manufactured and sold by complainants, and whether it was intended that those customers should be thus deceived is in dispute. Affidavits for complainants sustain the charge, and affidavits for the defendant deny it. But that the effect was to impose snuff manufactured by the defendants upon purchasers from retailers as 'Garrett's Snuff'—that is to say, as snuff manufactured by complainants—is, we think, too well established to be doubted; and we are fully impressed that it was the intention of the defendant company, by the use of the name 'Garrett', to appropriate the good will and interfere with the trade of the complainants.

The statement, made by Holloway in his affidavit, that the only reason for retaining the name of T. H. Garrett, in the name of the corporation was that he was its original projector and promoter, and that it would have been an unnecessary and unfair reflection on him to have changed the name, is mere pretense and sham, too

bald to be even plausible. If it be said that it was to preserve the good will of the company as first organized, the answer is that by Garrett's own affidavit it is shown that, by reason of the poor quality of the snuff put on the market by that company, its good will, if it ever had any, was all turned to ill will. Taking his own showing, it is apparent that the best thing for the company to do, if it was actuated by any honest purpose, would have been to get rid of the name as quickly as possible. The sending out of circulars and advertising matter, which might be suggested as another reason, was, almost exclusively, after the reorganization. If the defendant company was and is, as it claims, solicitous to avoid confusion of labels, and desirous to build up a good will of its own, which it would be able to protect against the complainants as well as all others, it ought to hail with satisfaction anything that the Court below could have done, or that this Court can do for it, in that behalf.

It is not claimed that the packages of snuff on which they were placed were put on the market with the intent to deceive the retail dealers who were supplied by defendant. That would have been impracticable. The claim is that the snuff was of inferior quality, and sold at prices below complainant's prices, with the expectation that the retail dealers, who knew what they were buying, would sell it to their customers as 'Garrett's Snuff,' and at the price of the genuine article, thereby reaping a larger profit. That was the lure, and it was of the sort to be successful in the great majority of instances. * * * But the injury to the complainants was and is two fold, for they not only lose trade, but reputation, or good will also.

Without the use of that name the fraudulent scheme of the defendant would never have materialized. * * * That the complainants were entitled to the use of the word 'Garrett' on their labels, as a trade-mark or as a descriptive word, is, in our opinion, beyond question, upon the undisputed facts of the case. They and their predecessors had enjoyed such use for many years and had built up an extensive trade based upon it. Even if it could not be used as a trade-mark, it is to be treated as a descriptive term, to the benefit of which they are entitled. It was so held by the Court of Appeals of this Circuit in *California Fig Syrup Co.* vs. *Frederick Sterns & Co.*, 20 C. C. A., 22; 73 Fed., 812, and in *Salt Co.* vs. *Burnap* also decided by the Court of Appeals of the Sixth Circuit and reported 20 C. C. A., 27; 73 Fed., 818. * * * In such a case as this, where the manifest intent was and is to appropriate the good will of the complainants by the

fraudulent use of the name 'Garrett' if the complainants be not protected by preliminary injunction against such use,—if, in other words, that question be postponed to the final hearing, there is every inducement to the defendant to delay and prolong the litigation, continuing, meanwhile, the assaults upon the good will of the complainants, so that, even if final decree be at last rendered in favor of the complainants the good will will have been so seriously and irreparably injured, if not in great measure destroyed, as to leave the complainants practically without remedy. * * *

Entertaining these views, the order of the Judge below for an injunction as to the use of the labels will be affirmed, and the order refusing an injunction against the use of the name of 'T. H. Garrett' or 'T. H. Garrett & Co.', will be reversed, with costs. The cause will be remanded, with instructions to continue the injunction granted, and to grant an injunction, in accordance with this opinion, against the use of the name of the defendant 'T. H. Garrett' or the name of 'Garrett,' as a part of the corporate name of the defendant, or in its business."

18.

Ludlow Valve Mfg. Co. vs. Pittsburgh Mfg. Co., 166 Fed. Rep., C. C. A., pp. 26, 29, 31:

"The power of courts of equity to restrain unfair competition, is a very beneficient one, and is founded upon a basis of sound business morality. The opinion of the Supreme Court of the United States, in the Singer case, while recognizing the right to the use of the word 'Singer' as a generic description of the article, makes emphatic recognition of the duty of the Court to require the name to be used in connection with such proper statements in advertisements, etc., as to guard against any possibility of deceiving the public as to the source of manufacture.

No arbitary rules have ever been nor ever can be, laid down by which courts of equity will furnish this protection. To establish such rules, would, like definitions in the law, furnish the means by which fraud could successfully accomplish its ends. Courts of equity may require such form of words to be used in connection with the appropriated name as will completely protect the rightful owner of that name from injury and the public from imposition, and a defendant so using the name has no just right to complain of any form of words in connection with the name, the only purpose and effect of which is to prevent appropriation by him of the fruits of another's business enterprise and skill. * * * The rule is, that

what the Court will regard as sufficient notice of the source of manufacture, must be given by such user of another's trade name, and that such name may not be used without clearly and unmistakably specifying, in connection therewith, that such machines are the product of the defendant, or other manufacturer, and therefore not the product of the original maker and vendor thereof.

19.

Charles E. Hires Co. v. Consumers Co., 100 Fed. Rep., C. C. A., pp. 809, 812, 813:

"It is true that no one has a monopoly of form, nor has he a monopoly of color, of the shape of letters, of geographical names, or of his own name. An action like the present proceeds upon no such ground, but upon the principle that one may not, by means lawful in themselves when devoted to a lawful end, perpetrate a fraud upon the public, or infringe the rights of another. The doctrine is not novel in this Court. We have held that one may not use his own name to work a wrong (*Meyer* v. *Medicine Co.*, 18 U. S. App., 372; 7 C. C. A., 558; 58 Fed., 884; *Pillsbury* v. *Mills Co.*, 24 U. S. App., 395; 12 C. C. A., 432; 64 Fed., 841), or a geographical name for like purpose (*Mills Co.* v. *Eagle*, 58 U. S. App., 490; 30 C. C. A., 386; 86 Fed., 608; 41 L. R. A., 162). * * * The obvious purpose and the manifest result of this piracy were to enable retail dealers to palm off upon the public the goods of the defendant as the goods of the complainant. That wrong could not be prevented by the partial restraint imposed by the Court below. * * * The Court below, upon holding that the changed label of the defendant infringed the complainant's right, caused to be submitted for its approval another form of label, which it approved, and authorized the defendant to use upon bottles of the same form as those used by the complainant. We greatly doubt the propriety of such action. When an infringement has been found, it should be restrained. A court of equity does not sit as an arbiter to determine in advance upon other and changed labels, which the infringer may adopt to avoid the condemnation of the Court. Whether such changed forms do in fact infringe is matter of fact to be determined by the Court in its usual course of procedure upon complaint lodged by the party damnified. The duty of the Court below was to determine whether the labels complained of in the bill infringed the complainant's right. That duty was fully performed when the Court had so determined. It is not called upon to decide whether a new label proposed for

adoption would infringe. This is especially so here, where the infringement was deliberate and designed. In such case the Court ought not to say how near the infringer may lawfully approximate the label of the complainant, but should cast the burden upon the guilty party of deciding for himself how near he may with safety drive to the edge of the precipice, and whether it be not better for him to keep as far from it as possible. * * * The defendant is not deprived of the right to market its root beer, but, at its peril, must see to it that its product is not dressed in the clothes of another."

20.

Walter Baker & Co. v. Sanders, 80 Fed. Rep., C. C. A., pp. 889, 894. Lacombe, *C. J.*:

"The Public do not go into the minuter refinements of the title or the label. Whether it is described as 'Walter Baker's Chocolate' or 'William Baker's Chocolate' or 'W. H. Baker's Chocolate', or 'W. H. Baker's Best Chocolate,' so long as the title contains the words which in trade and among consumers have come to be the every day designation of complainant's goods, the chocolate so labeled will naturally be assumed to be complainant's unless special care be taken to indicate that it is not. * * * The complainant is entitled to relief against further use of a title which causes confusion, provided such relief can be granted without depriving W. H. Baker of the right to use his own name in connection with the chocolate business. The measure of such right is tersely expressed by Judge Paul:

'The doctrine is equally well settled that equity will direct how a man shall use his name in his purpose to denote his own individuality. He will not be allowed to use his own name as to work an injury to another having the same name, nor to perpetrate a fraud on the public.' * * * But he should not be allowed to use his surname, Baker, whether his given name or its initials are prefixed or not, so as to announce upon label or advertisement that the goods he sells are 'Baker's Chocolate'."

21.

Souffront v. Compagnie Des Sucreries, 217 U. S., pp. 475, 486:

"Let it be conceded for the sake of argument, that ordinarily no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit (*Dull* v. *Blackman*, 169 U. S., 248; Freeman on Judgments, 1st ed., Sec. 162); nevertheless the rule has no application to a case like this where the nominal plaintiffs or complainants were in

legal intendment conducting the litigation under the direction and for the benefit of the real owners of the property. The persons for whose benefit, to the knowledge of the Court and of all the parties to the record, litigation is being conducted cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record. (*Lovejoy* v. *Murray*, 3 Wall., 1)".

22.

Gray v. Gibson, 6 Mich., 300:

Gibson, Mason & Mason brought replevin against Gray for a quantity of wheat. Gray pleaded that the wheat was the property of one Ells. At the trial plaintiffs to prove title, offered evidence of a witness who saw plaintiffs sign a partnership agreement, which agreement is now in the custody of the Clerk of Erie County. A copy of the agreement made by the witness was offered in evidence and admitted. The agreement set forth that G. M. & M. had formed a limited partnership under the laws of New York, and provided for the beginning and termination of the partnership. Plaintiff also offered evidence of certain dealings in the particular load of wheat in question. The trial judge charged the jury that as the evidence showed that the plaintiffs had made themselves partners as to third persons then they had in fact become general partners, and as such were entitled to maintain the action. There was a verdict for the plaintiffs.

HELD, on appeal, that even if the original certificate with due proof of execution had been offered in evidence, it could not of itself, without evidence *aliunde* show a partnership of any kind between the plaintiffs. If admissible at all for such a purpose it must have been in connection with acts of the parties tending to show they had actually gone into business as partners.

"But, standing alone, without any extrinsic evidence tending to show that they had actually entered into business as partners, it could not, we think, tend to prove an actual partnership between the plaintiffs, and if no such extrinsic evidence was given we think it would have been the duty of the court to charge the jury that there was no legal evidence from which they were authorized to find the fact of such partnership".

As to the trial Judge's charge that if evidence showed a partnership as to third persons, they were partners in fact. It was held:

"The question whether persons are partners *inter se* is to be determined by the understanding and intention of the parties, or in other words, the contract as between themselves, and no partnership as between the parties can be formed without the assent of every member and his actual intention to become such."

23.

Drennen et al. v. London Assurance Company, 113 U. S., 51, at p. 55:

A fire policy covering the merchandise belonging to a firm, provided that it should be void if the property "be sold or transferred, or any change takes place in title or possession, except by succession by reason of the death of the insured, whether by legal process or judicial decree or voluntary transfer or conveyance." Subsequently and before loss, the firm, owning this property in certain proportions made an agreement, in writing with A. by which they agreed to receive him into their business upon the following terms and conditions: Said firm to become incorporated; A. to pay into the firm for its use $5,000. forthwith and $5,000 in two years--the name of the new company to be determined hereafter. The property of the existing firm to be put into the corporation to be formed, adding to it the $10,000. to be paid by A. The interests and shares of the several parties in the new company to be in proportion to the amount so contributed by each to the capital stock. When a charter shall be procured as aforesaid, half of A.'s stock to be held by said company until the second sum of $5,000. be paid. No change in the name or the character of the existing firm shall be made until said corporation shall be formed.

Per, Mr. Justice Harlan.

"At the trial below the plaintiffs asked the Court to instruct the jury that the written agreement with Arndt followed by his payment of $5,000. in money, the delivery of his note for a like amount and the entry of the money and notes to his individual credit upon the books of Drennen, Starr and Everrett did not constitute him a partner with plaintiffs, as between themselves, and did not have the effect to assign or transfer to him any title or interest in the property insured. The court refused to give that instruction, but charged the jury that 'Said agreement so signed, if assented to by Everett, and the receipt by plaintiffs of the money and note and the credit thereof on their books to Arndt would and did constitute Arndt a partner with plaintiffs, as between themselves, from the

time of the receipt by plaintiffs of said money and had the effect to convey and transfer to and vests in Arndt a joint and undivided interest and title with plaintiffs in the insured property.'" * * * "We have now only to determine whether there was error in holding that Arndt by virtue of the agreement of May 24, 1883, and the facts recited in the charge to the jury, became a partner in the firm of Drennen, Starr & Everett. This question is within a very narrow compass, for our inquiry is restricted to the ascertainment of the real intention of the parties as disclosed by the written agreement, considered as a whole, and by their conduct in execution of its provision."

Held that Arndt did not become a partner nor acquired any interest in the property of the partnership before it was made a corporation, and that the parties did not contemplate a partnership and none was ever established between them.

24.

McLean v. Fleming, 96 U. S., pp. 245, at p. 253:

"Equity courts will not, in general, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits. *Rodgers* v. *Rodgers*, 31 L. T., 285; *Blackwell* v. *Crabb*, 45 L. J., Pt. I, 505. * * *"

25.

N. K. Fairbank Co. v. Luckel, King & Cake Soap Co., 116 Fed. Rep., pp. 332, 333:

"The Circuit Court entered a decree in favor of the complainant, granting the injunction, but denied the prayer for an accounting, upon the ground of complainant's laches. The complainant has appealed from so much of the decree as denied its right to an accounting. The appellant claims that notwithstanding its delay in seeking the relief prayed for in the bill of complaint, having obtained a decree against appellee for an injunction, it was entitled to the further order for an accounting as a matter of course, and particularly as to the gains and profits made by appellee's acts of infringement intermediate the time of the filing of the bill of complaint and the date of the decree. In answer to this contention it is sufficient to say that it was held by the Supreme Court in the case of *McLean* v. *Fleming*, 96 U. S., 245, L. Ed., 828, that in a suit like this a complainant who has been guilty of laches in asserting his rights is not entitled to an accounting for past profits, although upon the whole case the court might deem it proper to grant an injunction to prevent future infringement."

26.

Bissell Chilled Plow Works v. T. M. Bissell Plow Co., 121 Fed. (C. C. A.), 357, at p. 369:

"No doubt, Mr. Bissell had the right, upon severing connection with complainant, to go into the plow business again on his own account, and transact it in his own name, with such restrictions and precautions in regard to the use thereof, in relation to his business, as would prevent, as far as possible, his goods being taken for complainant's and thus avail himself of his reputation as a plow manufacturer. But that he did not do And whether he did so or not, this is not a case against him, but against the defendant corporation. It is not a case involving the right of a person to use his own name, but the right of a corporation formed and managed by persons not of that name to use the name. The line of authorities cited by counsel for defendants, involving the right of a person to use his name in his own business, are not, therefore, pertinent to this case.

27.

Shea v. Nilima, 133 Fed. Rep., p. 209, at p. 213:

"It is alleged in the complaint to be a 'prospecting and mining partnership.' But it matters not what name be given to it by the parties; it must be left to the Court to determine its general nature from the facts. Whether it is called a 'contract' an 'agreement' or a 'partnership,' the law steps in and from the facts determines the rights of the respective parties thereunder. * * * The entire steps taken by the parties must be considered. Whatever was done in furtherance of the common purpose, understanding, and agreement must be treated as an entire or continuous transaction so far as their rights and obligations in respect to the enterprise are concerned. If by words, acts and deeds they joined together in a common purpose, and agreed to share equally in the enterprise, they were, in a certain sense, partners and such a partnership may be formed without any written articles between the parties. In determining whether the relation between the parties to an oral agreement constitutes a partnership, their intention, as is disclosed by the nature and effect of the whole agreement, and acts done thereunder, must govern."

28.

Salter v. Ham et al., 31 N. Y., 321, at pp. 327, 328, 329:

"Whether two or more persons are partners, as between themselves, is determinable chiefly by a reference to their own intention. Now, what was intended by the agreement of December, 1855? Was it that the plain-

tiff by loaning to Ham, the sum of $500 to purchase materials for manufacturing his medicine, should become a partner indefinitely in the general or future business? Such intention, I think, cannot be inferred from the terms of the agreement, construed in the light of the surrounding circumstances and conceded facts. Ham was manufacturing his medicine and had agents engaged in vending it in this and other States. The plaintiff agrees to loan him $500 for one year, and, as security therefor, he assigns bills and accounts against his agents for more than the amount of the loan, and at the same time stipulates to invest the sum in articles necessary to manufacture the medicine, and to manufacture and put the same on sale, and pay over to the plaintiff one-quarter of the net profits arising from such manufacture and sale. The plaintiff advanced the money about the 1st February, 1856, and it is admitted in the complaint that the parties acted under this contract from the execution thereof until about the 11th February, 1856 (a period of two months), when it seems to have been abandoned. * * * This agreement, I think, cannot be construed to create a partnership even in respect to the specific medicine manufactured from the ingredients to be purchased with the $500 advanced; and certainly it was not intended that the covenant should reach the general or future business or the fruits of other money to be used or invested. It was a mere arrangement for a loan, upon security for a fixed period, with profits by way of interest. It did not impose upon the plaintiff the duties or clothe him with the powers of a partner. There was no joint ownership of the partnership funds according to the intention of the parties. The $500 loaned under the agreement was not a contribution to the capital of the firm as such; nor was it put into the business at the risk of the business. The plaintiff was, in no event to participate in the losses of the adventure. With respect to third persons, Salter might be held to be a partner in the particular transaction, but as between himself and Ham the relation was that of creditor and debtor. Salter loans to Ham five hundred dollars for a term, upon security, and by way of indemnity for the use of the money it is agreed that it shall be invested in ingredients for manufacturing the Invigorating Spirit (a business which Ham was then carrying on), and upon the manufacture and sale of the article, if any profits accrued over and above the expenses of manufacturing and selling, Salter was to receive one-fourth of such profits. This seems to me to be the obvious intent and meaning of the agreement. Neither in terms or by implication is any partnership relation created as between themselves."

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L. E. WATERMAN COMPANY *v.* MODERN PEN COMPANY.

MODERN PEN COMPANY *v.* L. E. WATERMAN COMPANY.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 54, 72. Argued November 10, 1914.—Decided November 30, 1914.

When the use of his own name upon his goods by a later competitor will and does lead the public to understand that such goods are the product of a concern already established and well known under that name, and when the profit of the confusion is known to, and, if that be material, is intended by the later man, the law will require him to take reasonable precautions to prevent the mistake. *Herring-Hall-Marvin Co.* v. *Hall's Safe Co.*, 208 U. S. 554.

There is no distinction between corporations and natural persons in the above principle, which is one to prevent a fraud.

All the protection which a manufacturer is entitled to get against a later person of the same name manufacturing similar goods is to require the later person to so use his name in marking his goods that they cannot be confused with the earlier manufacturer, and this

though one of the motives of the later person was to obtain an advantage by the use of his own name.

While the transfer of a person's name without any business may not be enough to entitle the transferee to prevent others from using the name, it still is a license that may be sufficient to put the licensee on the footing of the licensor against another party of the same name.

Two courts below having upheld arrangements as effective in giving a licensee of the right to use a name the same protection which the licensor would have had as against another party of the same name, this court will not go into any consideration of the facts on which such arrangement was based.

197 Fed. Rep. 534, 536, affirmed on cross appeals with costs equally divided between both parties.

THE facts, which involve the use of the name Waterman in connection with the manufacture and sale of fountain pens, are stated in the opinion.

Mr. Walter B. Raymond and *Mr. Oliver Mitchell*, with whom *Mr. Victor C. Cormier* and *Mr. Mortimer W. Byers* were on the brief, for the L. E. Waterman Co.:

The burden of proof is upon the defendant company to prove the affirmative defense set up by the answer, namely, that the defendant, Modern Pen Company, is selling pens made by a partnership rightfully doing business under the name "A. A. Waterman & Co." and rightly making and marking the same with the firm name. *Jacobs* v. *Beecham*, 221 U. S. 263.

The only evidence in support of its affirmative defense is a paper unsupported by any evidence that it was ever followed by any acts constituting partnership action. This is not sufficient to prove a partnership. *Gray* v. *Gibson*, 6 Michigan, 300; *Davis* v. *Key*, 123 U. S. 79.

The testimony of A. A. Waterman taken in the plaintiff's *prima facie* case shows that the alleged firm was to do nothing, that it had no function, that it was a paper firm, that the Modern Pen Company while ostensibly the selling agent for a manufacturing firm of A. A. Waterman & Co.,

actually conducted the entire business; that A. A. Waterman, as a member of the alleged firm, had no management, had no functions and under the firm was a salesman for the Modern Pen Company. The defendant did not produce any evidence to show that the alleged firm ever manufactured or did anything. Under these circumstances the rule is applicable that where proof would be easy, if it existed, and it is not made, the presumption is that rebutting proof cannot be made. *Kirby* v. *Tallmadge*, 160 U. S. 379; *Pac. S. S. Co.* v. *Bancroft*, 94 Fed. Rep. 180; *Penn. R. R. Co.* v. *Anoka Bank*, 108 Fed. Rep. 482.

The alleged partnership agreement is a fraud and a sham and a mere colorable device to enable the defendant to place the name "Waterman" on its pens. *R. Heinisch's Sons Co.* v. *Boker*, 86 Fed. Rep. 765; *Abel Morrall, Ltd.*, v. *Hessin & Co.*, 20 R. P. C. 429.

The Chapman-Waterman aggregation did not take over any going business. Waterman had no good-will to grant and no going business to which any good-will could be appurtenant. As to the alleged grant of a right to use Waterman's personal name, such a right cannot be granted in gross. *Thorneloe* v. *Hill*, 11 R. P. C. 61–1894 (Ch. Div.); *Burrow* v. *Marceau*, 124 A. D. (N. Y.) 665.

This case rests upon the proposition of whether or not a man has the right to cede by contract the use of his name to strangers to that name for the purpose of competition with an already established business. *R. Heinisch's Sons Co.* v. *Boker*, 86 Fed. Rep. 765; *Abel Morrall, Ltd.*, v. *Hessin & Co.*, 20 R. P. C. 429; *International Silver Co.* v. *Rogers*, 118 Fed. Rep. 133; *National Distilling Co.* v. *Century Co.*, 183 Fed. Rep. 206; *Royal Baking Powder Co.* v. *Royal*, 122 Fed. Rep. 343; *Garrett* v. *Garrett*, 78 Fed. Rep. 472.

The question of the right of Arthur A. Waterman to use his personal name in the conduct of his business is in no way raised by this proceeding.

The question for decision is as to the right of a corporation to use a personal name in the selling of goods.

The defendant has encouraged the use of the name "Waterman" by its dealers and agents and has sought to unfairly profit by the resulting confusion in the trade.

The defendant having failed to sustain the burden of proving its affirmative defense that it is the selling agent of a valid existing partnership actually manufacturing the pens sold by it and rightfully marking the same with the name "A. A. Waterman & Co.," should be absolutely enjoined from using the name "Waterman."

Mr. Alexander S. Bacon for the Modern Pen Company:

A. A. Waterman had been in the fountain pen business since before 1898, when under a decree in an action between the L. E. Waterman Company and himself and another, he was expressly permitted to do business under the firm name of A. A. Waterman & Co., but was prevented from doing business under the corporate name of the A. A. Waterman Pen Company. Since that date he has been continuously in the fountain pen business. On the reorganization in 1905, of an old firm of A. A. Waterman & Co. in which he was interested, a new firm was organized consisting of himself and the Messrs. Chapman. Under the copartnership agreement he retired from the eastern field and took over the western field in 1906, assigning his good will and the use of his name to his partners, the present firm of A. A. Waterman & Co., of which the Modern Pen Company is the sole selling agent.

A trade-mark or trade-name is assignable. *Burden* v. *Stratton*, 12 Fed. Rep. 696; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

There is no confusion except that slight confusion which arises from the similarity of names, against which courts will grant no relief. *Meneeley* v. *Meneeley*, 62 N. Y. 432.

The court below required the use of the firm name,

Arthur A. Waterman & Co. together with a suffix "Not connected with the L. E. Waterman Company." The suffix is much longer than the name, is inartistic and obnoxious to all parties. There are now at least twelve firms in the silverware business bearing the name of Rogers. If a man named John Doe Rogers should now start in the silverware business, he might be required in all his advertisements and on all his wares to use in addition to his own name of John Doe Rogers, thirteen separate and distinct suffixes "Not connected with the J. Rogers Silverware Company," "Not connected with the William Rogers Manufacturing Company," etc. This extreme example shows the impropriety of such a suffix.

A. A. Waterman was properly so named before the L. E. Waterman Company was organized. He had a right to use his own name, notwithstanding the fact that some one else had organized a corporation before he went into business. The plaintiff brought the trouble upon itself by selecting a family name for a corporate name. Such a suffix is unprecedented and unwarranted. Arthur A. Waterman & Co. is not sufficiently like L. E. Waterman Company to lead to confusion.

The elements of simulation, or inferior goods, or recent entry into the field, do not enter into this question. The defendant is not accused of simulating the plaintiff's wares. The A. A. Waterman fountain pen is the best that modern art can produce, and A. A. Waterman & Co. manufacture everything connected with their own pens while the plaintiff does not. It merely assembles the parts bought from others.

A. A. Waterman has been in business under his own name for many years and assigned his trade name to his partners on retiring from the firm. In these circumstances the new firm of A. A. Waterman & Co. has an absolute right at common law and by statute to the use of their trade-name, unfettered by any suffix. *Tussaud* v. *Tus-*

saud, L. R. 44 Chanc. Div. 678; *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.,* 208 U. S. 554; *Rathbone, Sard & Co.* v. *Champion Steel Range Co.,* 189 Fed. Rep. 26.

MR. JUSTICE HOLMES delivered the opinion of the court.

This suit was brought by the L. E. Waterman Company to enjoin the Modern Pen Company from using in connection with the manufacture and sale of fountain pens, other than those of the plaintiff's make, the name A. A. Waterman or any name containing the word Waterman in any form, and for an account. The decision of the Circuit Court of Appeals upon an order for a preliminary injunction is reported, 183 Fed. Rep. 118; 105 C. C. A. 408; that of the District Court upon the merits, 193 Fed. Rep. 242; and that of the Circuit Court of Appeals, 197 Fed. Rep. 534; 197 Fed. Rep. 536; 117 C. C. A. 30; 117 C. C. A. 32. The final decree, in the parts material here, restricted the defendant to using the name Arthur A. Waterman & Co. instead of A. A. Waterman & Co., and required the words 'not connected with the L. E. Waterman Co.' to be juxtaposed in equally large and conspicuous letters when the permitted name was marked upon any part of the fountain pen sold by the defendant or upon boxes containing such pens, and whenever the name was used by way of advertisement or otherwise to denote any fountain pens made or sold by the defendant, or to denote that it was the maker or seller of such pens. 183 Fed. Rep. 118. 193 Fed. Rep. 242, 248. 197 Fed. Rep. 534, 535, 536. See further *L. E. Waterman Co.* v. *Standard Drug Co.,* 202 Fed. Rep. 167, 171. 120 C. C. A. 455, 459. The bill besides alleging diversity of citizenship and unfair competition seemingly relied upon the registration of 'Waterman's' and 'Waterman's Ideal Fountain Pen, N. Y.' as trade-marks under the Act of Congress of March 3, 1881, c. 138, 21 Stat. 502, as a ground of juris-

diction. *Jacobs* v. *Beecham*, 221 U. S. 263, 274. Both parties appeal.

The defendant's appeal is from the requirements that it use the name Arthur A. Waterman & Co. instead of A. A. Waterman & Co. and that it juxtapose the words 'not connected with the L. E. Waterman Co.' After the finding of two courts and upon the evidence it must be assumed that the defendant had used the name Waterman in such a way as to mislead the public and to interfere with the plaintiff's rights unless the defendant had the right to use the name as matter of law because it was the selling agent of a firm calling itself A. A. Waterman & Co. and deriving its name from a man who started in business long after the plaintiff had acquired whatever rights it has. In support of this proposition the defendant lays hold of language in *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140, and in other books, to the effect that courts will not interfere with the use of a party's own name 'where the only confusion, if any, results from a similarity of the names and not from the manner of the use.' But, whatever generality of expression there may have been in the earlier cases, it now is established that when the use of his own name upon his goods by a later competitor will and does lead the public to understand that those goods are the product of a concern already established and well known under that name, and when the profit of the confusion is known to and, if that be material, is intended by the later man, the law will require him to take reasonable precautions to prevent the mistake. *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.*, 208 U. S. 554, 559. There is no distinction between corporations and natural persons in the principle, which is to prevent a fraud. *Ibid. Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118, 136. *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 273. In the *Howe Scale Co. Case* it was stated upon the same page

with the passage quoted that 'defendant's name and trade-mark were not intended or likely to deceive.'

The only other ground for the defendant's appeal that needs a word after the findings below is a decree of the Supreme Court of New York in a suit by the plaintiff against Arthur A. Waterman and Edward L. Gibson, partners doing business as the A. A. Waterman Pen Company of New York and Boston. The defendant alleges that it has succeeded to A. A. Waterman's rights. The decision found in the strongest terms that the name was used with fraudulent intent and the decree in some detail enjoined the defendant from using that or any corporate name containing the word 'Waterman,' and from using in connection with the business of making or selling fountain pens the word Waterman alone or with others in such collocation with the word pen as to indicate that such pens were a variety of Waterman's fountain pens. This rather damaging decree is thought to give some help because of a following sentence to the effect that the defendants were not prohibited from indicating that their pens were made or sold for or by Arthur A. Waterman & Co. or A. A. Waterman & Co. But that sentence was subject to the previous prohibition and consistent with it. The present defendant still not only may indicate the source of its pens in undeceptive ways but may mark them Arthur A. Waterman & Co. if only it add words that prevent the fraud that it insists upon the right to effect. It is unnecessary to go into other considerations presented by the record to show that the defendant's appeal cannot be maintained.

The plaintiff's appeal is from the failure of the decree to prohibit the use of the name Arthur A. Waterman & Co. even with the suffix required by the court. The ground upon which it claims this broader relief is that the agreement with A. A. Waterman by which he purported to become a partner in the firm of A. A. Waterman & Co.

was a sham, that the firm does not make the pens sold by the defendant, and that all the arrangements between Waterman the firm and the defendant were merely colorable devices to enable the defendant to get the name upon its pens. If we were to adopt this view of the facts the nature of the parties' rights and powers perhaps might need a more careful discussion than, so far as we are aware, it has received as yet. Under the decree in its present form the plaintiff gets all the protection to which it is entitled as against another Waterman who has established himself in the business, even though one of his motives for going into it was the hope of some residual advantages from the use of his own name. If with the warning that the law decrees sufficient to prevent a fraud a second Waterman could go into the business and give it his name, the question occurs whether a man might not change his name to Waterman and do the same thing, and, if so, whether the nature of the defendant's title to the name is any concern of the plaintiffs—whether in short the protection now granted is limited by reason of a personal privilege or is the measure of the plaintiff's rights as against the world. We express no opinion upon the point beyond saying that it would have to be considered before the plaintiff could obtain a broader decree. For the purposes of decision we give the plaintiff the benefit of the doubt.

Whatever view may be taken of the agreements, there is no question that they were intended, with A. A. Waterman's assent, to authorize the use of his name in a business that he had pecuniary reasons for wishing to see succeed. He purported to transfer to the partnership the good will attaching to his name. While it very well may be true that the transfer of a name without a business is not enough to entitle the transferee to prevent others from using it, it still is a license that may be sufficient to put the licensee on the footing of the licensor as against the plaintiff. Moreover two courts have upheld the arrangements

as effective to give the defendant the protection of such rights as A. A. Waterman would have had in establishing a business after the plaintiff, and therefore we shall not go into any consideration of the facts.

It cannot be said the partnership agreement was ineffectual for the present purpose as matter of law. The object is pretty plain, but it is none the worse for that. The leading features are as follows: A partnership is formed under the name A. A. Waterman & Co. Contributions of capital are to be deemed loans and bear interest. The two partners other than Waterman have the management of the business and alone can sign negotiable paper and contracts. The business is to make, buy and sell fountain pens, and the defendant corporation is to be formed, (the parties to be interested in it) and is to be the sole selling agent of the firm. Waterman grants to the firm the exclusive use of his own and the firm names in connection with the business, and all the good will attaching to either. The Continent is divided into two defined districts, and Waterman has the exclusive right to do business under the name A. A. Waterman & Co. in the Western District, if he begins it before July 1, 1906, and the remaining members the exclusive right to the Eastern District. In any event Waterman leaves the present firm at that date. Each party has the free use of all patents, trade-marks and trade-names within their territories that either party has or may acquire. Eastern Territory goods are to be marked 'A. A. Waterman & Co., New York' and those made in the Western, 'A. A. Waterman & Co., (or some similar name) Chicago.' Waterman covenants not to compete for thirty-six years, or to use or allow the use of his name except as provided. Finally if Waterman does not go into independent business he is to have the exclusive agency for the Western Territory for the thirty-six years, and his commissions are fixed in detail and with care.

As we have said we do not reopen the matters of fact that must be taken to have been found by the two courts. So we assume that there was nothing to hinder Waterman from making this agreement and that the defendant was organized and acted under it. Whether he had more or less good will to convey perhaps is not very material. We are not prepared to say as matter of law that a man who for years has been trying to do business, may not join a partnership for a long time enough to start it with his name and whatever good will he has, and provide that thereafter he will divide territory as above stated or become a selling agent, at his choice. The obvious motive is met by the protection given in the decree, but does not deprive him of all rights in his name. A sufficient interest is disclosed to sustain the transfer as against the plaintiff and to free the defendant from a greater liability than would have fallen on A. A. Waterman had he gone on alone.

Decree affirmed.

MR. JUSTICE PITNEY:

In No. 72, the appeal of the Modern Pen Company, I concur in the result.

In No. 54, the appeal of the L. E. Waterman Company, I dissent from the conclusion reached by the court. It seems to me that the alleged partnership agreement of June 12, 1905, made between Arthur A. Waterman and others, pursuant to which the Modern Pen Company was organized and under which it claims the right to use the name of "A. A. Waterman" and "A. A. Waterman & Co.," appears upon its face to be a mere sham and a fraudulent device, and is demonstrated to be such by the other evidence. The case presents no question respecting the right of an individual to the *bona fide* use of his name, but rather the question whether a partnership or a corporation can,

by purchase or otherwise, obtain the right to use the name of a third party for the very purpose of employing it in unfair competition with the established business of still another party. The case in its circumstances closely resembles *International Silver Company* v. *Rogers Corporation*, 67 N. J. Eq. 646, and, for reasons sufficiently indicated by a reference to that case, I think the Modern Pen Company should be unqualifiedly enjoined from using the name "Waterman."